DECISION ON THE MERITS

of

CASES Nos. CH/96/3, 8 and 9

Branko MEDAN, Stjepan BASTIJANOVIĆ and Radosav MARKOVIĆ

against

the State of Bosnia and Herzegovina

the Federation of Bosnia and Herzegovina

The Human Rights Chamber for Bosnia and Herzegovina, sitting on 3 November 1997, with the following members present:

Michèle PICARD, President
Jakob MÖLLER, Vice-President
Dietrich RAUSCHNING
Hasan BALIĆ
Rona AYBAY
Vletko MARKOTIĆ
Želimir JUKA
Mehmed DEKOVIĆ
Giovanni GRASSO
Mnfred NOWAK
Vitomir POPOVIĆ
Viktor MASENKO-MAVI

Andrew GROTRIAN, Registrar
Olga KAPIĆ, Deputy Registrar

Having considered the merits of the applications by Branko MEDAN, Stjepan BASTIJANOVIĆ and Radosav MARKOVIĆ against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, registered under Case Nos. CH/96/3, 8 and 9 respectively and declared admissible by the Chamber on 4 February 1997 under Article VIII paragraph 2 of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

Adopts the following Decision on the merits of the cases under Article XI of the Agreement and Rules 57 and 58 of its Rules of Procedure.

I. INTRODUCTION

1. The three applicants all contracted in 1992 to buy from the Yugoslav National Army ("the JNA") apartments which they occupied in Sarajevo. The contracts were annulled by legislation passed shortly after the General Framework Agreement for Peace in Bosnia and Herzegovina came into force in December 1995. The applicants complain that the annulment of their contracts violated their property rights as guaranteed by Article 1 of Protocol No. 1 to the European Convention on Human Rights and also allege various other violations of their human rights arising from related matters. The respondent Parties in the applications, as declared admissible by the Chamber, are the State and the Federation of Bosnia and Herzegovina.

2. The three applications were all referred to the Chamber by the Human Rights Ombudsperson for Bosnia and Herzegovina ("the Ombudsperson") under Article V paragraph 5 of the Human Rights Agreement set out in Annex 6 to the General Framework Agreement. In her decisions referring the cases to the Chamber she found that they raised issues under Articles 6 and 13 of the European Convention on Human Rights and under Article 1 of Protocol No. 1 to the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The Ombudsperson referred the Medan case to the Chamber on 3 July 1996, the Bastijanović case on 23 July 1996 and the Marković case on 26 July 1996. The Chamber considered these three cases on 15 August 1996 and decided to request both the State of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, as respondent Parties, to submit written observations on the admissibility and merits of the cases. It requested both respondent Parties to deal with a number of specific questions in their observations and fixed a time limit expiring on 30 September 1996 for submission of the observations. By letter dated 26 November 1996 received on 5 December 1996 the Minister of Justice of the Federation made certain observations as to the Federation's responsibility for the matters complained of in the Marković case. No other response was received from either respondent Party. On 4 February 1997 the Chamber declared these three cases admissible.

4. After declaring the cases admissible the Chamber invited both respondent Parties to submit written observations on the merits of the cases. On 10 April 1997 the Chamber also decided to hold an oral hearing on the merits of the cases. By letter dated 5 May 1997 the Federation adhered to observations previously submitted concerning the responsibility of the Federation for the matters at issue. No response was received from the State of Bosnia and Herzegovina. The hearing was held on 4 June 1997. Each of the applicants was present in person and represented himself. The Federation was represented by its Agent, Mr Džemaludin Mutapčić, and by Ms Nura Pinjo. The State of Bosnia and Herzegovina was not represented. At the close of the hearing the Federation representatives asked for the opportunity to submit further written observations. As an exceptional measure the Chamber decided to allow all parties to submit any further written observations they wished to make. The Federation submitted further observations on 17 June 1997. Each of the applicants also submitted further written observations between 17 and 19 June 1997. The applicants also submitted observations in response to the Federation's observations of 17 June. These observations were all received within the time limit set by the Chamber, which expired on 3 July 1997. The Chamber deliberated on the merits of the cases on 6 and 7 August 1997.

5. On 8 August 1997 the Chamber received information that the applicant Mr Branko Medan had died on 6 August 1997. A letter of authority dated 22 September 1997 executed by his widow, Mrs Ilinka Medan, has since been submitted. This indicates that Mrs Medan wishes to continue the application submitted by Mr Medan and authorises Mr Vlado Podvorac to act as her representative in the proceedings.

6. The Chamber further deliberated on the merits of the cases on 7, 9 and 10 October 1997. On 10 October 1997 it decided, pursuant to Rule 34 of its Rules of Procedure, to order the joinder of the three applications. On 3 November 1997 it adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

7. The facts of the cases are, for the most part, not in dispute. This part of the decision first sets out a summary of the relevant national law. Thereafter the facts of the individual cases are outlined.

A. The Relevant National Law

8. The apartments occupied by the applicants were all social property over which the JNA had jurisdiction. Social property was property which was considered to belong to society as a whole. Each applicant held an occupancy right in his apartment. An occupancy right was a right, subject to certain conditions, to occupy an apartment on a permanent basis.

9. Each of the applicants contracted to purchase his apartment under the Law on Securing Housing for the Yugoslav National Army, (SL SFRJ, No. 84/90). This was a Law of the Socialist Federal Republic of Yugoslavia ("the SFRJ"), which was passed in 1990 and came into force on 6 January 1991. Article 20 of the Law provided that the holder of an occupancy right residing in an apartment of the JNA Housing Fund could purchase the apartment on the basis of a contract made with the authority responsible for the apartment. Article 21 laid down a formula for calculating the price payable for apartments so purchased. The price was based on a valuation of the apartment, subject to a number of deductions. In particular in the case of serving or retired members or civilian employees of the JNA, provision was made for a deduction based on the re-valued amount of the purchaser's contributions to the JNA Housing Fund. This Law has not been adopted as part of the law of Bosnia and Herzegovina or the Federation.

10. On 15 February 1992 the Government of the Socialist Republic of Bosnia and Herzegovina issued a Decree imposing a temporary prohibition on the sale of socially owned property, (SL SRBH, No. 4/92). Article 2 of this Decree provided for a temporary prohibition of the sale of socially owned apartments under *inter alia* the Law on Securing Housing for the JNA. Article 3 of the Decree provided that contracts and other legal acts concluded contrary to the provisions of the Decree were invalid and Article 4 provided that courts and other state organs should not verify signatures or register titles or take other actions which were contrary to the prohibition provided for in Article 1. Article 5 of the Decree provided that the temporary prohibition on sales should be valid until the entry into force of a law regulating *inter alia* the sale of apartments over which the JNA exercised jurisdiction, and at longest for a year following the date of issue of the Decree.

11. The applicants have suggested that because the Decree of 15 February 1992 (SL No. 4/92) purported to prohibit contracts provided for in federal legislation, it contravened Article 207 of the Constitution of the SFRJ, which provided in its second paragraph that republican and provincial statutes, and various other specified forms of law, should not be contrary to federal statute.

12. On 15 June 1992 the Presidency of the Republic of Bosnia and Herzegovina issued a Decree with force of law (SL RBH No. 6/92) providing for the transfer of resources of the SFRY to the Republic of Bosnia and Herzegovina. Under Article 1 of this Decree social resources, including real property, located on the territory of the Republic, which had been used by the JNA, became the property of the Republic of Bosnia and Herzegovina. By the Decree with force of law on the Resources and Financing of the Army of Bosnia and Herzegovina (SL RBH No. 6/93 as amended by No. 17/93) it was provided that social resources of the former SFRJ which had been used by the JNA were placed under the temporary use and management of the army of the Republic. The Law on the Transformation of Social Property (SL RBH No. 33/94) which entered into force on 1 January 1995, provided that all property which had formerly been categorised as social property was transformed into state property. Article 9 of this law provided that ownership of property over which the Republic of Bosnia and Herzegovina had the right of disposal, and division of that property between the Republic and the Federation of Bosnia and Herzegovina, would be regulated by a particular law. No such law has yet been passed.

13. On 15 July 1994 the Presidency of the Republic of Bosnia and Herzegovina issued a Decree with force of law amending the Law on Real Property Transactions (SL RBH 18/94). This provided, in Article 1, that contracts relating to real property transactions must be in writing and that the signatures of the contracting parties must be verified by a competent court. Article 3 of the Decree provided that written contracts concluded prior to the entry into force of the Decree were valid if the parties had fulfilled all obligations arising from the contracts completely or substantially. It further provided that contracts concluded prior to the entry into force of the Decree would be considered valid provided the parties had their signatures certified by a competent court within six months of the entry into force of the Decree.

14. On 3 February 1995 the Presidency of the Republic issued a Decree with force of law amending the Law on the Resources and Financing of the Army. This Decree (SL RBH 5/95) provided that for the protection of the housing fund of the army, until the issuing of the Law on Housing in the Republic, courts and other state authorities should adjourn proceedings relating to the purchase of apartments and other properties under the Law on Securing Housing for the JNA. This Decree came into force on 10 February 1995, the date of its publication in the Official Gazette.

15. On 22 December 1995 the Presidency of the Republic of Bosnia and Herzegovina issued a Decree with force of law (SL RBH 50/95) amending the Law on the transfer of the resources of the SFRJ into the property of the Republic. This provided that contracts for the sale of apartments and other property concluded on the basis of *inter alia* the Law on Securing Housing for the JNA were invalid. This Decree came into force on 22 December 1995, the date of its publication on the notice board. It was adopted as law by the Assembly of the Republic of Bosnia and Herzegovina on 18 January 1996 (SL RBH 2/96).

16. The Decree of 22 December 1995 (adopted as law) also provided that questions connected with the purchase of real estate which was the subject of annulled contracts would be resolved under a law to be adopted in the future. Draft legislation concerning the purchase rights of occupancy right holders has been prepared. This would provide rights of purchase for occupancy right holders on defined terms under which the price paid under annulled contracts would be taken into account.

B. The Facts of the Individual Cases

(i) The Case of Mr Branko MEDAN

17. The applicant Mr Branko Medan, who died on 6 August 1997, was a citizen of Bosnia and Herzegovina. He was a retired officer of the JNA and at all material times he resided with his wife in a JNA apartment at 102 Azize Secerbegović Street (formerly 38 Ivana Krndelja Street) in Sarajevo ("the apartment"). He had an occupancy right over the apartment. He arranged with the JNA to purchase the apartment under the Law on Securing Housing for the JNA. On 6 February 1992 he paid the JNA the full purchase price for the apartment, which amounted to 320,000 Yugoslav Dinars. He also paid sums due for stamping the contract and for the valuation of the apartment. On 4 March 1992 he entered into a written contract for the purchase of the apartment.

18. On 7 September 1994 the applicant instituted civil proceedings in the Court of First Instance No. I (Osnovni Sud I) in Sarajevo, seeking to establish that he was entitled to recognition as owner of the apartment and to entry in the land register as such. On 10 February 1995 the Court issued a decision adjourning the applicant's case under the Decree of 3 February 1995, No. 5/95 (see para. 16 above). The court's decision stated that no special appeal was allowed against it. The proceedings have remained adjourned since.

(ii) The Case of Mr Stjepan BASTIJANOVIĆ

19. The applicant Mr Stjepan Bastijanović is a citizen of Bosnia and Herzegovina. He is a retired civilian employee of the JNA. At all material times he has occupied a JNA apartment at Malta Street 13 (formerly Brace Vujičića 13) in Sarajevo ("the apartment"), over which he held an occupancy right. On 7 February 1992 he concluded a written contract with the JNA for the purchase of the apartment

under the Law on Securing Housing for the JNA. On 13 February 1992 he paid the price of 388,446 Yugoslav Dinars which was due for the apartment under the contract.

20. On 10 January 1995 the applicant instituted civil proceedings before the Court of First Instance I in Sarajevo seeking to establish that he was the owner of the apartment and entitled to registration as such in the land register. No action has been taken by the Court in relation to this action and, on making enquiries, the applicant has been informed orally by the Court that the proceedings are adjourned.

(iii) The Case of Mr Radosav MARKOVIĆ

21. The applicant Mr Radosav Marković is a citizen of Bosnia and Herzegovina and is a retired member of the JNA. At all material times he has resided in a JNA apartment at Malta Street 13 (formerly Brace Vujičića 13) in Sarajevo ("the apartment") over which he holds an occupancy right. The applicant arranged to purchase the apartment from the JNA under the Law on Securing Housing for the JNA. On 31 January 1992 he paid the full purchase price of 370,000 Yugoslav Dinars to the JNA. On 19 March 1992 he entered into a written contract with the JNA to purchase the apartment.

22. On 7 January 1995 the applicant instituted civil proceedings in the Court of First Instance I in Sarajevo seeking to establish that he was the owner of the apartment and entitled to registration as such in the land register. On 3 June 1995 the Court issued a decision adjourning the proceedings under the Decree of 3 February 1995. The decision stated that no special appeal was allowed against it.

IV. FINAL SUBMISSIONS OF THE PARTIES

23. The applicants submit that the retroactive annulment of their purchase contracts and the adjournment of their civil proceedings in the courts have involved the violation of their rights under Articles 6 and 13 of the European Convention on Human Rights and Article 1 of Protocol No. 1 to the Convention.

24. No submissions have been received from the State of Bosnia and Herzegovina.

25. The Federation of Bosnia and Herzegovina first maintains that it is not responsible for the matters complained of by the applicants. It further submits that the applicants complaints of alleged violations of their human rights are in any event ill-founded and that they should be rejected.

V. OPINION OF THE CHAMBER

26. Before giving its opinion on the merits of the case the Chamber takes note of the fact that the applicant, Mr Branko Medan, has died during the proceedings before it. It notes that according to the case law of the European Commission and Court of Human Rights the death of an applicant does not in itself dispose of a case and that it falls to the Convention organ concerned to decide whether the application should be further examined, special consideration being given to the intentions of the applicant's legal successor as well as to the nature of the complaint, (Application No. 10474/83, Veit v. Federal Republic of Germany, Decision of the Commission, 47 DR 106, at p. 116; De Weer v. Belgium, Eur Ct HR, 1980 Series A No. 35 para. 37). It further notes that Article VIII paragraph 1 of the Annex 6 Agreement provides for it to examine applications presented on behalf of applicants who are deceased. In the present case Mr Medan died after the written and oral pleadings on the merits were concluded and the Chamber considers it appropriate in those circumstances to give a decision on the merits of the case. His widow, who has a legal interest in the outcome of the case, has also informed the Chamber of her wish to carry the application on. This is a further reason for deciding on the merits of the case.

27. In terms of Article XI paragraph 1 (a) of the Annex 6 Agreement the Chamber must, in the present decision, address the question whether the facts found indicate a breach by either of the respondent Parties of their obligations under the Agreement. It is convenient to deal first with arguments of a general character advanced by the Federation in relation to its responsibility for the matters complained of.

A. Responsibility of the Federation

28. The Federation of Bosnia and Herzegovina (in the following text "the Federation") maintains that it is not responsible for the matters complained of by the applicants, in respect firstly that the legislation at issue was not passed by the legislature of the Federation, and secondly that housing policy is, in terms of Article III para. 4 (d) of the Constitution of the Federation, the responsibility of Cantons and Districts and not of the Federation.

29. The Chamber first points out that under Article I of the Annex 6 Agreement the Parties to the Agreement are under a direct obligation to secure to all persons within their jurisdiction the human rights and fundamental freedoms referred to in the Agreement. The applicants' complaints concern the application within the territory of the Federation, as part of the law of the Federation, of laws concerning their housing and property rights. The Chamber notes that housing and property matters are not amongst the matters listed in Article III of the Constitution of Bosnia and Herzegovina (Annex 4 to the General Framework Agreement for Peace) as being within the responsibility of the institutions of Bosnia and Herzegovina. Since these matters are "not expressly assigned in this Constitution" to the institutions of the State, they fall within the responsibility of the Entities by virtue of Article III paragraph 3 (a) of the Constitution. The Federation is therefore responsible for both the content and the application of legislation in force in its territory concerning the subject-matter of the applicants' complaints. This is so, in the Chamber's opinion, even if the legislation was not passed by the institutions of the Federation.

30. As to the second branch of the Federation's argument the Chamber notes that under Article II paragraph 2 of the Annex 6 Agreement it has jurisdiction to consider alleged or apparent violations of human rights where such violations are alleged or appear "to have been committed by the Parties, *including by any official or organ of the Parties, Cantons, Municipalities, or any individual acting under the authority of such official or organ,*" (emphasis added). It follows from the words emphasised that the Parties are responsible under the Agreement for violations of human rights committed at any level of governmental organisation, including the level of cantons and municipalities, and are also subject to the Chamber's jurisdiction in relation to such violations. The Chamber adds that it is not in any event clear that the matters complained of in the present cases, which concern legislation and its application by the army authorities and courts, are within the responsibility of the cantons.

B. The Annulment of the Applicants' Contracts

31. The applicants all complain that the contracts which they entered into for the purchase of their apartments were annulled retroactively by the Decree issued on 22 December 1995, which was adopted as law on 18 January 1996. They allege the breach of Article 1 of Protocol No. 1 to the European Convention on Human Rights, which is in the following terms:

> "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."

32. The Chamber will first consider whether, at the time when the Decree came into force, the applicants had any rights under their contracts which constituted "possessions" for the purposes of Article 1. In this respect it first notes that the European Commission and Court of Human Rights have given a wide interpretation to the concept of "possessions" and have held that it covers a variety of

rights and interests which can be described as constituting "assets" (see e.g., Van Marle v. Netherlands, 1986 Series A No. 101, para. 41; Pressos Compania Naviera S.A. v. Belgium, 1995 Series A No. 332, para. 31). Assuming the applicants' contracts to have been valid they conferred on the applicants rights to occupy the apartments as owners, and to have themselves registered as owners. Although the contracts did not of themselves transfer to the applicants real rights of property in the apartments they thus conferred on them valuable personal rights which in the Chamber's opinion constituted "assets" and were "possessions" for the purposes of Article 1 of the Protocol.

33. In two of the cases before the Chamber, those of Mr Medan and Mr Marković, the validity of the contracts may be open to question in respect that in those cases the written contracts were entered into after the Decree of 15 February 1992, which imposed a temporary prohibition on sales under the Law on Securing Housing for the JNA, came into force, (see para. 10 above). The Chamber notes, however, that in both these cases the applicants had performed their obligations under the contracts by paying the price before the Decree of 15 February 1992 came into force and questions may therefore arise as to whether there were valid contracts before that date. The validity of the Decree of 15 February appears also to be open to question since it prohibited contracts which were provided for in federal law, whereas Article 207 of the Constitution of the Socialist Federal Republic of Yugoslavia provided that republican and provincial statutes and other legislation "may not be contrary to federal statute." Finally the Chamber notes that the prohibition provided for in the Decree was a temporary one which expired in February 1993 and that the Decree was never adopted as law. Taking these factors into account, the Chamber does not consider it established that the contracts entered into by these two applicants were invalid, although they may be challengeable in the courts. In considering whether the contractual rights of these two applicants were "possessions" the Chamber notes that the European Court of Human Rights has held that rights which may be subject to challenge in court proceedings, as well as claims for compensation requiring court proceedings to make them effective, may be "possessions" for the purposes of Article 1 of the Protocol. In particular in the case of Stran Greek Refineries v. Greece it held that an arbitral award which was the subject of challenge in the Court of Cassation was a "possession" (1994 Series A No. 301, para. 62). In the case of Pressos Compania Naviera v. Belgium it held that claims to compensation under the law of tort were "possessions" (1995 Series A No. 332, para. 31). Similarly in the Chamber's opinion the contractual rights of the two applicants in question, although subject to some uncertainty as a result of the Decree in question, should nonetheless be regarded as "possessions" for the purposes of Article 1 of the Protocol.

34. There is no reason to doubt the validity of the contract entered into by the other applicant, Mr Bastijanović. The Chamber therefore finds that all three applicants had rights under their contracts which were "possessions" for the purposes of Article 1 of the Protocol. The effect of the Decree of 22 December 1995 (adopted as law) was to annul those rights and each applicant was therefore "deprived of his possessions" by the Decree. It is accordingly necessary for the Chamber to consider whether these deprivations were justified under Article 1 of the Protocol as being "in the public interest" and "subject to the conditions provided for by law." The third requirement of Article 1, that a taking of property should be in accordance with the "general principles of international law" is not applicable in the present case since all the applicants are citizens of Bosnia and Herzegovina and the principles in question "are not applicable to a taking by a State of the property of its own nationals," (James and Others v. United Kingdom, 1986 Series A No. 98, para. 66).

35. The Chamber recalls that the European Court of Human Rights has held that in considering whether a taking of property is compatible with Article 1 it is necessary to consider whether the measure in question pursued a legitimate aim in the public interest and furthermore whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised. There must be a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights and this will not be found if the individual in question has to bear "an individual and excessive burden," (see e.g. James and Others v. United Kingdom, *sup. cit.,* paras. 46 & 50).

36. As to whether the Decree of 22 December 1995 (adopted as law) pursued a legitimate aim, the Federation has submitted that the purpose of the Decree was to rectify a violation of the constitutional principle of equality of treatment. It has argued that some members of the JNA had been placed in an especially privileged position in relation to the purchase of their flats and were able

to purchase them on terms more favourable than other occupiers of socially owned apartments. The European Court of Human Rights has held that in deciding what is in the public interest the national authorities enjoy a wide "margin of appreciation" and that their judgement will be respected unless it was "manifestly without reasonable foundation," (James Case, *sup. cit.,* para. 46). Bearing this wide margin of appreciation in mind, the Chamber can accept that the aim of putting all holders of occupancy rights on an equal footing as regards their rights to purchase their apartments might in principle be regarded as a legitimate one. There is no evidence, however, that the applicants were placed in an especially privileged position.

37. It remains to be considered, however, whether there was a reasonable relationship of proportionality between the means employed and the end sought to be realised. In this respect the Chamber notes that the effect of the legislation was to annul retroactively, and without compensation, existing contractual rights which the applicants had held since 1992. In the Chamber's opinion such retroactive legislation must be regarded as a particularly serious form of interference with property rights. It involves an infringement of the principle of the rule of law referred to in the Preamble to the Convention and carries the danger of undermining legal security and certainty. In the Chamber's opinion it can therefore be justified only by cogent reasons. Even though the applicants may have been able to purchase their apartments on relatively favourable terms, the Chamber is not satisfied that there was any form of social injustice involved in the system established by the Law on Securing Housing for the JNA which was of such magnitude as to justify retroactive legislation of the kind adopted. It notes in particular that reductions from the price established by valuation of the apartments were based to a large degree on contributions which the applicants had made to the housing fund over many years. It notes furthermore that the value of the apartments in question must have been substantially affected by the existence of the applicants' occupancy rights over them. They were not apartments which the JNA could have disposed of on the open market with vacant possession. In the circumstances the Chamber considers that the aim of achieving equality between different classes of occupancy right holders "could warrant prospective legislation" bringing their rights into line with each other but "could not justify legislating with retrospective effect with the aim and consequence of depriving the applicants" of their acquired contractual rights, (see *mutatis mutandis* Pressos Compania Naviera S.A. v. Belgium, *sup. cit.*, para. 43).

38. The Chamber concludes that the annulment of the applicants' contractual rights by the Decree of 22 December 1995 and the Law of 18 January 1996 violated their rights under Article 1 of Protocol No. 1 to the Convention and that the Federation is responsible for that violation in respect that the Decree in question is recognised and applied as part of its law. The Chamber will deal separately with the question of the responsibility of the State of Bosnia and Herzegovina at the end of this opinion, (see para. 44-47 below).

C. Compulsory Adjournment of the Applicants' Civil Actions

39. Each of the applicants complains that the civil proceedings that he instituted with a view to obtaining recognition of his rights as owner of his apartment and registration as such in the land registry, have been compulsorily adjourned by virtue of the Decree of 3 February 1995 (No. 5/95, see para. 14 above). They allege the breach of Article 6 of the European Convention on Human Rights in this respect. So far as material Article 6 is in the following terms:

> "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…"

40. The Chamber notes that the proceedings in question have been adjourned, and thus completely inactive, since shortly after the Decree in question entered into force. In so far as that situation has continued since the Annex 6 Agreement came into effect, and continues up to the present day so far as the Chamber is aware, there is a continuing interference with the applicants' right of access to court for the purpose of having their civil claims determined, as guaranteed by Article 6, (see Golder v. United Kingdom, 1975 Series A No. 18). The Chamber sees no justification for this state of affairs in light of the conclusion which it has reached under Article 1 of the Protocol to the Convention and finds that there is a breach of Article 6 of the Convention in the case of each

applicant in so far as the compulsory adjournment of his case has continued since 14 December 1995. The Chamber also finds that in consequence of the adjournment the duration of the proceedings has been prolonged beyond a "reasonable time" since that date, the cases having been completely inactive. There is therefore a breach of Article 6 in the case of each applicant in this respect also.

41. In respect that the breaches of Article 6 which it has found result from laws which are in force and applied in the Federation, and from acts or omissions of courts within the Federation, the Chamber finds that the Federation is responsible for these violations of the applicants' rights also.

D. The Alleged Absence of an Effective Remedy for the Applicants

42. Each of the applicants also maintains that he has been the victim of a breach of Article 13 of the Convention in respect that no effective remedy has been available to him in respect of his complaints under the Convention. Article 13 provides as follows:

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

43. In view of its decision under Article 6(1) of the Convention to the effect that the applicants have been denied access to court to establish their property rights, the Chamber considers it unnecessary also to examine the complaints under Article 13 of the Convention. The requirements of Article 13 of the Convention are less strict than those of Article 6, and in the present context are, in the Chamber's opinion, absorbed by Article 6, (see e.g. Hentrich v. France, 1994 Series A No. 296, para. 65).

E. Responsibility of the State of Bosnia and Herzegovina for the Violations Found

44. The Chamber has already pointed out that the matters which the applicants complain of are not within the responsibilities of the Institutions of the State of Bosnia and Herzegovina listed in Article III of the Constitution of Bosnia and Herzegovina (Annex 4 to the General Framework Agreement). A question nevertheless arises as to whether the State of Bosnia and Herzegovina is responsible for the annulment of the applicants' contracts since the Decree of 22 December 1995 which annulled the contracts was issued by the Presidency of the Republic of Bosnia and Herzegovina and adopted as law by the Assembly of the Republic, (see para. 15 above).

45. The State of Bosnia and Herzegovina has not participated in the proceedings in the present cases and has not denied responsibility for the matters complained of, although the Chamber notes that in the similar case of Turčinović v. State and Federation of Bosnia and Herzegovina its Agent argued that it and other cases of a similar kind were not within the jurisdiction of the State institutions under the Constitution, (see Decision on Admissibility dated 9 May 1997, para. 13).

46. Article I paragraph 1 of the Annex 4 Constitution provides that the Republic of Bosnia and Herzegovina, henceforth named "Bosnia and Herzegovina," is to "continue its legal existence under international law as a state." Paragraph 4 of Annex II to the Constitution, which deals with transitional arrangements, provides for the continued operation of existing institutions in the following terms:

> "Until superseded by applicable agreement or law, governmental offices, institutions and other bodies of Bosnia and Herzegovina will operate in accordance with applicable law."

47. The Chamber notes that at the time when the Decree in question was issued and adopted as law, the legislative organs provided for in the Constitutions of both the State and the Federation had not yet been established. The former institutions of the Republic, including the legislative institutions, continued to operate. In so far as they did so, however, they functioned as institutions of the continuing State of Bosnia and Herzegovina, which is therefore responsible for their acts. Since institutions of the State were responsible for passing the legislation which annulled the applicants'

contracts, the State is therefore responsible for the violations of Article 1 of Protocol No. 1 which the Chamber has found (see para. 38 above).

VI. REMEDIES

48. Under Article XI paragraph 1(b) of the Agreement the Chamber must address in its Decision the question what steps shall be taken by the respondent Party or Parties in question, in this case the State and Federation of Bosnia and Herzegovina, to remedy the breaches of the Agreement which it has found.

49. The breaches of Article 1 of Protocol No. 1 which the Chamber has found, arose from the legislation already referred to. The State is responsible for having passed that legislation, but the matters which it deals with are now within the responsibility of the Federation, which recognises and applies the legislation. In these circumstances the Chamber considers that it is the responsibility of the Federation to take the necessary legislative or administrative action to render ineffective the annulment of the applicants' contracts which was imposed. It will therefore make an order against the Federation to that effect.

50. The Chamber will also order the Federation to lift the compulsory adjournment of the court proceedings instituted by the applicants, which it has found to be in violation of Article 6 of the Convention, (see paras. 40-41 above).

51. The Chamber further considers it appropriate to allow the applicants to submit, within three months of the date of the public delivery of the present decision, any claims they wish to put forward against either respondent Party for monetary relief or other remedies within the scope of Article XI paragraph 1 (b) of the Agreement.

VII. CONCLUSIONS

52. For the reasons given above the Chamber:

- 1. **Decides** by eleven votes against one that the passing of legislation providing for the retroactive nullification of the applicants' contracts for the purchase of their apartments involved violations by Bosnia and Herzegovina of the applicants' rights under Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and that Bosnia and Herzegovina has thereby breached its obligations under Article I of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

- 2. **Decides** by eleven votes against one that the recognition and application within the Federation of the legislation providing for the retroactive nullification of the applicants' contracts involves violations by the Federation of Bosnia and Herzegovina of the applicants' rights under Article 1 of Protocol No. 1 to the Convention and that the Federation is thereby in breach of its obligations under Article I of Annex 6 to the General Framework Agreement;

- 3. **Decides** by a unanimous vote that the continuing adjournment since 14 December 1995 of the civil proceedings instituted by the applicants involves violations by the Federation of the applicants' rights to access to court and to a hearing within a reasonable time as guaranteed by Article 6 of the Convention and that the Federation is thereby in breach of its obligations under Article I of Annex 6 to the General Framework Agreement;

- 4. **Decides** by a unanimous vote that it is unnecessary to examine the applicants' complaints based on Article 13 of the Convention;

- 5. **Decides** by eleven votes against one to **order** the Federation of Bosnia and Herzegovina to take all necessary steps by way of legislative or administrative action to render ineffective the annulment of the applicants' contracts imposed by the Decree of 22 December 1995 and the Law of 18 January 1996;

- 6. **Decides** by a unanimous vote to order the Federation of Bosnia and Herzegovina to lift the compulsory adjournment of the court proceedings instituted by the applicants and to take all necessary steps to secure the applicants' right of access to court;

- 7. **Decides** by a unanimous vote to order the Federation of Bosnia and Herzegovina to report to it by 8 January 1998 on the steps taken by it to give effect to this Decision;

- 8. **Decides** by a unanimous vote to reserve for further consideration the question whether any other remedies should be ordered against either respondent Party and to allow the applicants to submit before 9 February 1998 any claim they wish to put forward in that respect.

(signed) Andrew GROTRIAN
Registrar of the Chamber

(signed) Michèle PICARD
President of the Chamber

ANNEX

In accordance with the Rule 61 of the Chamber's Rules of Procedure this Annex contains a separate concurring opinion by Mr Dietrich RAUSCHNING.

SEPARATE CONCURRING OPINION BY MR RAUSCHNING

While I agree with the conclusions of the decision, I would like to elaborate on two more compelling reasons for reaching these conclusions.

I. Invalidity of the Decree of the SRB&H, as of 15 February 1992

1. Under para. 32 the Chamber deals with the question concerning the effect of the Decree of the Government of the Socialist Republic of Bosnia and Herzegovina on a Temporary Prohibition of Sales of Socially Owned Apartments, signed on 15 February 1992 (the Decree). The Chamber states that the validity of that Decree is open to question. I am convinced that the Decree was invalid from the outset. It consequently can not have the effect of invalidating contractual rights of the applicants or of hindering the acquisition of the rights.

2. Article 1 of the Decree temporarily prohibits the sales of socially owned apartments assigned to the JNA. These sales were regulated and authorised by the Law on Securing Housing for the JNA (JNA Housing Law) which was enacted by the Parliament of the Socialist Federal Republic of Yugoslavia on 29 December 1990 (SL SFRJ 1990, 2347). There are no doubts concerning the validity of that law in the time prior to Bosnia and Herzegovina becoming independent as the Federal Republic had jurisdiction to enact the law under Article 281 para. 6 of the Federal Constitution. Consequently, the Decree was in conflict with the JNA Housing Law as a federal law.

3. The conflict between the Decree and the federal law has to be resolved applying the law that was in force at the time the Decree was enacted. In this respect Article 207 para. 2 of the Constitution of the SFRJ is decisive. It states that normative acts of a Republic shall not contradict federal law. The Constitution provided that conflicts of this kind were to be settled by the Constitutional Court. If the federal organs were competent to apply and to administer the relevant law in question, then the federal law was to be applied temporarily pending a decision of the Constitutional Court.

4. At present, the Constitutional Court of the former Federal Socialist Republic of Yugoslavia which had the jurisdiction to resolve the conflict does not exist. No court or institution currently has exclusive jurisdiction to decide on the conflict between the Decree of February 1992 and the JNA Housing Law, at that time a federal law. In particular, the Constitutional Court of Bosnia and Herzegovina, established under the Constitution of Bosnia and Herzegovina (Annex 4 to the General Framework Agreement), is not called upon to decide this conflict, because this conflict does not arise under the new Constitution.

5. In order to decide on the applications, the Chamber has to ascertain whether the applicants acquired rights by concluding the contracts and paying the price for their apartments. For this purpose, the Chamber has to apply the national law in force at that time, and it is competent to do so. Thus, the Chamber has to resolve the conflict between the Decree and the federal JNA Housing Law of December 1990 by applying Article 207 para. 6 of the Constitution of the SFRJ as a rule of conflict of laws. As a result, the Decree of 15 February 1992 was inapplicable *ab initio.*

II. Legitimacy of the aim of the provisions enacted 1995/1996

6. In para. 35 the Chamber states correctly that in order to apply Article 1 para. 1 of the First Protocol to the ECHR, it has to assess the legitimacy of the aim of the legislation and the reasonable relationship of proportionality between the means and the ends. The respondent Party has argued that the JNA were privileged compared with other occupiers of socially owned apartments, and that the purpose of the Decree of 22 December 1995 and the endorsing law of 18 January 1996 was to rectify this violation of the principle of equality of treatments. The Chamber finds that this aim might be regarded as a legitimate one.

7. But the principle of equality of treatment has not been violated by the enactment of the JNA Housing Law 1990 which provides for the sale of apartments to the holder of occupancy rights. This measure can be regarded as a means of privatisation, and considering that the apartments were encumbered with the occupancy rights, the price provided in the law was not unreasonable. I admit that not all holders of occupancy rights in socially owned apartments in former Yugoslavia were given the opportunity to buy their apartments. However, in my opinion, the former SFRJ did not violate the principle of equality of treatment by offering to sell socially owned apartments assigned to federal institutions, whereas housing funds affiliated to the Republics, the communities and to the commercial enterprises were not privatised by the legislatures competent to enact corresponding laws. The principle of equality of treatment only demands that equal or comparable cases are regulated in the same way by the same authority. The fact that other competent legislative authorities in former SFRJ did not enact similar laws entitling all holders of occupancy rights in socially owned apartments not assigned to the JNA to buy their apartment in 1990-1992 does not violate the principle of equality of treatment.

8. If there is no violation of the principle of equality of treatment, the aim of the legislative measures 1995/1996 cannot be to rectify that violation. In my opinion, the reasons for the measures submitted by the respondent Party are ill-founded and they are manifestly unreasonable. Consequently, the Decree of December 1995 and the endorsing law of January 1996 cannot be regarded as fulfilling a legitimate aim. They aim at depriving the applicants of the possessions without being legitimised by the public interest. Their enactment and their application violates human rights of the applicants protected by Article 1 of the First Protocol to the ECHR.

(signed) Dietrich RAUSCHNING