DECISION ON ADMISSIBILITY AND MERITS
(delivered on 5 November 1999)

Case no. CH/97/77

Nurko ŠEHIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 7 October 1999 with the following Members present:

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

Mr. Anders MÅNSSON, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

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

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina of Bosniak origin and owns a house in Livno. In July 1993 persons wearing HVO (Croatian Defence Council) uniforms forcibly evicted him and his family from this house. Subsequently, a displaced person of Croat origin from Bugojno moved into the applicant's property. In November 1996 the applicant initiated proceedings before the judicial authorities in Livno, seeking to regain possession of his house. The applicant complains that due to his ethnic origin he has been denied a fair hearing before an independent and impartial tribunal, his right to equality before the law and his right to respect for his home.

2. The case raises issues of discrimination in relation to Articles 6, 8 and 13 of the European Convention on Human Rights and Article 1 of Protocol No. 1 to the Convention as well as under Article 26 of the International Covenant on Civil and Political Rights. The application also raises issues in relation to the aforementioned Convention provisions in isolation.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced and registered on 14 October 1997. The applicant's son, Mr. Mehmet Šehić, represents the applicant. The applicant seeks remedies which include reinstatement into the house, compensation associated with lose of use of and damage to the property in question, and monetary compensation for moral pain and suffering.

4. On 14 and 16 April and 29 May 1998 the Chamber requested additional information from the applicant. Documents and further information in reply to the questions asked by the Chamber were received on 9 February, 24 April, 27 May and 16 July 1998.

5. On 12 November 1998 the Chamber decided to transmit the application to the respondent Party for its observations on the admissibility and merits pursuant to Rule 49(3)(b) of the Rules of Procedure. No observations on the admissibility and merits of the case were received from the respondent Party.

6. On 4 March 1999 the Chamber received the applicant's compensation claim. The respondent Party submitted its reply to the compensation claim on 26 April 1999.

7. On 12 and 19 April and 22 June 1999 the applicant submitted to the Chamber further decisions and orders issued by the Municipal Court in Livno in his case. These decisions were transmitted to the respondent Party for its information.

8. The Chamber further deliberated on the admissibility and merits of the case on 9 September 1999 and 7 October 1999. The Chamber adopted its decision on the latter date.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

9. The respondent Party has not made any submissions on the facts of the case, except for a specific point in which it implicitly confirms the applicant's allegations (see paragraph 11 below). Therefore, the facts as stated by the applicant and evidenced by the documents he has introduced stand undisputed.

10. The applicant, of Bosniak origin, owns a house with garden at S.S. Kranjčevića 4 in Livno (Canton 10) in the Federation of Bosnia and Herzegovina. The applicant's brother owned and ran the café on the ground floor of the house. On 21 July 1993 persons wearing HVO uniforms forcibly evicted the applicant and his family from the house. The HVO soldiers then occupied the house for approximately five months.

11. Subsequently, M.A. and his family, who were displaced persons from Bugojno, occupied the

house at the end of 1993 or early 1994. The applicant and the respondent Party agree that M.A. did not receive any authorisation from the Livno authorities to occupy the applicant's house.

12. In 1995 the applicant returned from Germany, where he had been living as a refugee, and requested unofficially from the Livno authorities to be reinstated in the possession of his house. He also sought the assistance of domestic and international institutions to this end, including, *inter alia*, the Organisation for Security and Cooperation in Europe (OSCE) and the Federation Ombudsmen.

13. As his efforts to regain possession of the house by unofficial contacts with the authorities did not yield any result, in November 1996 the applicant initiated proceedings before the Municipal Court in Livno to evict M.A. from the house. On 15 November 1996 the court issued a judgment by default (signed by Judge Nijaz Kamber) in favour of the applicant due to M.A.'s failure to appear at the hearing.

14. On 20 January 1997 the Municipal Court held a hearing at which M.A. was present, and issued another judgment (signed by Judge Mirko Bralo) in favour of the applicant. The judgment ordered M.A. to leave the house and pay court costs.

15. On 11 February 1997 M.A. submitted an appeal to the Higher Court in Mostar against the 20 January 1997 judgment of the Municipal Court. M.A. argued firstly that the operative section of the judgment did not provide the cadastral specifications concerning the property involved, and secondly, that he had obtained permission from Livno authorities to move into the house. In response the applicant made submissions to the Higher Court on 18 February 1997. He claimed that M.A. was attempting to prolong the proceedings without any basis. The applicant further claimed that M.A. himself acknowledged at the 20 January 1997 hearing that he had entered the applicant's house without written authorisation.

16. On 21 March 1997, based on M.A.'s arguments, the Higher Court issued a decision sending the case back to the Municipal Court for further investigation.

17. The Municipal Court scheduled a hearing for 18 April 1997. On 17 April 1997 the applicant filed a request for provisional measures to that court, requesting that he be allowed to effect repairs on his apartment as soon as possible. However, the defendant did not appear at the hearing of the following day and it was therefore postponed.

18. On 10 June 1997 the Federation Ministry of Justice sent a letter to the Livno Ministry of Justice to proceed with the applicant's case.

19. The Municipal Court scheduled another hearing for 19 June 1997. Again, the applicant filed a request for provisional measures, the defendant did not appear, and the proceedings were postponed.

20. On that occasion, Judge Mirko Bralo, the judge of the Municipal Court in charge of his case, told the applicant that the President of the Livno Municipal Council, Mr. Mirko Baković, had told the court that it was not to proceed with any cases initiated by Bosniaks. According to the applicant, Judge Bralo made this assertion in the presence of officials of the OSCE, the International Police Task Force (IPTF) and the Federation Ombudsmen in Livno. The Acting President of the court, Ms. Katica Tadić, confirmed the existence of such a policy to the applicant and to the officials of the mentioned organisations (see the written evidence in paragraphs 34 and 35 below). According to the applicant, also the Cantonal Minister of Justice, Mr. Stipo Babić, confirmed this policy.

21. On 2 October 1997 the Livno office of the Federation Ombudsmen sent a letter to the Municipal Court urging immediate action in the case.

22. The Municipal Court scheduled another hearing for 28 January 1998. The defendant did not appear and the court issued a judgment in favour of the applicant. The court ordered M.A. to vacate the house within 15 days of the date on which the decision took effect. The court also granted the applicant's request for a provisional measure, allowing him to begin repairs and reconstruction of his house within 48 hours. M.A. appealed against this decision.

23. By a judgement of 8 May 1998 the Cantonal Court in Livno confirmed the first instance decision of 28 January 1998 insofar as it stated that the applicant was the exclusive owner of the real estate at issue and that there was no legal basis for M.A.'s occupation of the applicant's real estate. However, the Cantonal Court annulled the provisional measure granted by the Municipal Court and sent the relevant part of the case back to the Municipal Court for a new decision.

24. By a submission to the Municipal Court on 20 May 1998 the applicant withdrew his request for a provisional measure and asked the court to proceed expeditiously with the ordinary procedure.

25. On 28 August 1998 the applicant filed a motion with the Municipal Court asking for the execution of the judgment of 28 January 1998.

26. On 9 October 1998 the applicant received the decision of the Municipal Court in which it declared "itself absolutely incompetent to proceed and on the basis of Articles 10 and 11 of the Law Terminating the Application of the Law on Temporarily Abandoned Real Property Owned by Citizens, published in the Official Gazette of the Federation BiH No. 11/98."

27. On 12 October 1998 the applicant appealed against this decision to the Cantonal Court. By a decision of 26 November 1998 the Cantonal Court quashed the decision of the Municipal Court and returned the case to the Municipal Court.

28. By the procedural decision of 26 March 1999 the Municipal Court (Judge Mirko Bralo) ordered M.A. to vacate the applicant's house within 8 days from the receipt of that decision. The decision orders that: "The defendant is responsible for handing over the key of the house to the plaintiff through a court mediator, of which regular minutes shall be taken. In case the defendant does not comply with the request, the Court shall execute the eviction by coercive measures, including the presence of the police (MUP) Livno and Communal Company Livno workers, all at the expense of the defendant". By the same decision the Municipal Court granted the applicant 600 Croatian Kuna for expenses incurred in the court proceedings.

29. On 12 April 1999 the Municipal Court (Judge Mirko Bralo) issued an order to M.A. "to hand over the building in question free from persons and things" to the applicant by 23 April 1999. The order states that, should M.A. fail to comply within the time allotted, the Municipal Service Company in Livno shall carry out the order in the presence of police officers from the Livno Police Department. This did not happen.

30. On 31 May 1999 the Municipal Court (Judge Mirko Bralo) issued a "Conclusion" in the applicant's matter. It ordered the applicant to pay within 10 days 1,000 German Marks (DEM) for execution expenses, as well as "to assure storage space for the things of the respondent [M.A.] who refused to vacate the apartment and the house". The Conclusion specified that it was issued under threat of suspension of the execution and that no remedy was allowed against it. The applicant did not comply with the Conclusion.

31. On 26 August 1999 the applicant appeared before Judge Mirko Bralo at the Municipal Court. Present at the meeting were Suzannah Linton of the OSCE, Jan Ole Dystland of the IPTF, Mithad Osmančaušević of the Office of the Federation Ombudsmen, and the spouse of M.A. The minutes of the meeting reflect that M.A. and his family have until 9 September 1999 to leave the house, or "PU Livno, Utility Company, ... will provide warehouse workers and cardboard boxes at nine o'clock [to] carry out the ... eviction. Neither party can appeal or object against such a court order and the order shall be executed".

32. On 9 September 1999 the Chamber received from the applicant a copy of a court order by which he was to pay DEM 100 for the execution expenses. The applicant paid this amount.

33. On 13 September 1999 the applicant regained his property as M.A. and his family left voluntarily. On that day the court made an extensive record of the damage to and items missing from the house and café.

B. Particular written evidence

1. The Report by the Institution of the Ombudsmen of the Federation of Bosnia and Herzegovina

34. The Livno office of the Federation Ombudsmen submitted an Information Report about the applicant's case dated 8 October 1998. After a brief summary of the proceedings in the applicant's case up to July 1997, the Report states the following:

> "In June 1997 the judge Mirko Bralo said in presence of observers, representatives of the Ombudsmen Office Livno, OSCE PC Livno, IPTF (in a corridor of this Court) that he may not rule in that way in this legal matter, because he was ordered so by his superiors [the President of the Municipal Council, Mirko Baković, and his superiors from the Cantonal Ministry of Justice]. The judge did not hold the hearing and the representatives of the above listed organisations requested the President of the Municipal Court in Livno, Ms. Katica Tadić, to receive them. She *de facto* delivered a lecture about adjudication in such legal matters, having compared this Court with the Municipal Court in Bugojno, which was unacceptable for all present persons, as they can confirm in their reports concerning this case.
>
> Both the intentional delay in this lawsuit P-174/97 and the evasion of the trial in this legal matter by the competent judge are evident. A request for provisional measure, which requires urgency, submitted by the applicant in order to protect the housing structure from further damage, was not considered at all by the judge, which indicates the factual state of the lawsuit pending before the competent court."

2. The Report of the OSCE Field Office in Livno

35. The then Human Rights Officer of the OSCE Field Office in Livno, Mr. José Maria Aranaz, has submitted the following report dated 20 October 1997:

> "This is to certify that in the framework of the assistance that we are providing to Mr. Mehmed Šehić in order to find a proper judicial solution for his case involving a property case, case in which we are working for more than one year, me, José Maria Aranaz, I would like to certify that I have eye-witnessed unjustified delays and postpone[ment] of the hearings and the sentence including one in June (date 19 June 1997 at 11:00) in which the President of the Court, Ms. Katica Tadić, explain[ed] to myself as OSCE representative, to IPTF representative in the presence of Mr. Jerry Seffel and to the Assistant Federal Ombudsmen in the presence of Mr. Mithad Osmančaušević referred to the principle of reciprocity as reason to postpone in indefinite way the hearing of the case."

3. The Recommendation of the Institution of the Ombudsmen of the Federation of Bosnia and Herzegovina

36. In a Recommendation dated 10 November 1998 addressed to Judge Mirko Bralo, to the President of the Municipal Court in Livno, to the President of the Cantonal Court in Livno and to the Cantonal Ministry of Justice, the Livno office of the Federation Ombudsmen noted

> "The Ombudsmen of the Federation of BiH have been monitoring for quite a long time the realisation of the right to one's home and to equality before the law … in cases where final procedural decisions were issued authorising the repossession of the apartment to its occupancy right holder or the repossession of a real estate to its owner …, but they have not regained the possession to date.
>
> Such a situation is, over the last period, evident also in the area of our Canton and it concerns primarily the execution of final court judgements [proceedings were conducted before the Municipal Court in Livno]."

The Ombudsmen then provided summaries of the proceedings concerning three cases pending

before their Office (among them the applicant's case) and recommended that:

> "Pursuant to your powers, you should take measures to have the Municipal Court take immediate steps in the executive proceedings to execute final judgements [in both the three above stated cases and in all other identical cases which were concluded by final first or second instance judgements] and in this way have the plaintiffs' real estates be delivered into their possession as the actual owners, as established in the proceedings, because these applicants claimed their right to private property in a legitimate way – through the court."

C. Relevant domestic law

1. The Constitution of the Federation of Bosnia and Herzegovina

37. According to Article 1 of Chapter IV(C)(1) of the Constitution of the Federation of Bosnia and Herzegovina, the judicial functions in the Federation shall be exercised, *inter alia*, by the Supreme Court of the Federation, by the cantonal courts as prescribed in Chapter V(11) and by the municipal courts as prescribed in Chapter VI(7). Under Chapter V(6) the cantonal legislatures shall elect the judges of the cantonal courts.

38. Chapter V(11) of the Constitution reads as follows:

> "1) Each canton shall have courts, which shall have appellate jurisdiction over the courts of its municipalities and original jurisdiction over matters not within the competence of those courts and as provided by law.
>
> 2) Cantonal judges shall be nominated by the Cantonal President from among outstanding jurists and be elected by a majority vote in the Cantonal Assembly, in such a way as to ensure that the composition of the judiciary as a whole shall reflect that of the population of that Canton.
>
> 3) Cantonal judges shall serve until the age of 70, unless they resign or are removed from office by consensus among the judges of the Supreme Court. The conditions of service shall be determined by cantonal legislation. ...
>
> 4) Each cantonal court shall elect its own President."

39. Chapter VI(7) provides as follows:

> "1) Each municipality shall have courts, which may be established in co-operation with other municipalities, and which shall have original jurisdiction over all civil and criminal matters, except to the extent original jurisdiction is assigned to another court by this or the Cantonal Constitution or by any Law of the Federation or the Canton.
>
> 2) Municipal courts shall be established and funded by the Cantonal Government.
>
> 3) Judges of municipal courts shall be appointed by the President of the ... Cantonal Court after consultation with the Mayor of the municipality.
>
> 4) Judges of municipal courts shall serve until age 70, unless they resign or are removed from office by consensus among the judges of the ... Cantonal Court. The conditions of service shall be determined by cantonal legislation. ..."

2. The Constitution of Canton 10

40. Chapter IV(C) of the Constitution of Canton 10 (Official Gazette of Canton 10 no. 1/96) states, as far as relevant, as follows:

Article 45:

"The judicial authorities in the Canton are independent and shall execute their power based on the Constitution and the laws of Federation and Canton."

Article 46:

"The courts in the Canton shall ensure an equal position to all parties to judicial proceedings."

Article 48:

"The cantonal courts shall be established in accordance with the law of the Canton."

Article 51:

"The judges of the Cantonal Court shall be proposed by the Governor of the Canton from among prominent lawyers, and shall be elected by the [Cantonal] Assembly, whereby the national composition of the judiciary as a whole shall reflect the national structure of the population of the Canton."

Article 52:

"The judges of the cantonal and municipal courts shall serve until the age of 70, unless they resign or are removed from office as follows:

a) the judges of the Cantonal Court by consensus among the judges of the Supreme Court of the Federation; and

b) the judges of a municipal court by consensus among the judges of the Cantonal Court.

The terms of service shall be determined in a separate law of the Canton. ..."

Article 53:

"The Cantonal Court shall elect its President in accordance with the law."

Article 54:

"All the judges of the Cantonal and the municipal courts shall be prominent lawyers of the highest moral qualities. The judges of the cantonal and the municipal courts shall not be criminally prosecuted or [held] responsible in civil proceedings for any action undertaken in performing their functions."

Article 73:

"The judges of the municipal courts shall be appointed by the President of the Cantonal Court upon consultations with the Mayor of the municipality."

3. The Law on the Judiciary of Canton 10

41. The Law on the Judiciary (Official Gazette of Canton 10 no. 1/97) governs, *inter alia,* the competence of the courts of the canton and the appointment of their judges (Article 1). It provides the following:

Article 4:

"The courts of the Canton shall perform its judicial function under the Constitution of the

Federation of Bosnia and Herzegovina (hereinafter "the Federation") and the Constitution and laws of the Canton."

Article 11:

"The judges and lay judges ... are appointed and removed from office by the competent authorised body established by this law."

Article 44:

"A citizen of the Federation who resides on the territory of the Federation, is a lawyer ... with a barrister's exam and a jurist of recognised competence, can be appointed judge. Judges are appointed for an unlimited period of time and may remain in service until they reach the age of 70. The national composition of the judges as a whole shall reflect the national structure of the population of the Canton."

Article 46:

"Judges of the municipal courts are appointed by the President of the Cantonal Court upon consultations with the Mayor of the municipality."

Article 47:

"Judges of the Cantonal Court are appointed by majority of votes of the Cantonal Assembly, on the proposal by the Governor of the Canton."

Article 48:

"The appointment of judges shall be performed on the basis of a public announcement published in media available to all citizens of the Canton. This public announcement is published by the Ministry of Justice...."

Article 49(4):

"The applications received ... shall be analysed by the Ministry which shall make a list of candidates in alphabetic order and, with its opinion on the competence of the candidates, transmit it to the Governor and the President of the Cantonal Court for further procedure."

Article 51:

"Before taking up their duty judges shall make the solemn declaration. It reads as follows: 'As the judge I solemnly declare that I will adhere to the Constitution and the law of the Federation and the Constitution and the law of the Canton, and that I will perform my duty conscientiously and impartially.'"

Article 54:

"The duty of the judge shall be terminated by his or her removal from office or by his or her resignation."

Article 55:

"The procedure for the removal from office of a judge is set in motion:
- if he or she is convicted of a criminal act which makes him or her unworthy of exercising the duty of a judge;
- if it is established that he or she seriously abused her position as a judge or damaged the reputation of the judicial office;
- if it is established that he or she is not qualified for the post as judge, if he or she does not achieve satisfactory results in his or her duty for a longer period of time or if he or she performs his or her duty as a judge in a disorderly manner for a longer period of time; [or]

- if it is established that he or she is permanently disabled to act in the position of a judge on the basis of an opinion of the competent medical service."

Article 56:

"A proposal to remove a Cantonal Court judge from office shall be made by the Governor on the initiative of the President of the Supreme Court of the Federation, the President of the Cantonal Court or the Minister of Justice and Administration [of the Canton]. A proposal to remove municipal court judge from office is made by the President of the Cantonal Court or the President of the Municipal Court."

Article 62:

"Lay judges on the Cantonal Court are appointed by the Cantonal Assembly on the proposal of the Governor. Lay judges on the Municipal Court are appointed by the President of the Cantonal Court on the proposal of the Mayor."

IV. COMPLAINTS

42. The applicant complains that because of his Bosniak origin he has been denied his right to a fair hearing within a reasonable time before an independent and impartial tribunal, his right to respect for his home, his right to an effective remedy and his right to the peaceful enjoyment of property (Articles 6, 8 and 13 of the Convention as well as Article 1 of Protocol No. 1 to the Convention).

V. FINAL SUBMISSIONS OF THE PARTIES

A. The respondent Party

43. The respondent Party did not make any submissions on the admissibility and merits. With regard to the compensation claimed by the applicant, the respondent Party asked the Chamber to reject the entire claim on the grounds that the respondent Party bore no responsibility for the damage suffered by the applicant due to the action of an illegal occupant of his house. The respondent Party also disputed the single components of the applicant's compensation claim as ill-founded and, should the Chamber nonetheless admit them, excessive.

B. The applicant

44. The applicant maintains that his house was unlawfully occupied by M.A. He claims that the administrative and judicial authorities of Canton 10, as agents of the respondent Party, deliberately failed to evict the illegal occupant. The applicant maintains that this inaction is part of a general policy of discrimination against persons of Bosniak origin. As recompense, he claims pecuniary and non-pecuniary damages in the amount of DEM 590,000.

VI. OPINION OF THE CHAMBER

A. Admissibility

1. Competence *ratione temporis*

45. Before considering the merits of the case the Chamber must decide whether to accept the case, taking into account the admissibility criteria set out in Article VIII of the Agreement. According to Article VIII(2)(c), the Chamber shall dismiss an application that it considers incompatible with the Agreement. The Chamber recalls that in accordance with generally accepted principles of international law, the Agreement cannot be applied retroactively (see, e.g., case no. CH/96/1,

Matanović, decision on admissibility of 13 September 1996, at section IV, Decisions on Admissibility and Merits 1996–1997).

46. The Chamber notes that the applicant's complaints focus on the court proceedings he began in November 1996 and on the ongoing violation of his right to his home and to peacefully enjoy his property that results from the ineffectiveness of these proceedings. The application is thus compatible with the Agreement for the purposes of Article VIII(2)(c), insofar as it concerns actions and omissions of the authorities of the respondent Party from November 1996 onwards which therefore fall within the Chamber's competence *ratione temporis*.

2. Requirement to exhaust effective domestic remedies

47. For the purposes of Article VIII(2)(a) of the Agreement, the Chamber must next consider whether any "effective remedy" was available to the applicant. If so, the Chamber must also decide whether the applicant has demonstrated that they have been exhausted or that further pursuit of such remedies is futile. Normal recourse should be had by an applicant to remedies that 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. Moreover, in applying the rule on exhaustion of domestic remedies it is necessary to take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as of the personal circumstances of the applicants (see, e.g., case no. CH/96/21, *Čegar*, decision on admissibility of 11 April 1997, paragraphs 11 and 14, Decisions on Admissibility and Merits 1996–1997).

48. In the present case, the applicant asserts that the deliberate hindrances of the respective administrative and judicial officials result in the violation of his rights guaranteed by the Agreement. In response, the respondent Party has not argued that the applicant failed to make proper use of the remedies available. The Chamber notes that the applicant has initiated court proceedings for the eviction of the undisputedly illegal occupation of his house nearly three years ago. Further, since 26 March 1999 the illegal occupant was under a court order to vacate the applicant's property that was not executed for an extended period. The Chamber therefore concludes that the remedies available have proved ineffective and that the admissibility requirement in Article VIII(2)(a) of the Agreement has also been met.

49. Finally, the Chamber notes that the applicant has regained possession of his property. The applicant's success in regaining his property, however, neither affects the Chamber's finding of admissibility nor means that the case should be struck out on the grounds that the matter has been resolved (see Article VIII3(b) of the Agreement) because this does not effect the examination of possible human rights violations in any manner.

B. Merits

50. Under Article XI of the Agreement the Chamber must address the question whether the facts found disclose a breach by the respondent Party of its obligations under the Agreement. Under Article I of the Agreement the parties are obliged to "secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms", including the rights and freedoms provided for in the treaties listed in the Appendix to the Agreement.

51. Under Article II 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, including by any official or organ of the Parties, Cantons, Municipalities or any individual acting under the authority of such an official or organ.

52. The Chamber has considered the present case under Article II(2)(b) of the Agreement in

relation to Articles 6 paragraph 1, 8 and 13 of the Convention, Article 1 of Protocol No. 1 to the Convention and Article 26 of the Covenant. The Chamber has further considered the case under Article II (2)(a) of the Agreement in relation to the said provisions of the Convention.

53. The Chamber has held in numerous decisions that the prohibition of discrimination is a central objective of the Agreement to which the Chamber must attach particular importance (see, e.g., case no. CH/97/45, *Hermas*, decision on admissibility and merits delivered on 18 February 1998, paragraph 68, Decisions and Reports 1998; see also case no. CH/98/756, *Đ. M.*, decision on admissibility and merits delivered on 14 May 1999, paragraph 68, Decisions January-July 1999; and case no. CH/96/29, *The Islamic Community in Bosnia and Herzegovina*, decision on admissibility and merits delivered on 11 June 1999, paragraph 153, Decisions January-July 1999). It will therefore first consider whether the applicant was discriminated against.

1. Discrimination in the enjoyment of the applicant's right to a fair hearing within a reasonable time before an independent and impartial tribunal, to equal protection of the law, to respect for his home and to the peaceful enjoyment of his property

54. Article 6 paragraph 1 of the Convention provides, as far as relevant, as follows:

> "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. …"

Article 26 of the Covenant reads as follows:

> **"**All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth, or other status."

Article 8 of the Convention provides, as far as relevant, as follows:

> "1. Everyone has the right to respect for his … family life, his home…
>
> 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 …for the protection of the rights and freedoms of others."

Article 13 of the Convention 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."

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."

55. The Chamber recalls that the right to one's property and "home" is a "civil right" within the meaning of Article 6 paragraph 1 of the Convention (see, e.g., case no. CH/97/46, *Kevešević,* decision on the merits delivered on 10 September 1998, paragraph 63, Decisions and Reports

1998). The dispute before the Livno Municipal Court regarding the applicant's right to his property therefore comes within the ambit of that provision. The applicant's grievances also fall within the ambit of Articles 8 and 13 of the Convention as well as of Article 1 of Protocol No. 1.

56. The Chamber observes that Article 26 of the Covenant sets out an independent right to equality before the law and equal protection of the law (see case no. CH/97/41, *Marčeta*, decision on admissibility and merits delivered on 6 April 1998, paragraph 61 et seq., Decisions and Reports 1998). In the present case the Chamber notes that the applicant has seized the Municipal Court of the matter, before which he may assert his right to equal and effective protection of the law, as guaranteed under Article 26 of the Covenant. In these circumstances, the Chamber will also consider whether the applicant has been discriminated against in the enjoyment of his right to equal protection of the law.

57. In examining whether there has been discrimination contrary to the Agreement, the Chamber recalls the jurisprudence of the European Court of Human Rights with respect to Article 14 of the Convention, the UN Human Rights Committee with respect to Articles 2 and 26 of the Covenant, and the jurisprudence of other international courts and monitoring bodies. Article 14 of the Convention and Article 2 of the Covenant stipulate that the enjoyment of the rights and freedoms set forth in the respective treaties shall be secured without discrimination on any ground. Article 26 of the Covenant goes further and guarantees an independent right to equality before the law, equal protection of the law, prohibition of discrimination and protection against discrimination. The European Court and the UN Human Rights Committee have consistently found it necessary first to determine whether the applicant was treated differently from others in the same or relevantly similar situation. Any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification; 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 sought to be realised. There is a particular onus on the respondent Party to justify differential treatment which is based on any of the grounds explicitly enumerated in the relevant provisions, including religion or national origin. In previous cases, the Chamber has taken the same approach (see case no. CH/97/67, *Zahirović*, decision on admissibility and merits delivered on 8 July 1999, paragraph 133 et seq., Decisions and Reports January-July 1999).

58. In the present case, the uncontroverted evidence before the Chamber (see paragraphs 34-36 above) establishes that the Cantonal Court in Livno has established a deliberate policy of postponement of the proceedings and non-execution of decisions rendered regarding the applications of returning refugees attempting to repossess their homes.

59. The applicant's case is an illustration of this policy. The Chamber recalls that the applicant's ownership of the house has never been in dispute. Nevertheless, his attempts to have the illegal occupant evicted and to regain control over that property were unsuccessful for a prolonged period, notwithstanding a significant number of hearings held, petitions and submissions filed by the applicant, and the involvement of domestic and international organizations. In addition, although the applicant had a judgment is his favour, the court asked the applicant to pay a fee of DEM 1,000 to cover the storage costs of the furniture of the former illegal applicant, which under the circumstances seems unreasonable.

60. The evidence before the Chamber suggests that the reason for this differential treatment is to reciprocate the discriminatory treatment to which refugees of Croat descent from Bugojno are allegedly subjected to before the administrative and judicial authorities in Bugojno. The Chamber finds that this reason, i.e. retaliation for discrimination allegedly suffered by persons of Croat descent in a different Municipality, does not constitute a legitimate aim that would justify the differential treatment.

61. The Chamber recalls that in its decision in *Đ.M.* it found that

> "the evidence before the Chamber suggests that in Canton 10 there is a pattern of discrimination consisting of the courts' and the municipal authorities' failure to process claims for repossession of property belonging to returning Bosniaks, or of not enforcing judgments rendered in favour of such plaintiffs against defendants of the Croat majority,

whether or not they are lawful temporary occupants. For the purposes of this case, the Chamber need not determine whether this pattern of discrimination is based on an outright policy seeking to discourage the return of Bosniak refugees to Canton 10. In light of all the aforementioned considerations the Chamber finds it established that in the proceedings before the Municipal Court of Livno as well as in her dealings with the municipal administration the applicant, on account of her Bosniak origin, has been subjected to differential treatment compared with the Croat majority in similar situations. The respondent Party has not suggested any justification for the differential treatment in issue and the Chamber cannot, of its own motion, find any such justification." (See the above-mentioned *Đ.M.* decision, paragraphs 79-80.)

62. Accordingly, the Chamber concludes that the applicant, in a substantially similar position as the applicant in the above cited decision, has suffered discrimination in enjoyment of his right under Article 6 paragraph 1 of the Convention to a fair hearing before an independent and impartial tribunal, and in the enjoyment of his right under Article 26 of the Covenant to equal protection of the law. The discrimination found has also barred the applicant from any effective use of a remedy on the domestic level within the meaning of Article 13 of the Convention and has until recently prevented him from returning to his home and property within the meaning of Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention.

63. The Chamber will next consider the case under Article II(2)(a) of the Agreement in relation to Articles 6, 8 and 13 of the Convention as well as to Article 1 of Protocol No. 1 to the Convention in isolation. In doing so it will have regard also to the facts and evidence on which it has based its findings of discrimination in the enjoyment of the applicant's rights under the Agreement.

2. Article 6 of the Convention

(a) Regarding the length of the proceedings

64. The Chamber must consider whether, under Article 6 of the Convention, the tribunal in question has determined, within a reasonable time, the applicant's complaint.

65. The Chamber has discussed above that the proceedings in the applicant's case have been an illustration of unjustifiable ineffectiveness. To review, the applicant initiated the proceedings in November 1996. On 20 January 1997 the Municipal Court rendered a decision in his favour, ordering M.A. to leave the premises and pay court costs. M.A. appealed this decision to the Higher Court in Mostar. On 21 March 1997 that court ordered the Municipal Court to reconsider the case. On 18 April and 19 June 1997 hearings were scheduled but postponed in each case because M.A. failed to appear. On 28 January 1998, even though the defendant was again absent, the court ordered M.A. to vacate the applicant's house within 15 days. The Cantonal Court confirmed this decision on 8 May 1998. However, on 9 October 1998 the Municipal Court found itself "absolutely incompetent" to proceed with the execution of its previous decision. On 26 November 1998 the appeals court quashed the decision of 9 October 1998. On 26 March and 12 April 1999 the Municipal Court ordered M.A. to vacate the applicant's house within eight days, granted the applicant 600 Croatian Kuna for the expenses incurred in the proceedings and decided that M.A. was to bear the expenses of the eviction. On 31 May 1999, however, the same judge ordered the applicant to make an advance payment of DEM 1,000 on account of the execution expenses and to provide storage space for the illegal occupant's belongings. In early September 1999 the court ordered the applicant to pay DEM 100 for costs associated with the execution order.

66. Regarding the protracted failure of the judicial authorities to give execution to their decisions in the applicant's favour, a precedent of the European Court of Human Rights, adopted by the Chamber, has established that the execution of a judgement given by a court must be regarded as an integral part of the "trial" for the purposes of Article 6 (Eur. Court HR, *Hornsby v. Greece* judgment of 19 March 1997, Reports of Judgments and Decisions 1997-II, paragraph 40). Therefore, given the protracted delays in the execution of the applicant's decisions, the Chamber finds that that the applicant's right to a fair hearing within a reasonable time has been violated.

(b) Regarding the judicial independence of the courts of Canton 10

67. In considering whether a judicial body is "independent" for the purposes of the Convention, the Chamber considers the manner of appointment of the judges, the duration of their term of office, the existence of guarantees against outside pressures and the question of whether a body presents an appearance of independence (see, e.g., case no. CH/96/30, *Damjanović*, decision on the merits delivered on 8 October 1997, paragraphs 39 and 40, Decisions on Admissibility and Merits 1996–1997). In respect of the last criterion the Chamber recalls that justice must not only be done, it must also be seen to be done. What is at stake is the confidence that the courts in a democratic society must inspire in the public (see, e.g., Eur. Court HR, *Sramek v. Austria* judgment of 22 October 1984, Series A no. 84, p. 20, paragraph 42).

68. In this case, however, the applicant, the Human Rights Officer for the OSCE in Livno, Mr. José Maria Aranaz, and a representative of the Office of the Federation Ombudsmen in Livno, Mr. Mithad Osmančausević, have reported that the judge in charge of the applicant's case before the Municipal Court in Livno expressly stated, in their presence, that in obstructing a solution of the applicant's case he was acting upon instruction of the President of the Municipal Council. These statements have remained unchallenged by the respondent Party.

69. The Chamber recalls that in the case of *Đ. M.,* it found that "the current practice in Canton 10 is that only members or sympathisers of the ruling Croat party are appointed to judicial office. The respondent Party has in fact conceded that there is 'a problem' in the court system in Canton 10 'in respect of both efficiency and independence'." The evidence before the Chamber reveals that at least some of the judges in Canton 10 feel compelled to act in a manner accommodating certain political views, for fear that their judicial tenure might be subject to termination because of political considerations, other than those prescribed by law. "In the Chamber's opinion it is therefore very likely that the judge on the applicant's case before the Livno Municipal Court does not process the case for the aforementioned reason." (see the above-mentioned *Đ. M.* decision, paragraph 87).

70. The Chamber further recalls that also in the *Zahirović* case it concluded that "the Livno Municipal Court cannot be regarded as independent of political influence when examining the applicant's case" (see the above-mentioned *Zahirović* decision, paragraph 139).

71. In the present case, therefore, the Chamber finds that the applicant has been discriminated against, *inter alia,* in the enjoyment of his right to a fair hearing before an independent tribunal within the meaning of Article 6 paragraph 1 of the Convention. With reference also to the facts on which it has based its finding of discrimination (see paragraphs 20 and 34-36 above), the Chamber concludes that the judge in the applicant's case has not acted "independently" in terms of the Convention. A court that is not entirely independent of the political bodies cannot objectively comply with the requirement of impartiality.

72. The Chamber concludes, therefore, that the applicant's rights under Article 6 paragraph 1 of the Convention were violated in the proceedings before the Livno Municipal Court.

3. Article 8 of the Convention

73. The Chamber noted in the *Blentić* case that the object of Article 8 is to protect the individual against arbitrary interference by public authorities (case no. CH/96/17, *Blentić,* decision on admissibility and merits delivered on 3 December 1997, paragraph 26, Decisions on Admissibility and Merits 1996–1997). This may also give rise to positive obligations on the part of those public authorities, which are necessary to ensure the effective respect for the rights that the Agreement guarantees. In this context, as in others, a fair balance must be struck between the general interest and the interests of the people concerned.

74. In the present case the Chamber finds that the failure by the judicial authorities to evict the illegal occupant of the applicant's house is a failure on their part to ensure the applicant's right to his "home" within the meaning of Article 8 paragraph 1 of the Convention. The respondent Party has made no attempt to justify this inaction. The Chamber recalls that it has already found (see

paragraph 60 above) that the lack of respect for the applicant's case is motivated by the general intent to obstruct the return of refugees and displaced persons. The Chamber therefore concludes that the applicant's rights under Article 8 of the Convention in isolation have also been violated.

4. Article 13 of the Convention

75. The applicant also complains that he has been the victim of a breach of Article 13 of the Convention as there is no effective remedy available to him.

76. However, because of the finding of violations under Article 6 paragraph 1 of the Convention, the Chamber considers it unnecessary to examine the complaint under Article 13 of the Convention.

5. Article 1 of Protocol No. 1 to the Convention

77. In the present case the term "possessions" for the purposes of Article 1 of Protocol No. 1 to the Convention includes the applicant's house and surrounding real property. Under Article 1 of Protocol No. 1, three rules are used to determine if there has been a violation of this Article. First is the general principle of peaceful enjoyment of possessions. The second rule covers deprivation of property and subjects any such deprivation to the requirements of public interest and conditions laid out by law. The third rule deals with control of use of property and subjects this to the requirement of the general interest and domestic law. It must be determined in all these situations whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual applicant's fundamental rights (see, e.g., the above-mentioned *Blentić* decision, paragraphs 31 and 32). Although States Parties to the Convention enjoy wide latitude in judging what is in the general interest, that judgement must not be manifestly without reasonable foundation (see Eur. Court HR, *James and Others v. the United Kingdom* judgment of 21 February 1986, Series A no. 98, p. 32, paragraph 46). In the assessment of whether an applicant has had to bear "an individual and excessive burden," it is also of relevance whether he has had the possibility of effectively challenging the measure taken against him (see Eur. Court HR, *Hentrich v. France* judgment of 22 September 1994, Series A no. 296-A, p. 21, paragraph 49). Article 1 of Protocol No. 1 may, like other Convention guarantees, give rise to positive obligations on the authorities to provide effective protection for the individual's rights (see, e.g., the above-mentioned *Blentić* decision, paragraph 32 and the case-law of the European Court referred to therein). Such positive obligations may include the provision of necessary assistance in the recovery of property by means of eviction.

78. The Chamber is here concerned with a failure by the authorities to protect the applicant against a continuing unlawful occupation of his possessions within the meaning of the first sentence of the first paragraph of Article 1 of Protocol No. 1. The Chamber finds, for essentially the same reasons as it has given in relation to Article 8 of the Convention, that this failure of the authorities to assist the applicant in recovering his property also amounts to a breach of his rights under Article 1 of Protocol No. 1 in isolation.

6. Conclusion

79. The Chamber, therefore, has found that this case involves discrimination against the applicant in the enjoyment of his rights under Articles 6, 8 and 13 of the Convention, Article 1 of Protocol No. 1 to the Convention and Article 26 of the Covenant. Further, the Chamber finds separate violations of Articles 6 and 8 of the Convention as well as Article 1 of Protocol No. 1 to the Convention.

VII. REMEDIES

80. Under Article XI(1)(b) of the Agreement the Chamber must address the question what steps shall be taken by the respondent Party to remedy breaches of the Agreement which it has found, including orders to cease and desist, and monetary relief.

81. The applicant requests that the respondent Party enable him to return to his home. In a letter of 4 March 1999, the applicant also requests monetary compensation as follows:

1. DEM 200,000 to effect repairs to the applicant's home, including repairs to the interior and exterior of the house, the electrical and water systems and the furniture and other personal items;
2. DEM 50,000 to effect repairs to the café on the ground floor of the house;
3. DEM 70,000 in back rent to be paid by M.A: for six years of occupation of the applicant's house (approximately 70 months at DEM 1,000 per month);
4. DEM 120,000 for "pain and moral suffering" suffered (DEM 20,000 per each of the six members of the family),
5. DEM 100,000 (minimum) in lost profits relating to the café, over the six year period of M.A.'s occupation; and
6. DEM 50,000 for treatment of liver disease, attributed to stress associated with the applicant's inability to secure control of his home.

The total amount sought by the applicant is thus DEM 590,000.

82. In response, the respondent Party maintains that they should not be held responsible for the actions of an illegal occupant in which it had no involvement. Therefore, the respondent Party argues that it is not responsible for any of the subsequent damage to the home and any associated expenses, and that it should not be held accountable for any requested compensation.

83. In the alternative, should the Chamber find the respondent Party responsible, the respondent Party submits that the applicant has provided no evidence as to the damage to the house, that his claim lacks specificity, and that there is no proof that the state of the house is outside the scope of ordinary use for which the respondent Party cannot be held accountable. The respondent Party therefore again denies the claim as whole, or, in the alternative, argues that it is excessive.

84. Regarding the café, the respondent Party argues that the claim is excessive and lacks concrete evidence as to the damage. Further, the respondent Party argues this claim should be denied because the applicant and his brother jointly own the café, and his brother does not have standing in this case to claim damages.

85. Regarding the rent, the respondent Party argues that this claim is groundless because such income could not be expected during the war and that the applicant had not made use of the home as a rental unit before. Therefore, he could not expect to have such income.

86. Regarding the claim of "pain and moral suffering," the respondent Party rejects the claim of the five persons in the applicant's claim who are not parties to the proceedings and therefore do not have standing to bring a claim. Further, the respondent Party rejects this claim as a whole, stating that "neither the applicant nor his family members suffered any [such] mental pain [and] how the applicant decided upon this amount is overly vague" (Letter from the Office for Cooperation with and Representation before the Human Rights Commission, Federation of Bosnia and Herzegovina, dated 29 April 1999).

87. Regarding the lost income, the respondent Party argues that this claim is imprecise. In addition, the respondent Party raises the previously stated objection with respect to the brother's standing to make a claim for damages. Lacking evidence as to the exact amount of lost profit, which, the respondent Party argues, is made more difficult to calculate because of the war, the respondent Party "cannot explicitly state its position" regarding this claim.

88. Lastly the respondent Party rejects the claim regarding the medical expenses as no evidence links the applicant's health problems to his situation with his home, and also states that the claim is excessive.

89. As for the applicant's monetary claim, it is well established that it is beyond the Chamber's competence *ratione temporis* to consider any claims for damages that occurred prior to December 1995. Therefore, any portion of the applicant's claim which stems from that period must be rejected.

90. Regarding the damage to the house and the café, the Chamber finds that the respondent Party did not directly cause the damage to the applicant's property. The respondent Party cannot be held responsible for damage and wear, nor for the cost of repairing such damage, and therefore this claim is rejected.

91. Regarding the applicant's claim for lost profits associated with the business and rent of the applicant's home, the Chamber finds that these claims must be rejected. The profits associated with the business, i.e. the café, must be rejected *ab initio* because the applicant is not the owner of the property. The loss of profits associated with the rental of the apartment must be rejected owing to the speculative and unsubstantiated nature of this claim.

92. With respect to the applicant's claims for the pain and suffering of his family, it must first be stated that the applicant's family does not have standing in this case and therefore their claims must be rejected. With respect to the applicant, however, the Chamber recalls the *Đ.M.* case where it awarded damages to the applicant on the basis of her pain and suffering. The applicants in the two cases are similarly situated, having been discriminated against and lost possession of their respective homes. The Chamber finds, therefore, that the applicant suffered stemming from his treatment by the authorities and from the *de facto* loss of his home. By its nature, the damage suffered does not lend itself to precise quantification. Deciding on an equitable basis, the Chamber will award the applicant 4,000 Convertible Marks (*Konvertibilnih Maraka*) with respect to damage up to and including the date of this decision (see the above-mentioned *Đ.M.* decision, paragraph 103).

93. Regarding the applicant's claim for medical expenses resulting from his liver disease, the Chamber finds that this claim must be rejected. Where it has not been shown that the alleged injury was directly caused by the respondent Party or any person acting on its behalf, the respondent Party cannot be held responsible (see, e.g., the above-mentioned *Blentić* decision, and case no. CH/96/27 *Bejdić*, decision on the claim for compensation of 14 July 1998, paragraph 11, Decisions and Reports 1998). In the present case, no such responsibility can be established.

VIII. CONCLUSIONS

94. For the reasons given above, the Chamber decides,

1. by 6 votes to 1, to declare the application admissible under Article VIII of the Human Rights Agreement;

2. by 6 votes to 1, that the applicant has been discriminated against in the enjoyment of his rights under Articles 6, 8 and 13 of the European Convention on Human Rights, Article 1 of Protocol No. 1 to the Convention and Article 26 of the International Covenant on Civil and Political Rights, the Federation of Bosnia and Herzegovina thereby being in violation of Article I of the Agreement;

3. by 6 votes to 1, that there has been a violation of the applicant's right under Article 6 paragraph 1 of the Convention to a fair hearing within a reasonable time before an independent and impartial tribunal established by law, the Federation of Bosnia and Herzegovina thereby being in violation of Article I of the Agreement;

4. by 6 votes to 1, that there has been a violation of the applicant's right under Article 8 of the Convention to respect for his home, the Federation of Bosnia and Herzegovina thereby being in violation of Article I of the Agreement;

5. unanimously, that it is not necessary to rule on the complaint under Article 13 of the Convention;

6. by 6 votes to 1, that there has been a violation of the applicant's right under Article 1 of Protocol No. 1 to the Convention to the peaceful enjoyment of his possessions, the Federation of Bosnia and Herzegovina thereby being in violation of Article I of the Agreement;

7. by 6 votes to 1, to order the Federation of Bosnia and Herzegovina to pay to the applicant, within three months, 4,000 (four thousand) Convertible Marks (*Konvertibilnih Maraka*) by way of compensation for non-pecuniary damage;

8. by 6 votes to 1, that simple interest at an annual rate of 4% will be payable over the above sum or any unpaid portion thereof from the day of expiry of the above-mentioned three-month period until the date of settlement;

9. by 6 votes to 1, to reject the remainder of the applicant's compensation claim; and

10. unanimously, to order the Federation of Bosnia and Herzegovina to report to the Chamber by 5 February 2000 on the steps taken by it to comply with the above order.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Michèle PICARD
President of the First Panel