DECISION ON THE ADMISSIBILITY

of

CASE No. CH/ 96/9

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 4 February 1997 with the following members present:

Peter GERMER, President
Jakob MÖLLER, Vice-President
Dietrich RAUSCHNING
Adam ZIELINSKI
Hasan BALIĆ
Rona AYBAY
Vlatk MARKOTIĆ
Želimi JUKA
Mehmed DEKOVIĆ
Manfred NOWAK
Michèle PICARD

Andrew GROTRIAN, Registrar
Olga KAPIĆ, Deputy Registrar

Having considered the Application by Radosav MARKOVIĆ against (1) Bosnia and Herzegovina and (2) the Federation of Bosnia and Herzegovina submitted on 26 July 1996 by the Human Rights Ombudsperson for Bosnia and Herzegovina under Article V paragraph 5 of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina and registered on 2 August 1996 under Case No. CH/96/9.

Takes the following Decision on the Admissibility of the Application under Article VIII paragraph 2 of Annex 6 to the General Framework Agreement.

I. THE FACTS

The facts of the case as they appear from the decision of the Ombudsperson referring the case to the Chamber and from the documents in the case-file, may be summarised as follows:

The applicant is a citizen of Bosnia and Herzegovina. He is a retired member of the Yugoslav National Army (JNA). He resides in an apartment at Malta (formerly Braće Vujičića) Street No. 13 Sarajevo ("the apartment").

The applicant had an occupancy right in the apartment, which was social property over which the JNA exercised jurisdiction. On 31 January 1992 the applicant paid the JNA 370 000 Yugoslav dinars to purchase the apartment under the Law on Securing Housing for the Yugoslav National Army of 29 December 1990 (Official Gazette 84/90). This law gave the holders of occupancy rights in JNA apartments the right to purchase their apartment, subject to certain conditions. On 15 February 1992 a temporary prohibition on the sale of such apartments was imposed by Decree with legal force of the Socialist Republic of Bosnia and Herzegovina (Official Gazette 4/92). On 19 March 1992 the applicant entered into a written contract for the purchase of the apartment.

On 15 July 1994 a Decree with legal force was issued by the Presidency of the Republic of Bosnia and Herzegovina laying down the conditions for the validity of contracts for the purchase of real estate. Written contracts concluded before the decree entered into force were to be valid either if the contracting parties had completely or predominantly fulfilled their obligations arising from the contract or if the parties' signatures were verified by a competent court within six months after the Decree came into force. On 7 January 1995 the applicant raised civil proceedings in the Court of First Instance in Sarajevo (Osnovni sud I), requesting the court to declare that he was owner of the apartment. On 10 January 1995 the Court transferred the proceedings to a different court (Osnovni Sud II). On 3 February 1995 the Presidency of the Republic of Bosnia and Herzegovina issued a Decree with legal force (OG 5/95) requiring courts and other organs of the state to adjourn all proceedings relating to purchase contracts for *inter alia* JNA apartments under the Law on Securing Housing for the JNA. On 3 June 1995 the Court of First Instance issued a decision adjourning the applicant's case. The decision stated that no special appeal was allowed against this decision.

On 22 December 1995 the Presidency of the Republic of Bosnia and Herzegovina issued a Decree with legal force providing *inter alia* that contracts concluded on the basis of the law on Securing Housing for the JNA were invalid. On 8 and 9 January 1996 the Parliamentary Assembly of the Republic of Bosnia and Herzegovina adopted this Decree as law. (OG 2/96 R. BiH).

II. COMPLAINTS OF THE APPLICANT

In his application to the Human Rights Ombudsperson the applicant has complained of the revocation of his property rights. He complains of the decision to adjourn his court case and also complains that it is not possible for him to appeal to a court.

In her decision referring the case to the Chamber the Ombudsperson has found that the case raises issues under Article 6 and 13 of the European Convention on Human Rights and Article 1 of Protocol No. 1 to the Convention.

III. PROCEEDINGS BEFORE THE CHAMBER

The case was referred to the Chamber under Article V para. 5 of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina by decision of the Human Rights Ombudsperson dated 26 July 1996.

The Chamber considered the case on 15 August 1996. It then **decided**, in accordance with Provisional Rule 1 of its Provisional Rules of Procedure, to transmit the case to both respondent Parties for information and also to request both Governments to submit written observations on the admissibility and merits of the case, before 30 September 1996.

The Chamber requested each Government to include in their observations all relevant information as to the facts of the case and the applicable national law. It also requested them to deal with the following questions in particular, namely:

-(i) whether the length of proceedings, since the entry into force of the Dayton Agreement on 14 December 1995, in the civil action brought by applicant has exceeded a "reasonable time" for the purposes of Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, ("the Convention");

-(ii) whether the continued adjournment of the proceedings since 14 December 1995 has involved a denial of the applicant's right of access to a court for the purposes of Article 6(1) of the Convention;

-(iii) whether the alleged retroactive nullification of the applicant's contract for the purchase of an apartment by Decree dated 22 December 1995 infringed his rights under Article 1 of Protocol No. 1 to the Convention, which guarantees *inter alia* the right to "peaceful enjoyment of his possessions...";

-(iv) whether any "effective remedy" is available to the applicant, for the purposes of Article 13 of the Convention, in respect of (a) the alleged retroactive nullification of the applicant's contract and (b) the continuing adjournment of the civil proceedings.

The Chamber also informed each Government that it would wish to receive as part of their observations, any observations they might have in relation to:

-(i) their responsibility for the matters complained of in view, in particular, of the allocation of responsibilities as between Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina under Annex 4 to the Dayton Agreement;

-(ii) the competence of the Chamber *ratione temporis*;

-(iii) the admissibility of the application under the criteria set out in Article VIII para 2.(a)-(d) of Annex 6 to the Dayton Agreement;

It further requested each Government, in the event that they contended that effective remedies existed for the matters complained of, to identify the remedies concerned with precision, identifying the court or other authority relied on and the legal basis on which a remedy could be sought.

Neither Government submitted any observations on the case within the time-limit set, or requested any extension of the time-limit. By letter dated 26 November 1996, received on 5 December 1996, the Minister of Justice for the Federation made certain comments on the case.

IV. SUBMISSIONS OF THE FEDERATION

In his letter of 3 December 1996 the Minister of Justice submits that the Federation of Bosnia & Herzegovina and Republika Srpska should be treated equally in proceedings before the Chamber. He further points out that the laws referred to in the application are not laws of the Federation and that under Article III para. 4(d) of the Federation Constitution, cantons, districts, not the Federation have authority in respect of housing policy. On these grounds, and since the Federation legislation on housing matters does not exist, the Federation is not responsible for the violation of human rights complained of and the application in relation to the Federation should be rejected.

V. THE LAW

The applicant complains that his property rights in the JNA apartment which he contracted to purchase have not been respected and also complains of the adjournment of his court case and of the alleged absence of any effective remedies.

Before considering the case on its merits the Chamber must decide, pursuant to Article VIII para. 2 of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina, whether to accept the case, taking into account the admissibility criteria set out in Article VIII para. 2.

The Chamber first notes that the applicant's complaints relate in part to events which took place before 14 December 1995, when the Agreement set out in Annex 6 came into force. In accordance with generally accepted principles of law the Agreement cannot be applied retroactively (see Case No. CH/96/1, *Matanović v. Republika Srpska*, Decision of 13 September 1996). The Chamber must therefore confine its examination of the case to considering whether the applicant's rights have been violated since that date. In so far as the applicant complains of the continuing adjournment of his court case after 14 December 1995, the continuing absence of an effective remedy after that date and the alleged retroactive annulment of his contract by a law passed since 14 December 1995 his complaints are within the Chamber's competence and are not incompatible with the Agreement *ratione temporis* for the purposes of para. 2(c) of Article VIII of the Agreement.

The Chamber has next considered whether for the purposes of para. 2(a) of Article VIII of the Agreement, any "effective remedy" was available to the applicant in respect of his complaints in so far as they are within its competence *ratione temporis*. In relation to this question the Chamber refers to the principles applied by the European Court of Human Rights in relation to the rule as to exhaustion of domestic remedies under Article 26 of the European Convention on Human Rights. In particular in the case of *Akdivar v. Turkey* (Judgement of the Grand Chamber dated 16 September 1996) the Court stated:

> "Under Article 26 normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. 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 "(para. 66)

As regards the burden of proof the Court also stated:

> "In the case of exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy ... was in fact exhausted or for some reason inadequate or ineffective in the particular circumstances ... or that there existed special circumstances absolving him or her from the requirement ..."(ibid., para. 68).

In para. 69 of the Judgement the Court further emphasised that the application of the domestic remedies rule "must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting States have agreed to set up." Accordingly, the Court said, it must be applied "with some degree of flexibility and without excessive formalism" and 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 the personal circumstances of the applicants".

In the present case the Chamber notes that neither of the respondent Parties has suggested that any effective alternative remedy was available to the applicant. In the circumstances of the case the Chamber does not consider it established that any effective remedy was in practice available and finds that there is no obstacle to the admissibility of the application under para. 2(a) of Article VIII of the Agreement.

In the Chamber's opinion the case raises issues under Articles I and II of Annex 6 to the General Framework Agreement which require examination of the case on its merits. In particular the following questions arise under the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is referred to in Article I and Article II (a) of Annex 6, namely:

-(i) whether the length of proceedings since 14 December 1995 in the civil action brought by the applicant has exceeded a "reasonable time" for the purposes of the Article 6(1) of the Convention;

-(ii) whether the continued adjournment of the proceedings since 14 December 1995 has involved a denial of the applicant's right of access to a court under Article 6(1) for the purpose of having his civil claim determined on its merits;

-(iii) whether the alleged retroactive nullification of the applicant's contract for the purchase of an apartment by Decree dated 22 December 1995 infringed his rights under Article 1 of Protocol No. 1 to the Convention, which guarantees *inter alia* the right to "peaceful enjoyment of his possessions...."

-(iv) whether any "effective remedy" is available to the applicant, for the purposes of Article 13 of the Convention, in respect of (a) the alleged retroactive nullification of the applicant's contract and (b) the continuing adjournment of the civil proceedings.

The Chamber has next considered the argument put forward on behalf of the Federation to the effect that the Federation is not responsible for the matters complained of and that the application so far as directed against it should therefore be rejected. In the opinion of the Chamber complex questions of fact and law may arise in relation to the question of the responsibility of the two respondent Parties for the matters in question having regard to their respective responsibilities under the Constitution set out in Annex 4 to the General Framework Agreement and the transition to the constitutional system thereby introduced. The Chamber notes in this respect that whilst the legislation in question, including in particular the Decree of 22 December 1995, was passed by the legislative authorities of the (former) Republic of Bosnia and Herzegovina, responsibility for the application of the legislation may now rest with the courts and other authorities of the Federation. In so far as housing matters are the responsibility of cantons and districts under the Constitution of the Federation, the Chamber notes that in proceedings before the Chamber the Parties may be held responsible, under Article II para. 2 of Annex 6 of the Dayton Agreement, for any violation of human rights which "is alleged or appears to have been committed by the Parties including by any official or organ of the Parties, Cantons, Municipalities ...". The Chamber does not therefore consider that the application against the Federation can be rejected at the present stage on the basis suggested. It reserves, however, for consideration as part of the merits of the case the question whether either or both of the respondent Parties is responsible for any violation of human rights which may be found.

In these circumstances the Chamber finds that the application cannot be regarded as manifestly ill-founded so far as directed against either Party. No other ground of inadmissibility under Article VIII para. 2 of the Agreement is established, and the case must therefore be declared admissible.

V. DECISION

For the above reasons The Chamber, without prejudging the merits, decides unanimously to declare the case admissible in so far as it relates to the claims:

-1. That the continuing adjournment since 14 December 1995 of the applicant's civil proceedings has violated Article 6 of the Convention;

-2. That the applicant's contract to purchase his apartment has since 14 December 1995 been retroactively annulled in breach of Article 1 Protocol No. 1 to the Convention;

-3. That no effective remedy is available to the applicant in respect of the above claims and that there is therefore a breach of Article 13 to the Convention.

(signed) Andrew GROTRIAN
Registrar of the Chamber

(signed) Peter GERMER
President of the Chamber

ANNEX

CONCURRING OPINION OF MR. RAUSCHNING

With respect, I concurred with the decision of the Chamber, sharing the opinion that the application is admissible. But this result follows in my view from some additional reasons:
Under Article VIII § 1 of the Agreement on Human Rights (i.e. Annex 6) the Chamber receives for resolution or decision by or on behalf of a victim applications concerning violations of human rights within the scope of § 2 of Article II. According to this provision it considers alleged or apparent *violations of human rights* as provided in the European Convention of Human Rights (ECHR) or discriminations in the enjoyment of rights and freedoms provided for in other international agreements where such violation is alleged or appears to have been *committed by the Parties* or under their authority. This violation can appear as an act or omission, i.e. a decision, the passing of a law, a measure or other official behaviour (in short: act) imputable to a Party. Whether an act in this sense violates the human rights of the victim is the *matter in dispute* before the Chamber. The application is admissible if the matter in dispute, as determined by the application, falls under the jurisdiction of the Chamber and no specific obstacle renders the application inadmissible.
In order to determine the matter in dispute it has to be ascertained which act allegedly or apparently violates the human rights of the victim and is imputable to a Party. This act is significant for the criteria set out in Article VIII § 2 - exhaustion of effective remedies and time limit of six months (a), same matter (b), pending of other proceedings (d). The determination of the impugned act is necessary to establish the respondent Party. It serves as well the purpose for determining whether the applicant is a victim in the sense that he "is directly affected by the act or omission which is in issue, a violation being conceivable even in the absence of any detriment" (see Eur.Court.H.R., case of Groppera Radio AG and Others, Plenary Judgement of 28 March 1990, Series A no. 173, p. 20, § 47).
The matter in dispute is determined by the application. That does not mean that the Chamber is limited in its judgement of the violation to human rights invoked expressly in the application. The Chamber is free in applying the law, once an application has been made. (see, inter alia, the Handyside judgement of 7 December 1976, Series A no. 24 p. 20, § 41; De Wilde, Ooms and Versyp Cases judgement of 18 June 1971, Series A no. 12 p. 29, § 49) The Chamber might be guided by the application in determining the impugned act, but it is not bound by the wording of the complaints in the application, e.g. on page 3 or 4 of the questionnaire for applicants, issued by the Ombudsperson.
The matter in dispute has to be determined by the Chamber based on the facts stated in the application. In doing so the Chamber has to take into account the objective of the legal proceedings which the applicant initiates with his application.
In the case of Marković it appears from the facts, referred to in the application, that the applicant obtained a right to become the owner of the flat he occupied for a long time by means of the sales contract and his payment. According to Article 33 of the Law on Basic Ownership - Legal Relations (30.01.1980, SL SFRJ 6/80) the transfer of property rights concerning real estate is effectuated by the registration in a public book, the land register. The aim of the applicant is to complete the acquirement of the flat which he bought by obtaining the right of property, i.e. by entering the transfer of title in the land register. The land register is administered by the courts. To obtain this registration he applied to the Court of First Instance in Sarajevo, and on 3 June 1995 the competent Court decided to adjourn the proceedings and not to allow any appeal against this decision.
The impugned behaviour is the adjournment of the legal proceedings with the aim of transferring property rights to the applicant; this adjournment continued after 14 December 1995, and any effective remedy to end this adjournment was denied. The matter in dispute is whether this behaviour violates the human rights of the applicant. Consequently I subscribe to the decision of the Chamber to declare the application admissible in so far as it relates to the claims referred to under no. 1 and 3 of the decision.
I also share the opinion that the applicant's rights under Article 1 Protocol 1 of the Convention have to be examined. But I disagree as to the impugned act or behaviour: It can be argued that the applicant obtained a legal position entitling him to demand the transfer of the rights of property by entering this transfer in the land register. This legal position can be considered to be protected as possession under Article 1 Protocol 1. The continuance of the adjournment of the civil proceedings

possibly violates the applicant's human rights to enjoy his possessions. Under this view the impugned behaviour is that of the Sarajevo Court. According to Article II § 2 of the agreement the behaviour of the court is imputable to the competent Party. It follows from Article III § 3 (a) of the Constitution of Bosnia and Herzegovina that the functions of the civil court in Sarajevo fall within the competence of the Federation of Bosnia and Herzegovina.

The fact, that the decree of 22 December 1995 and the corresponding statute enacted by parliament on 8./9. January 1996 were issued under the authority of the Republic of Bosnia and Herzegovina does not change the picture. In my view these provisions may be the legal basis for the continuing behaviour of the court, but are not directly the matter in dispute. If the court were to apply these provisions in this adjourned, but still pending, case, it would have to be decided whether the Republic of Bosnia and Herzegovina were competent to issue these provisions after 14 December 1995 and whether they are invalid because of the lack of competence and as violating applicable human rights.

As these provisions are not directly impugned and their conformity with human rights is not the matter in dispute it is not necessary to express a view on the question of whether the application, filed on 9 July 1996, can directly challenge the validity of these acts, regarding the time limit set out in Article VIII § 2 (a) of the Agreement. It has not to be decided whether the time limit of six months is applicable in view of the fact that the Agreement is not yet officially made public by the Parties in spite of their obligations under Article XV of the Agreement.

To sum up the result I hold that number 2 of the specification of the Chamber should read

"-2. that the continuing refusal to enter the transfer of the rights of property into the land register violates the applicant's rights guaranteed under Article 1 Protocol 1 of the Convention".

(signed) Dietrich Rauschning