DECISION ON REQUEST FOR REVIEW

Miro GRBAVAC (CH/97/81), Slavoljub MITIĆ (CH/97/83), Mladen DIMITRIJEVIĆ (CH/97/85), Milan LAPONJA (CH/97/91), Georgi POPOVSKI (CH/97/95), Anđa MIŠEVSKI (CH/97/101), Dragoljub SVETOZAREVIĆ (CH/97/111), Mirko OBRADOVIĆ (CH/98/121), Himzo SALIHBEGOVIĆ (CH/98/125), Dušan ŽIGIĆ (CH/98/127), Sejda FRLJ (CH/98/131), Selim ŠKAMO (CH/98/137), Vidoje ŠIPČIĆ (CH/98/143), Muhamed HODŽIĆ (CH/98/147), Meho AJKIĆ (CH/98/149), Bajro DREKOVIĆ (CH/98/151), Milan BATAR (CH/98/155), Ibrahim KUKURUZOVIĆ (CH/98/157), Dedo SARVAN (CH/98/163), Marko BEGOVIĆ (CH/98/165), "M.R." (CH/98/167), Franjo PREMUDA (CH/98/169), Advija SALIHOVIĆ (CH/98/179), Daut DAUTOVSKI (CH/98/185), "M.M." (CH/98/233), Miloš DAVIDOVIĆ (CH/98/235) and Ilija SARIĆ (CH/98/237)

against

BOSNIA AND HERZEGOVINA
AND
THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 15 May 1999 with the following members present:

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

Mr. Leif BERG, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

Having considered the request of the Federation of Bosnia and Herzegovina for a review of the decision of the First Panel of the Chamber on the admissibility and merits of the aforementioned cases;

Having considered the Second Panel's recommendation;

Adopts the following decision pursuant to Article X(2) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina as well as Rules 63-66 of the Chamber's Rules of Procedure:

I. FACTS AND COMPLAINTS

1. In 1991 and 1992 the 27 applicants contracted to buy apartments from the Yugoslav National Army ("the JNA") under the Law on Securing Housing for the Yugoslav National Army (Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 84/90). This Law came into force on 6 January 1991. In the following years a number of Decrees with force of law were issued by the Government of the Socialist Republic of Bosnia and Herzegovina, and the Presidency of the Republic of Bosnia and Herzegovina (confirmed as laws by the Parliament of the Republic of Bosnia and Herzegovina) with the aim of regulating social property issues in general and social property over which the JNA had jurisdiction in particular. These legal instruments included, amongst others, a Decree imposing a temporary prohibition on the sale of socially owned property, issued on 15 February 1992 by the Government of the Socialist Republic of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina , No. 4/92). A Decree with force of law issued on 3 February 1995 ordered courts to adjourn proceedings seeking to have the purchasers' ownership of such apartments registered. A Decree of 22 December 1995 declared purchase contracts in respect of JNA apartments retroactively invalid. This Decree was adopted as a law on 18 January 1996.

2. The applicants essentially complained that the retroactive annulment of their purchase contracts and the compulsory adjournment of any court proceedings with a view to registering the ownership of the acquired apartments involved violations of Article 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and of Article 1 of Protocol No. 1 to the Convention.

II. SUMMARY OF THE PROCEEDINGS BEFORE THE CHAMBER

3. The applications were introduced between November 1997 and February 1998 and registered between November 1997 and April 1998. On 2 April and 11 May 1998 the First Panel decided pursuant to Rule 49(3)(b) of the Rules of Procedure to transmit the applications to the respondent Parties for observations on their admissibility and merits. The Federation of Bosnia and Herzegovina ("the Federation") submitted observations between April and June 1998. The applicants replied between July and October 1998.

4. On 18 December 1998 the First Panel decided, under Rule 34 of the Chamber's Rules of Procedure, to join the applications. In its decision on the admissibility and merits of the cases which was delivered on 15 January 1999 pursuant to Rule 60, the First Panel found, *inter alia*, that the Federation had violated the applicants' rights under Article 1 of Protocol No. 1 to the Convention and Article 6 of the Convention, and that the Federation was thereby in breach of Article I of the Agreement. The Federation was furthermore ordered to pay certain compensation to some of the applicants and to report to the Chamber by 15 April 1999 on the steps taken by it to give effect to the decision. More particularly, the First Panel decided, *inter alia,* as follows:

> "…
> 2. …, that the passing of legislation providing for the retroactive nullification of the applicants' purchase contracts violated their rights under Article 1 of Protocol No. 1 to the Convention, Bosnia and Herzegovina thereby being in breach of its obligations under Article I to the Agreement;
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> 3. …, that the recognition and application of the legislation providing for the retroactive nullification of the applicants' contracts (had) violated their rights under Article 1 of Protocol No. 1 to the Convention, the Federation thereby being in breach of its obligations under Article I of the Agreement;
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> 4. …, that the continuing adjournment since 14 December 1995 of court proceedings aiming at formal recognition of the applicants' property rights (whether or not actually initiated by them) (had) violated their right of access to a court and to a hearing within a reasonable time as guaranteed by Article 6 of the Convention, the Federation thereby being in breach of its obligations under Article I of the Agreement;
> …
> 6. …, to order the Federation to take all necessary steps to render ineffective the annulment of the applicants' contracts imposed by the Decree of 22 December 1995 and the Law of 18 January 1996;
> 7. …, to order the Federation to take all necessary steps to lift the compulsory adjournment by the Decree of 3 February 1995 of court proceedings aiming at formal recognition of the applicants'

property right and to take all necessary steps to secure in this matter their right of access to court and to a hearing within a reasonable time; ..."

5. On 15 February 1999 the Federation submitted a request for a review of the First Panel's decision. In pursuance of Rule 64(1) the request was considered by the Second Panel which, on 15 April 1999, decided to recommend to the plenary Chamber that the request be rejected. The plenary Chamber considered the request and the Second Panel's recommendation on 15 May 1999. On 14 May 1999 the Federation had submitted additional observations which could not be taken into account (see paragraph 30 below).

III. REQUEST FOR REVIEW

6. In its request for review the Federation submits that the First Panel's decision on the admissibility and merits of the cases in issue raises serious questions of a general interest with respect to the interpretation and implementation of the Agreement.

7. The Federation argues, first, that the First Panel lacked *quorum* to adjudicate the cases in question, as it did not sit with all seven members. Reference is made to Article X(2) of the Agreement which stipulates that the Chamber shall "normally" sit in Panels of seven. It is the Federation's view that the word "normally" implies that the Panels are under an unconditional obligation to respect this *quorum* of seven. Whilst it is true that Article XII of the Agreement authorises the Chamber to promulgate the rules and regulations necessary for its functions, provided those provisions are consistent with the Agreement, this authorisation does not, in the Federation's opinion, cover the composition of the Panels and the number of members thereon. This number is in the Federation's view mandatory under Article X(2) of the Agreement and cannot be tampered with in the Chamber's Rules of Procedure.

8. Second, the Federation argues that the Chamber lacked competence *ratione temporis* to deal with the cases which should therefore have been declared inadmissible. The Federation submits that the cases involved acts which occurred before the entry into force of the Agreement on 14 December 1995.

9. Third, the Federation submits that the applications had been introduced between November 1997 and February 1998 and thus out of time, since the applicants' essential grievance concerned the Decree of 22 December 1995 which was adopted as law on 18 January 1996. This enactment, so the Federation argues, constituted the "final decision" within the meaning of Article VIII(2)(a) of the Agreement. As the applications had not been lodged by 18 July 1996, they should have been declared inadmissible.

10. Fourth, the Federation submits that the First Panel, in concluding that the passing of legislation providing for retroactive nullification of the applicants' purchase contracts violated their rights under Article 1 of Protocol No. 1 to the Convention, failed to distinguish between various contracts.

11. Fifth, the Federation argues that the First Panel failed to consider the Federation's argument that it was obliged under the International Convention on the Elimination of All Forms of Racial Discrimination to afford equal treatment to all occupants of socially-owned apartments.

12. Sixth, the Federation argues that the First Panel failed to consider that prior to the conclusion of some of the applicants' purchase contracts such contracts had been prohibited by legal provisions which had never been declared unconstitutional.

13. Seventh, the Federation challenges the First Panel's decision in so far as it ordered the Federation to take effective steps to lift the adjournment imposed by the Decree of 3 February 1995 of court proceedings aiming at formal recognition of the applicants' rights, and to take all necessary steps to secure, in this matter, their right of access to court and to a hearing within a reasonable time. The Federation submits that some of the applicants have already concluded new purchase contracts so that any continuation of the court proceedings would be irrelevant. The Federation further submits that the reason for the adjournment of court proceedings ceased to exist more than one year ago. As the proceedings are of a civil nature, their possible continuation is solely dependent on the applicants.

IV. OPINION OF THE SECOND PANEL

14. The Second Panel notes that the request for review has been lodged within the time limit prescribed by Rule 63(2).

15. The Federation has first submitted that under the Agreement the First Panel lacked *quorum* to adjudicate the cases in question, as it did not sit with all seven members. The Second Panel observes that under Article X(2) of the Agreement there should be two Panels of seven judges each. Cases should "normally" be decided by a Panel (with the possibility of review by the Plenary Chamber as foreseen in Article XI(3) of the Agreement). Exceptionally, cases may also be decided by the Plenary Chamber only. The Agreement does not specify the *quorum* necessary for the Panels (or the Plenary Chamber) to function in an effective manner. On the contrary, Article XII authorises the Chamber to promulgate the rules and regulations necessary for its functions, provided those provisions are consistent with the Agreement. To that end the Chamber has adopted, among other provisions, Rule 28(1) which stipulates a *quorum* of four members for a Panel. As the *ratio* of Article X(2) of the Agreement must be that the Panels should be working in parallel, a system of substitute judges cannot be applied. In these circumstances, an interpretation of the Agreement to the effect that Panel decisions could be adopted only if all members are present would seriously hamper the work of the Panels as soon as a single member is absent or if the position of a particular judge were to be vacant. It cannot have been the intention of the framers of the Agreement that a Panel would become inoperative if a member is absent for whatever reason.

16. For the above reasons, the Second Panel has no doubts that the Federation's objection to the number of members who adopted the challenged decision is inconsistent with the *ratio* of the Agreement. Accordingly, the request for review does not in this respect disclose any "serious question affecting the interpretation or application of the Agreement or a serious issue of general importance" required by Rule 64(2)(a). It follows that already one of the two requirements for accepting the request even in part has not been met.

17. The Federation has further argued that the Chamber lacked competence *ratione temporis* to examine the cases in question, given that certain relevant legislation had been in force only prior to 14 December 1995. The Second Panel is of the opinion that in all of these cases the present argument could have been made during the ordinary proceedings before the First Panel. Even if this argument had been made by the Federation in all of the cases examined in the challenged decision, the Second Panel recalls that the First Panel found no distinction between the cases before it and, *inter alia*, the cases of *Medan and Others* (see cases nos. CH/96/3, 8 and 9, decision on the merits of 7 November 1997, Decisions 1996-97, and paragraphs 81 and 84 of the challenged decision). The Second Panel further recalls that in declaring the *Medan* case admissible the (plenary) Chamber noted that the applicant's complaints related in part to events which took place before 14 December 1995. The Chamber considered, however, that in so far as the applicant complained 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 after 14 December 1995, his complaints were within the Chamber's competence *ratione temporis* for the purposes of Article VIII(2)(c) of the Agreement (case no. CH/96/3, decision on admissibility of 4 February 1997, Decisions and Reports 1996-97).

18. In view of this position of the plenary Chamber, as advanced in the cases of *Medan and Others* as well as other similar cases, the Second Panel does not, in this respect of the request for review, detect any "serious question affecting the interpretation or application of the Agreement or a serious issue of general importance" required by Rule 64(2)(a). It follows that already one of the two requirements for accepting the request even in part has not been met.

19. In respect of the Federation's argument that the cases had not been lodged by 18 July 1996 and were therefore out of time, the Second Panel recalls that this argument of the Federation was rejected in the Chamber's decisions in the cases *Ivković and others* as well as *Marić and others*, adopted by the First Panel and the Second Panel, respectively, and delivered on 10 March 1999 (cases nos. CH/98/129 et al. and CH/98/126 et al.; see paragraphs 40 and 32 of the respective decisions). In those decisions neither Panel was able to identify any "final decision" whereby the six months' period stipulated in Article VIII(2)(a) of the Agreement could be considered to have

commenced on 18 January 1996. Given the identical reasoning applied by the Panels for rejecting the Federation's argument in the aforementioned cases, the Second Panel does not, in this respect of the request for review, find any "serious question affecting the interpretation or application of the Agreement or a serious issue of general importance" as stipulated in Rule 64(2)(a). It follows that already one of the two requirements for accepting the request even in part has not been met.

20. The Federation has further requested a review of the First Panel's decision with reference to its conclusion that the passing of legislation providing for retroactive nullification of the applicants' purchase contracts violated their rights under Article 1 of Protocol No. 1 to the Convention. The Second Panel notes that in the conclusion in question the First Panel found Bosnia and Herzegovina to be in violation of the Agreement. As that respondent Party has not sought a review of the decision the Second Panel does not, in this respect of the request for review, find that "the whole circumstances justify reviewing the decision" as required by Rule 64(2)(b). It follows that already one of the two requirements for accepting the request even in part has not been met.

21. The Federation further argues that the First Panel failed to consider the argument that the impugned acts resulted from the Federation's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination to ensure equal treatment of all occupants of socially-owned apartments. The Second Panel notes that in its observations on the merits of the cases the Federation argued, *inter alia,* that the impugned legal acts were designed to place those not entitled to buy JNA apartments on an equal footing with the applicants (see paragraph 70 of the challenged decision). The Second Panel again recalls that the First Panel found no material distinction between the cases examined before it and those of, *inter alia, Medan and Others*. In its decision on the merits of those cases the (plenary) Chamber held as follows:

> "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.
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> 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. ..."

22. In view of the above-cited decision of the plenary Chamber the Second Panel does not, in this respect of the request for review, find any "serious question affecting the interpretation or application of the Agreement or a serious issue of general importance" as stipulated in Rule 64(2)(a). It follows that already one of the two requirements for accepting the request even in part has not been met.

23. The Federation also argues that the First Panel failed to consider that prior to the conclusion of some of the applicants' purchase contracts such contracts had been prohibited by legal provisions which had never been declared unconstitutional. The Second Panel again notes the decision on the merits of *Medan and Others* in which the plenary Chamber held as follows:

> "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)."

24. The Second Panel notes that certain applicants concluded their purchase contract after 15 February 1992. The Second Panel recalls, however, that the present applicants' respective purchases of a JNA apartment were, as in the cases of *Medan and Others* and other similar cases before the Chamber, made possible by the applicants' contributions to the JNA Housing Fund over several years preceding the Decree of 15 February 1992. Although some of the purchase contracts were signed after 15 February 1992, all applicants had in fact already - either in whole or in part – fulfilled their contractual obligations prior to that date. Accordingly, whether or not they signed their contracts before 15 February 1992, all applicants enjoyed, by that date, rights which may be considered "possessions" for the purposes of Article 1 of Protocol No. 1 to the Convention.

25. In view of the above-cited constant case law of the plenary Chamber, as applied by the First Panel in the present cases, the Second Panel does not, in this respect of the request for review, find any "serious question affecting the interpretation or application of the Agreement or a serious issue of general importance" as stipulated in Rule 64(2)(a). It follows that already one of the two requirements for accepting the request even in part has not been met.

26. The Federation finally challenges the First Panel's decision with reference to the civil proceedings whose adjournment the Federation was ordered to lift. The Federation argues that the reason for the adjournment of court proceedings ceased to exist more than a year ago and their possible continuation is solely dependent on the applicants. Moreover, as some of the applicants have already concluded new purchase contracts, any continuation of the court proceedings concerning those applicants would be irrelevant. The Federation has not, however, referred to any official act which formally lifted the adjournment of the proceedings or revoked the Decree of 3 February 1995 ordering the adjournment. Neither has the Federation indicated which of the applicants have concluded a new purchase contract under new legislation.

27. The Second Panel further notes that the Federation's observations on the admissibility and merits of the present cases were submitted between April and June 1998. The Second Panel is therefore of the opinion that in all of these cases the present grounds of the request for review could at any rate have been invoked during the ordinary proceedings before the First Panel. In these circumstances the Second Panel does not, in this respect of the request, find that "the whole circumstances justify reviewing the decision" as required by Rule 64(2)(b). It follows that already one of the two requirements for accepting the request even in part has not been met.

28. As the request for review does not in any respect meet the two conditions set out in Rule 64(2), the Second Panel, unanimously, recommends that the request be rejected.

V. OPINION OF THE PLENARY CHAMBER

29. The Chamber first recalls that under Article X(2) of the Agreement it shall normally sit in panels. When an application is decided by a Panel, the plenary Chamber may decide, upon motion of a party to the case or the Human Rights Ombudsperson to review the decision. Article XI(3) of the Agreement stipulates that subject to the aforementioned review the decisions of the Chamber shall be final and binding. Under Rule 63(2) of the Rules of Procedure any request for review shall be made within one month of the date on which the Panel's decision is communicated to the parties under Rule 52 or delivered under Rule 60. The request shall specify the grounds invoked in support of a review. Under Rule 64(1) the request shall be referred to the Panel which did not take the challenged decision, and that Panel shall make a recommendation to the plenary Chamber as to whether the decision should be reviewed. The plenary Chamber shall consider the request for review as well as the recommendation of the aforementioned Panel, and shall decide whether to accept the request. It shall not accept the request unless it considers (a) that the case raises a serious question affecting the interpretation or application of the Agreement or a serious issue of general importance and (b) that the whole circumstances justify reviewing the decision (see *Rizvanović and Herak v. The Federation of Bosnia and Herzegovina*, cases nos. CH/97/59 and CH/97/69, decisions on requests for review of 13 November 1998, Decisions and Reports 1998, pp. 261 and 291, respectively).

30. In the present cases the plenary Chamber agrees with the Second Panel, for the reasons stated above, that the request for review does not meet the two conditions required for the Chamber to accept such a request pursuant to Rule 64(2). In so far as the Federation made additional observations on 14 May 1999, these cannot be taken into account, as they have been lodged after the expiry of the one-month period prescribed by Rule 63(2).

VI. CONCLUSION

31. For these reasons, the Chamber, by 12 votes to 1,

REJECTS THE REQUEST FOR REVIEW.

(signed)	(signed)
Leif BERG	Michèle PICARD
Registrar of the Chamber	President of the Chamber