DECISION ON ADMISSIBILITY AND MERITS
(delivered on 6 June 2003)

Case no. CH/98/1493

Milan PILIPOVIĆ

against

BOSNIA AND HERZEGOVINA
and
THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 8 May 2003 with the following members present:

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

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

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

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

I. INTRODUCTION

1. The case concerns an applicant complaining of the fact that Article 3a paragraph 1 of the Law on Cessation of the Application of the Law on Abandoned Apartments prevents him from repossessing his pre-war apartment located in Bihać in the Federation of BiH. The applicant further complains that the Federation of BiH does not recognise him as the owner over the apartment in question on the basis of the steps taken by the applicant in 1992, aimed at purchasing the apartment from the then Yugoslav National Army ("JNA"). Those steps included paying the purchase price, but did not include concluding a written purchase contract.

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

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced on 20 November 1998.

4. On 20 January 1999, the Chamber transmitted the case to Bosnia and Herzegovina and the Federation of BiH for their observations on the admissibility and merits under Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention.

5. On 22 March 1999, the Federation of BiH submitted its observations on the admissibility and merits.

6. On 24 May 1999, the applicant submitted his response.

7. On 25 June 1999, 31 December 2001 and 9 December 2002, the Federation of BiH submitted additional observations.

8. On 5 July 1999, Bosnia and Herzegovina submitted its observations contesting the applicant's compensation claim as being unsubstantiated.

9. On 27 February 2002, 3 December 2002 and 20 December 2002, the applicant submitted additional comments.

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

11. On 10 January 2003, the Chamber retransmitted the case to the Federation of BiH for its observations on the admissibility and merits also under Article 8 of the Convention and Article II(2)(b) of the Agreement.

12. On 27 January 2003, the Federation of BiH submitted its observations on the admissibility and merits.

13. On 12 February 2003, the applicant submitted his response.

14. The Chamber deliberated on the admissibility and merits of the application on 14 January 1999, 8 January 2003, 4 March 2003, 1 April 2003 and 8 May 2003 and adopted the present decision on the latter date.

III. STATEMENT OF FACTS

15. The applicant is a citizen of Croatia by birth. He acquired citizenship of Bosnia and Herzegovina in 1999.

16. The applicant is the pre-war occupancy right holder over an apartment located at Harmani H-2 in Bihać. The applicant moved into the apartment on 15 September 1987. The allocation right holder over the apartment was the then JNA (the applicant served in the then JNA as a civilian employed by the armed forces).

17. On 10 February 1992, the applicant requested the then JNA to sell the apartment to him in accordance with the Law on Securing Housing for the Yugoslav National Army (Official Gazette of the Socialist Federal Republic of Yugoslavia – "OG SFRY" – no. 84/90). On 12 February 1992, the applicant paid the purchase price totalling, after deduction of contributions made to the JNA housing fund, 400,000 Yugoslav Dinars (*jugoslovenskih dinara*, "YUD"). The applicant did not conclude a purchase contract with the then JNA due to circumstances that were beyond the control of the contracting parties[1].

18. The applicant was a member of the then JNA until 19 May 1992. On 20 May 1992 he joined the Republika Srpska armed forces and has served in these forces since then, still as a civilian employed by the armed forces. According to the applicant, he and his family occupied the apartment at issue until 18 May 1992. The applicant alleges that he left Bihać for two reasons. First, he was afraid for his own safety and the safety of his family. Wives and children of service members of the then JNA were allegedly insulted on a regular basis in order to make them leave Bihać. Secondly, his entire unit was ordered by the higher chain of command within the military structure to move from Bihać to Banja Luka.

19. On 15 December 1992, the Army of the Republic of Bosnia and Herzegovina ("RBiH Army") declared the apartment temporarily abandoned and allocated the apartment to Mr. Z.M., a member of the RBiH Army. On 23 June 1996, the RBiH Army declared the apartment permanently abandoned because the applicant did not return to it before 6 January 1996 (*i.e.* 15 days after the war in Bosnia and Herzegovina officially stopped) in accordance with Article 10 of the Law on Abandoned Apartments (Official Gazette of the Republic of Bosnia and Herzegovina – "OG RBiH" – nos. 6/92, 8/92, 16/92, 13/94, 36/94, 9/95 and 33/95).

20. On 1 September 1998, the applicant requested the Service of Reconstruction, Housing and Public Utilities of the Bihać Municipality ("Service") to reinstate him into his apartment.

21. On 28 November 2000, the Service issued a procedural decision refusing the applicant's request. The request was refused on the basis of Article 3a paragraph 1 of the Law on Cessation of the Application of the Law on Abandoned Apartments (Official Gazette of the Federation of BiH – "OG FBiH" – nos. 11/98, 38/98, 12/99, 18/99, 27/99, 43/99, 31/01, 56/01 and 15/02) ("Law on Cessation"). This provision denies the right to repossess his or her pre-war apartment to a person who was in active service in the JNA on 30 April 1991 and was not a citizen of Bosnia and Herzegovina on the same date. On 15 February 2001, the Ministry for Building, Physical Planning and Environmental Protection of the Una-Sana Canton ("Ministry") confirmed the procedural decision of 28 November 2000.

22. On 26 March 2001, the applicant initiated an administrative dispute before the Cantonal Court in Bihać ("Cantonal Court") and requested it to declare the procedural decision of 15 February 2001 null and void. On 14 January 2002, the Cantonal Court issued a judgment refusing the applicant's request and thus confirming the procedural decision of 15 February 2001.

23. On 7 February 2002, the applicant appealed against the judgment of 14 January 2002 to the Supreme Court of the Federation of Bosnia and Herzegovina ("Supreme Court"). The case is currently pending before the Supreme Court.

[1] In several other cases before the Chamber, the Federation of BiH has submitted that not a single purchase contract was concluded with the former JNA in the Bihać region due to the fact that, under the former JNA internal organisation, the Bihać region was attached to a unit controlled out of Zagreb in Croatia. As the Law on Securing Housing for JNA was never applied in Croatia, the Federation of BiH submits, apartments in the Bihać region could not possibly have been purchased. At some point the Bihać region was transferred to a unit controlled out of Sarajevo. However, no contracts on purchase were ever concluded in the Bihać region.

24. According to the applicant, he and his family rent an apartment in Laktaši, the Republika Srpska, while waiting for the request for reinstatement to be decided. More than four and a half years have elapsed since the applicant requested the Federation of BiH to reinstate him.

IV. RELEVANT LEGAL FRAMEWORK

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

25. Article II(2) reads:

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

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

26. Article I paragraph 1 reads:

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

C. Law on Abandoned Apartments (OG RBiH nos. 6/92, 8/92, 16/92, 13/94, 36/94, 9/95 and 33/95)

27. On 15 June 1992 the Presidency of the then Republic of Bosnia and Herzegovina issued a Decree with Force of Law on Abandoned Apartments. The Parliament of the Republic of Bosnia and Herzegovina approved this Decree on 17 June 1994 and renamed the Decree the "Law on Abandoned Apartments". The Law governed the declaration of abandonment of certain categories of socially owned apartments and their re-allocation.

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

> (a) where the occupancy right holder and members of his or her household had been forced to leave the apartment as a result of aggressive actions intended to execute a policy of ethnic cleansing of a particular population from certain areas or in the course of a pursuit of other goals of the aggressors;
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> (b) where the apartment was destroyed, burnt or in direct jeopardy as a result of war actions;
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> (c) where the occupancy right holder or a member of his or her household had been drafted or voluntarily enlisted himself or herself into the armed forces of the then Republic of Bosnia and Herzegovina.

29. The Decision on the Cessation of State of War entered into force on 22 December 1995, the date when it was placed on the bulletin board of the Presidency of the Republic of Bosnia and Herzegovina. The issue of the Official Gazette comprising this Decision (OG RBiH no. 50/95) was published on 28 December 1995.

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

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

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

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

> "The occupancy right holder of an apartment declared abandoned or a member of his/her household defined in Article 6 of the [Law on Housing Relations] (hereinafter the "occupancy right holder") shall have the right to return in accordance with Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina.
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> Paragraph 1 of this Article shall be applied only to those occupancy right holders who have the right to return to their homes of origin under Article I of Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina. Persons who have left their apartments between 30 April 1991 and 4 April 1998 shall be considered to be refugees and displaced persons under Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina.
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> ..."

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

> "As an exception to Article 3, paragraphs 1 and 2 of this Law, regarding apartments declared abandoned on the territory of the Federation of BiH, at the disposal of the Ministry of Defence, the occupancy right holder shall not be considered a refugee if on 30 April 1991 she or he was in active service in the SSNO (Federal Secretariat for National Defence) – JNA (*i.e.* not retired) and was not a citizen of Bosnia and Herzegovina according to the citizenship records, unless she or he had residence approved to him or her in the capacity of a refugee, or other equivalent protective status, in a country outside the former SFRY before 14 December 1995.
>
> A holder of an occupancy right from paragraph 1 of this Article will not be considered a refugee if she or he remained in the active military service of any armed forces outside the territory of Bosnia and Herzegovina after 14 December 1995, or if she or he has acquired another occupancy right outside the territory of Bosnia and Herzegovina."

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

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

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

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

"Exceptionally, in respect of apartments at the disposal of the Ministry of Defence, where an occupancy right to an apartment is cancelled in accordance with Article 5[2] or Article 12[3], or where the claim is finally rejected in accordance with this Law, the competent body of the Ministry of Defence may issue a new contract on use to a temporary user of an apartment in cases where she or he is required to vacate the apartment under this Law to enable the return of a pre-war occupancy right holder or purchaser of the apartment, provided that her or his housing needs are not otherwise met."

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

38. Point 23 reads:

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

39. Point 24, as amended, reads:

"(i) The temporary user of an apartment at the disposal of the Ministry of Defence may be entitled to a new or revalidated contract on use if the requirements of Article 2 paragraph 4 of the Law and Articles 18c and 18d of the Law are met. In such cases, the body which issued the contract shall be authorised to revalidate a cancelled contract on use in accordance with points 10 and 11 of this Instruction, following any procedures which are necessary to ensure that the requirements of the Law and this Instruction are met, including among others that the housing needs of the temporary user are not otherwise met under point 24(ii) of this Instruction and that the temporary user has no other accommodation available to him or her under point 9 of this Instruction.

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

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

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

40. Article 83a, as amended, reads:

"The occupancy right holder may not be given a notice on the termination of the contract on use of apartment under this Law if the circumstances, which are the basis for the termination of the contract, occurred within the period while the occupancy right holder was absent from

[2] If the pre-war occupancy right holder failed to file a request for repossession of his or her pre-war apartment before 4 July 1999.
[3] If the pre-war occupancy right holder over an apartment failed to file a request for eviction of the current occupant of the apartment within 30 days after the deadline for the vacation of the apartment had expired.

the apartment in the capacity of a refugee or a displaced person under Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina.

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

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

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

G. Law on Sale of Apartments with Occupancy (OG FBiH nos. 27/97, 11/98, 22/99, 27/99, 7/00, 25/01, 32/01, 61/01 and 15/02)

41. Article 8a, as amended, reads:

"An occupancy right holder over an apartment that was declared abandoned in accordance with the Law on Abandoned Apartments and other regulations that define the issue of abandoned apartments, or an occupancy right holder that left the apartment in the period between 30 April 1991 and 4 April 1998[4], in case when the apartment has not been officially declared abandoned, is entitled to purchase that apartment in accordance with conditions set forth in this Law immediately after repossessing the apartment, or at the latest one year after repossession of the apartment, or within one year after this provision has been published in the Official Gazette of the Federation of BiH, depending on which date is later".

42. Article 15 paragraph 1 reads:

"The Ministry of Defence shall sell, in accordance with this Law, the apartments formerly at the disposal of the JNA and SSNO."

43. Article 39 reads, in relevant part:

"The occupancy right holders who previously concluded a contract on purchase of an apartment in accordance with the Law on Securing Housing for JNA ... shall have the amount they paid, expressed in German Marks ("DEM") according to the applicable exchange rate on the day of purchase, recognised when the new contract on purchase of the apartment is concluded in accordance with this Law."

44. Article 39a reads:

"The Ministry of Defence shall issue an order that the occupancy right holder over an apartment at the disposal of that Ministry be registered as the owner with the competent court, when the occupancy right holder is legally using the apartment and when he concluded a legally valid contract on purchase of the apartment with the [JNA] in accordance with the Laws indicated in Article 39 of this Law."

45. According to Article 39c, Article 39a shall also apply to an occupancy right holder who has realised the right to repossess her or his pre-war apartment pursuant to the Law on Cessation.

46. Article 39d states that if an individual has unsuccessfully tried to realise his or her rights with the Ministry of Defence pursuant to this Law, he or she may initiate proceedings before the competent court.

[4] The Law on Cessation entered into force on 4 April 1998.

H. Instruction on Application of Articles 39a, 39b and 39c of the Law on Sale of Apartments with Occupancy Right (OG FBiH no. 6/00)

47. Article 6 reads, in relevant part:

> "In cases when an occupancy right holder has a receipt confirming that he paid a certain amount on the seller's account, but he does not have a contract on purchase which would show the total price of the apartment, the Ministry [of Defence] shall, based on the request by the occupancy right holder, conclude a new contract on purchase of the apartment and shall subtract from the newly established purchase price the previous sum paid.
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> …"

I. Law on Administrative Procedure (OG FBiH nos. 2/98 and 48/99)

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

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

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

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

51. Once the administrative dispute has been initiated, there is no time limit in which the court must issue its decision in the matter. There is also no legal remedy to speed up the proceedings before the court in question.

K. Law on Civil Procedure (OG FBiH nos. 42/98 and 3/99)

52. Article 172 reads:

> "The plaintiff may initiate a lawsuit and request that the court establish the existence or non-existence of some right or legal relationship, and authenticity or non-authenticity of some document, respectively.
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> Such lawsuit may be initiated when a special regulation provides so, when the plaintiff has a legal interest that the court establish the existence or non-existence of some right or legal relationship and authenticity or non-authenticity of some document before the maturity date of the claim for enforcement from the same relationship or when the plaintiff has some other legal interest to initiate such lawsuit.
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> If a certain legal relationship has become disputable in the course of a pending lawsuit and if the decision in the lawsuit depends on whether that legal relationship exists or not, the plaintiff may file, in addition to the existing claim, a complaint requesting that the court establish the existence or non-existence of such legal relationship, if the court before which the lawsuit is pending is competent for such complaint.
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> Filing a complaint under the provision in paragraph 3 of this Article shall not be deemed modification of the lawsuit."

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

53. On 4 May 2001, the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") issued its judgment in case no. U-14/00. The appellant in that case, Ž.M. had lodged an appeal before the Constitutional Court requesting the Court to annul the lower-instance decisions in his case. The contested decisions refused the appellant's claim for repossession because he had not concluded a contract on use of the apartment and therefore did not acquire the occupancy right over the apartment, due to circumstances that were beyond his control[5].

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

> *"The Constitutional Court considers that the interference initially served a legitimate aim in accordance with the meaning of Article 8 paragraph 2 of the Convention. The relevant aim was the protection of the rights of others, i.e. the rights of persons who were forced to leave their homes because of the war. Indeed, the war in Bosnia and Herzegovina caused mass movements of the population and created a great number of housing problems. Many apartments and houses were abandoned or destroyed, or the inhabitants were forcefully evicted. Empty homes were immediately taken over by others. The authorities of, at the time, the Republic of Bosnia and Herzegovina enacted a law which temporarily solved the housing problems caused by a great number of refugees.*
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> *However in the present case, the appellant has still not been able to realise his rights. Therefore, the "interference", which initially could have been justified and in compliance with the principle of "necessity", can no longer, five years after the end of the war, represent a necessary "interference in a democratic society" with the appellant's right to return to his home."*[6]
>
> *"The Court accepts that there may have been strong reasons in the war period justifying the use of the apartment for giving shelter to refugees. However, the conditions, which then prevailed have fundamentally changed and can no longer justify an interference with the appellant's rights. It is also true that the apartment is at present occupied by other persons and that their interests must be taken into account when determining whether the interference with the appellant's rights is proportionate. However, when weighing the various interests involved, the Court must pay particular attention to the fact that the return of refugees and displaced persons to their previous homes is a primary objective of the GFAP*[7] *and the Constitution and that the restoration of previously existing rights to houses and apartments should in this perspective be seen as a predominating objective."*[8]

The Constitutional Court also established that a situation where any temporary occupant continued to use an abandoned apartment after 4 April 1998[9] was unlawful, given the fact that the Law on Cessation declared null and void "all administrative, judicial and any other decisions enacted on the

[5] According to the housing legislation, an individual shall acquire the occupancy right over an apartment once a contract on use of the apartment has been concluded. That contract on use shall be based on a decision of the allocation right holder. In the case at issue, the appellant had obtained a decision of the allocation right holder granting an apartment to him, but did not conclude a contract on use of the apartment for reasons beyond his control. Nevertheless, the appellant lived in the apartment from 1987 to 1994, when he left Bosnia and Herzegovina.
[6] The above-mentioned decision of the Constitutional Court, paragraphs 24-25.
[7] General Framework Agreement for Peace in Bosnia and Herzegovina.
[8] The above-mentioned decision of the Constitutional Court, paragraph 34.
[9] The Law on Cessation entered into force on 4 April 1998.

basis of [the Law on Abandoned Apartments] terminating occupancy right". The Constitutional Court also pointed out that an important reason behind the General Framework Agreement for Peace in Bosnia and Herzegovina ("Dayton Peace Agreement") was to enable return of refugees and displaced persons to their pre-war places of residence. Accordingly, the factual situation on 30 April 1991 had to be a starting point when deciding legal disputes pertaining to the repossession of pre-war apartments and houses.

V. COMPLAINTS

55. The applicant complains of not being reinstated into his apartment, of not being recognised as the owner over that apartment and of being discriminated against in that regard. The applicant also complains of the length of the proceedings before the competent authorities. Therefore, the Chamber transmitted the case to Bosnia and Herzegovina under Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention and to the Federation of BiH under Articles 6, 8 and 13 of the Convention, Article 1 of Protocol No. 1 to the Convention and Article II(2)(b) of the Agreement.

VI. SUBMISSIONS OF THE PARTIES

A. Bosnia and Herzegovina

56. Bosnia and Herzegovina submitted observations exclusively on the applicant's compensation claim. The Chamber has not received any observations on the admissibility and merits from Bosnia and Herzegovina.

B. The Federation of Bosnia and Herzegovina

57. In its observations of 22 March 1999, the Federation of BiH submits that the application is inadmissible because: (a) the applicant did not exhaust available domestic remedies (at that time, the case was pending before the Service in Bihać); (b) the applicant did not file his application with the Chamber within six months from the date of "final decision" in his case (in the opinion of the Federation of BiH, the date of "final decision" was 26 January 1996 when the Parliament of RBiH adopted as law the Decree annulling all contracts on purchase of the former JNA apartments[10]).

58. In regard to the merits, the Federation of BiH states that it did not violate Article 1 of Protocol No. 1 to the Convention. Article 1 of Protocol No. 1 protects the peaceful enjoyment of one's possessions. The Federation of BiH understands that provision as preventing it from evicting the applicant from an apartment that he occupies. As the applicant has not been evicted from his apartment, but he voluntarily left it in 1992, the Federation of BiH did not interfere with the applicant's right to the peaceful enjoyment of his possessions under Article 1 of Protocol No. 1. Even if the Chamber found that the Federation of BiH interfered with the applicant's right to the peaceful enjoyment of his possessions by not reinstating him into his apartment, such interference would be justified under Article 1 of Protocol No. 1 to the Convention. The Federation of BiH continues to defend the annulment of contracts on purchase of the former JNA apartments although the applicant has not concluded such a contract. The Federation of BiH states that the former JNA discriminated against citizens of Bosnia and Herzegovina who did not serve in the JNA by selling JNA apartments to JNA service members on favourable terms. Finally, the Federation of BiH submits that it did not violate Articles 6 and 13 of the Convention because the applicant did not exhaust effective domestic remedies.

[10] On 22 December 1995, the Presidency of the Republic of Bosnia and Herzegovina issued a Decree with Force of Law on Amendments of the Law on Transfer of Assets of the former SFRY to the Republic of Bosnia and Herzegovina (OG RBiH no. 50/95). The Parliament of the Republic of Bosnia and Herzegovina approved this Decree on 26 January 1996 and renamed the Decree the "Law on Amendments of the Law on Transfer of Assets of the former SFRY to the Republic of Bosnia and Herzegovina" (OG RBiH no. 2/96).

59. In its observations of 31 December 2001, the Federation of BiH submits that the applicant was not the owner of his apartment but only the occupancy right holder because he has not concluded a contract on purchase of the apartment. The Federation of BiH also suggests to the Chamber to hold a public hearing in this case in order for the Federation of BiH to prove that the present case differs substantially from *Miholić and others* (case nos. CH/97/60 *et al, Miholić and others,* decision on admissibility and merits of 9 November 2001, Decisions July – December 2001).

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

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

62. On 20 December 2002, the Federation of BiH submitted four procedural decisions of the Supreme Court in case nos. Už-61/01, Už-46/01, Už-455/01 and Už-449/01 of 4 April 2002, 25 April 2002, 23 May 2002 and 24 October 2002, respectively. In those four cases, the Supreme Court quashed judgments of the Cantonal Courts in Bihać and Sarajevo because, in the opinion of the Supreme Court, the Cantonal Courts wrongly considered the cases against domestic laws exclusively. The Supreme Court instructed the Cantonal Courts to apply directly the Convention (particularly Article 8 and Article 1 of Protocol No. 1). However, the Supreme Court did not give any instructions or indications to the Cantonal Courts as to how the application of the Convention should affect the cases.

63. In its observations of 27 January 2003, the Federation of BiH submits that the applicant did not exhaust available domestic remedies (at that time, the case was pending before the Supreme Court). As to the alleged violation of Article 8 of the Convention, the Federation of BiH decides to refrain from commenting until the Supreme Court has decided upon the applicant's appeal. The Federation of BiH further submits that the applicant's complaint of discrimination is unsubstantiated.

C. The applicant

64. In his observations of 11 May 1999, the applicant submits that the only available domestic remedy, at that time, is the appeal against the "silence of the administration" and he does not consider that remedy to be effective. The applicant explains that Bosnia and Herzegovina and the Federation of BiH have done everything in order to deprive service members of the former JNA of their apartments. The applicant also states that he is the owner over his apartment (and not only the occupancy right holder) although he did not enter into a contract on purchase, because the contract was not concluded due to circumstances that were beyond the control of the contracting parties.

65. In his observations of 27 February 2002, the applicant argues that Article 3a of the Law on Cessation is not applicable in his case because he served in the then JNA as a civilian employed by the armed forces. The applicant then repeats that he is the owner over his apartment (and not the occupancy right holder). The applicant also submits that on 25 December 2000 he vacated an apartment in Laktaši, the Republika Srpska, that had been temporarily allocated to him and that he had to rent another apartment as of then. Finally, the applicant complains of his low salary totalling 238 Convertible Marks (*konvertibilnih maraka,* "KM") at that time.

66. In his observations of 20 December 2002, the applicant repeats that Article 3a of the Law on Cessation is not applicable in his case because he served in the then JNA as a civilian employed by the armed forces. The applicant also contests the submission of the Federation of BiH that *Miholić*

and others (see the above-mentioned *Miholić and others* decision) is applicable exclusively when an applicant has concluded a contract on purchase of his or her apartment with the then JNA before 6 April 1992, when such contract has been verified by the competent court and when purchase price of the apartment has been fully paid. The applicant states that such a situation is "non-existent in practice". In the applicant's opinion, *Miholić and others* should be applied in his case because the occupancy right, as a *sui generis* right, constitutes a "possession" in the sense of Article 1 of Protocol No. 1 to the Convention. Finally, the applicant refers to the above-mentioned decision of the Constitutional Court[11].

67. In his observations of 12 February 2003, the applicant submits that he has exhausted all effective domestic remedies. He alleges to have no possibility to speed up the pending proceedings in his case before the Supreme Court. The applicant further submits that, in cases of this type, it is the established practice of the Supreme Court to return the cases to the Cantonal Courts. The applicant is of the opinion that such practice is designed in order to postpone final decisions in the cases where Article 3a of the Law on Cessation is applicable.

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

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

69. The OSCE first asserts that the occupancy right, as defined in domestic legislation, does amount to a "possession" under Article 1 of Protocol No. 1 to the Convention[12].

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

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

> *"The International Community has received numerous reports of non-compliance on the part of the Ministry of Defence, particularly regarding allocation of apartments to individuals whose housing needs are otherwise met and therefore do not meet the legal criteria for such allocation. The Ministry of Defence often neglected to provide information regarding the current status of apartments to the International Community so that such reports could be assessed accurately. Information on apartments held by Croat elements was rarely made available. In particular, many high-ranking officials of the Army of the Federation of BiH who do not meet the legal criteria have been allocated apartments. In numerous meetings staff of the Ministry of Defence informed members of the International Community that they would not apply provisions of the Law on Cessation and Instruction to high-ranking officials, despite warnings that such action clearly violated the Law on Cessation and Instruction."*[13]

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

[11] See paragraphs 53-54 above.
[12] As the Chamber, in *Miholić and others,* has found a violation of Article 1 of Protocol No. 1 to the Convention only, the OSCE commented on the alleged violation of that human right.
[13] Submission of the OSCE Acting as *Amicus Curiae* of 3 January 2003, p. 8.

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

> *"Given that there is no justification demonstrated by the FBiH Government for singling out this group of occupancy right holders and no legitimate aim is being accomplished, there appears no reasonable proportionality between the means used and the aims sought. Thus Article 3a of the Law on Cessation should be found discriminatory and contrary to Article 1 of Protocol 1 ECHR."*[14]

VII. OPINION OF THE CHAMBER

A. Admissibility

73. Before considering the merits of the application the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. Under Article VIII(2)(a), the Chamber shall consider whether effective remedies exist and, if so, whether they have been exhausted. Further, pursuant to Article VIII(2)(c), the Chamber shall dismiss any application, which it considers incompatible with the Agreement (*ratione temporis, ratione materiae* or *ratione personae*).

1. Bosnia and Herzegovina

74. The present case was transmitted to Bosnia and Herzegovina.

75. Bosnia and Herzegovina did not submit any observations on the admissibility of the present case.

76. In the previous cases decided by the Chamber in the matter of JNA apartments, the Chamber held Bosnia and Herzegovina responsible for passing the legislation that retroactively annulled the contracts on purchase of JNA apartments (see *e.g.* case nos. CH/96/3, CH/96/8 and CH/96/9, *Medan, Bastijanović and Marković,* decision on merits of 3 November 1997, Decisions on Admissibility and Merits March 1996 – December 1997; case no. CH/96/22, *Bulatović,* decision on merits of 3 November 1997, Decisions on Admissibility and Merits March 1996 – December 1997; case nos. CH/96/2 *et al., Podvorac and others,* decision on admissibility and merits of 14 May 1998, Decisions and Reports 1998; case nos. CH/97/82 *et al., Ostojić and others,* decision on admissibility and merits of 13 January 1999, Decisions January – July 1999; the above-mentioned *Miholić and others* decision).

77. In the present case, the Chamber notes that the applicant did not submit a written purchase contract. Moreover, the applicant admits that he never concluded such contract with the former JNA. Furthermore, it has not been established in any proceedings in the domestic courts that an informal contract of a legally valid nature existed. It is not shown therefore that the retroactive annulment of the purchase contracts affected the applicant's situation. The Chamber further notes that the conduct of the Service in Bihać, the Ministry in Bihać, the Cantonal Court in Bihać and the Supreme Court, the bodies responsible for the proceedings complained of by the applicant, engages the

[14] *Ibid,* p. 5.

responsibility of the Federation of BiH, not of Bosnia and Herzegovina, for the purposes of Article II(2) of the Agreement. Accordingly, as directed against Bosnia and Herzegovina, the application is incompatible *ratione personae* with the provisions of the Agreement, within the meaning of Article VIII(2)(c). The Chamber therefore decides to declare the application inadmissible as against Bosnia and Herzegovina.

2. The Federation of BiH

a. Complaint that the Federation of BiH failed to reinstate the applicant into his pre-war apartment

78. The applicant complains of the fact that the Federation of BiH failed to reinstate him into the apartment in question.

79. The Federation of BiH objects to the admissibility of the application on the ground that the applicant has failed to exhaust domestic remedies. The Chamber has found that the existence of domestic remedies must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see *e.g*, case no. CH/96/17, *Blentić,* decision on admissibility and merits of 5 November 1997, paragraph 19, Decisions on Admissibility and Merits March 1996 – December 1997).

80. The Chamber notes that, according to its long established case law, it is incumbent on the respondent Party, claiming non-exhaustion, to satisfy the Chamber that there was an effective remedy available (see *e.g,* case nos. CH/96/3, *Medan,* decision on admissibility of 4 February 1997, section IV, Decisions on Admissibility and Merits March 1996 – December 1997; CH/96/8, *Bastijanović,* decision on admissibility of 4 February 1997, section V, Decisions on Admissibility and Merits March 1996 – December 1997; CH/96/9, *Marković,* decision on admissibility of 4 February 1997, section V, Decisions on Admissibility and Merits March 1996 – December 1997). In the present case, an effective remedy would be one that would have a reasonable prospect of enabling the applicant to repossess his apartment. According to Article 3a of the Law on Cessation, the applicant is not entitled to do so.

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

82. The Chamber observes that the Supreme Court recently annulled several judgments of Cantonal Courts and informed the Cantonal Courts of their constitutional duty to apply directly the Convention. The Chamber recognises the significance of such decisions. However, the Supreme Court left open the main question in the present case, which is whether individuals who fall under Article 3a of the Law on Cessation have or have not the right to repossess their pre-war apartments in accordance with the Convention. The Chamber is not aware of any individual who falls under Article 3a of the Law on Cessation and who repossessed a pre-war apartment on the ground that his or her rights under the Convention should prevail over the Law on Cessation. In these circumstances, the Chamber is satisfied that the applicant cannot be required to exhaust any further domestic remedies for the purpose of Article VIII(2)(a) of the Agreement.

b. Complaint that the Federation of BiH failed to recognise the applicant as the owner over his pre-war apartment

83. The applicant additionally complains because the Federation of BiH has not recognised him as the owner on the basis of the steps he took in 1992, aimed at purchasing the apartment from the then JNA. Those steps included paying the purchase price, but did not include concluding a written purchase contract.

84. The Chamber notes that the applicant failed to raise this question before the domestic organs. The applicant could have initiated a lawsuit and requested the court to establish his ownership under Article 172 of the Law on Civil Procedure[15]. Alternatively, the applicant could have raised this question in the administrative dispute that has been pending since 26 March 2001 (Article 172 paragraph 3 of the Law on Civil Procedure). In his complaints to the Cantonal Court in Bihać and the Supreme Court, the applicant only requested to be reinstated in the capacity of the pre-war occupancy right holder. Accordingly, insofar as the applicant argues that he has validly purchased the apartment, the applicant has not exhausted domestic remedies as required by Article VIII(2)(a) of the Agreement.

c. Conclusion as to admissibility

85. The Chamber finds that none of the other grounds for declaring the application inadmissible have been established. Accordingly, the application is declared admissible insofar as the applicant complains of his inability to repossess his pre-war apartment and inadmissible, due to non-exhaustion of domestic remedies, insofar as the applicant complains of his inability to be registered as the owner over the apartment.

B. Merits

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

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

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

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

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

a. Article 8 of the Convention

89. The applicant alleges a violation of the right to respect for his home, as protected by Article 8 of the Convention. Article 8 reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.

[15] See paragraph 52 above.

> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

90. The Chamber must first determine whether the applicant's pre-war apartment constitutes his "home" for the purposes of Article 8 of the Convention. If so, the Chamber must determine whether the Federation of BiH has interfered with the applicant's right to respect for his home under Article 8 of the Convention. Finally, the Chamber must determine whether the interference of the Federation of BiH is justified. The Chamber recalls that the conditions upon which a respondent Party may interfere with the right to respect for one's home are set out in Article 8 paragraph 2. The interference is only justified if it is: (a) "in accordance with the law"; (b) in the interest of one or more of the legitimate aims listed; and (c) "necessary in a democratic society". Therefore, a proper balance must be struck between the legitimate aim pursued and the means employed, taking into account the respondent Party's margin of appreciation.

(i) Whether the apartment at issue is the applicant's "home" for the purposes of Article 8 of the Convention

91. The applicant used to live in the claimed apartment and use it as his home until the outbreak of the armed hostilities in his community. On 1 September 1998, the applicant requested the competent body to reinstate him into his pre-war apartment. The Chamber has previously held that links that persons in the applicant's situation retained to their apartments were sufficient for them to be considered to be their "homes" within the meaning of Article 8 of the Convention (see *e.g,* case nos. CH/97/46, *Kevešević,* decision on the merits of 15 July 1998, paragraphs 39-42, Decisions and Reports 1998; CH/97/58, *Onić,* decision on admissibility and merits of 12 January 1999, paragraph 48, Decisions January – July 1999; CH/00/4566 *et al, Jusić and others,* decision on admissibility and merits of 10 May 2002, paragraph 62, to be reported).

92. The Chamber holds in the instant case that the applicant's pre-war apartment is his "home" for the purpose of Article 8 of the Convention.

(ii) Interference with the applicant's right

93. On 23 June 1996, the RBiH Army, whose legal successor is the Army of the Federation of BiH, declared the apartment at issue permanently abandoned and confirmed the previous allocation of the apartment to Mr. Z.M., a serving member of the RBiH Army. The RBiH Army acted on the basis of the Law on Abandoned Apartments. The applicant did not have any remedies available to him to repossess his pre-war apartment until 4 April 1998.

94. On 4 April 1998, the Law on Cessation entered into force. This Law expressly repealed the Law on Abandoned Apartments and declared all administrative, judicial and other decisions terminating the occupancy right on the basis of the Law on Abandoned Apartments null and void. It provided the pre-war occupancy right holders with the right to repossess the apartments at issue and regulated the procedure to do so. Namely, the pre-war occupancy right holders were to submit a request for repossession to the competent bodies and the competent bodies were to decide within 30 days from the date of submission of the request. The present applicant duly submitted his request for repossession on 1 September 1998. However, the competent body failed to decide on his request before 4 July 1999.

95. On 4 July 1999, Article 3a of the Law on Cessation entered into force. This Article completely deprived the applicant of the right to repossess the apartment at issue and the authorities of the Federation of BiH accordingly refused the applicant's request for repossession. The applicant is still not able to repossess his pre-war apartment due to the effect of Article 3a of the Law on Cessation.

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

(iii) Legality of the interference

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

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

99. On 4 April 1998, the Federation of BiH passed the Law on Cessation expressly repealing the Law on Abandoned Apartments. The Law on Cessation provided the applicant with the right to be reinstated into his pre-war apartment. The applicant submitted his request to the Service in Bihać on 1 September 1998. According to Article 6 paragraph 1 of the Law on Cessation, the authorities of the Federation of BiH had 30 days to issue a decision on the reinstatement of the applicant into his pre-war apartment. The interference of the Federation of BiH was "in accordance with the law" from 4 April 1998, the date of the entry into force of the Law on Cessation, until 1 October 1998, that is to say the date on which the 30-day time limit for issuance of the decision elapsed.

100. From 1 October 1998 until 4 July 1999, the date of the entry into force of Article 3a of the Law on Cessation, the interference of the Federation of BiH was again not "in accordance with the law".

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

102. The Chamber observes that the applicant's continuing complaint concerns only the interference under Article 3a of the Law on Cessation. The crux of the present case is thus the introduction and application of Article 3a in the case of the applicant. The Chamber thus proceeds to establish whether the interference that has been based on Article 3a, and which interference the Chamber has found to be "in accordance with the law", is justified under Article 8 paragraph 2 of the Convention.

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

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

104. The Chamber is aware that JNA apartments, where the repossession request of the pre-war occupant was refused on the basis of Article 3a of the Law on Cessation, are not necessarily being used for the purpose asserted by the respondent Party, as it has been explained in the submission of the OSCE acting as *amicus curiae* of 3 January 2003 (see paragraph 71 above). Notwithstanding,

the Chamber can accept, in principle, that the national authorities' decision to provide housing for former soldiers of the RBiH Army and their families pursues the legitimate aim of "protection of the rights and freedoms of others" in the sense of Article 8 paragraph 2 of the Convention.

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

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

106. As to the scope of the margin of appreciation enjoyed by the respondent Party, it will depend not only on the nature of the aim pursued, but also on the nature of the right involved. In the instant case, the common interest of the protection of the housing needs of former soldiers of the RBiH Army and their families must be balanced against the applicant's right to respect for home, a right which is germane to his personal security and well-being. The importance of such a right to the individual must be taken into account in determining the scope of the margin of appreciation allowed to the Federation of BiH.

107. The applicant was born outside the territory of Bosnia and Herzegovina, in Croatia. He was thus registered as the citizen of the republic of his birth. He requested and acquired citizenship of Bosnia and Herzegovina only recently, although he has lived in Bosnia and Herzegovina since 1987. During the 1992-1995 armed conflict, the applicant served with the Republika Srpska armed forces.

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

109. As to the active service requirement as of 30 April 1991, the Chamber has held in *Miholić and others* (see the above-mentioned *Miholić and others* decision, paragraphs 161-162) that, at that time, Bosnia and Herzegovina was still a part of the former SFRY. Persons who served in the JNA were accordingly serving in the armed forces of the then unified country.

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

111. In the present case, the Federation of BiH deprived the applicant, who is an internally displaced person, of his pre-war apartment in order to meet the housing needs of a former soldier of the RBiH Army, Z.M., and of his family. The Chamber acknowledges that the Federation of BiH has had a difficult task in reconciling the right of the pre-war occupant to repossess the disputed apartment and of the current occupant to have his housing needs met. However, the Federation of BiH did not assure the Chamber that Z.M. fell into those particularly vulnerable categories for which

housing space was to be freed by introducing Article 3a. Moreover, the Chamber is of the opinion that the Federation of BiH, when weighing the opposing interests of those individuals should give preference to the right of the applicant to return. The Constitutional Court has established (see paragraph 54 above) that the right to return of refugees and internally displaced persons is a primary objective of the Constitution of Bosnia and Herzegovina and of the Dayton Peace Agreement in general. Additionally, the Chamber recalls its conclusion in *Miholić and others* (see the above-mentioned *Miholić and others* decision) related to the citizenship and active service requirements where both were found to be unreasonable and therefore not proportionate. The Chamber considers that these conclusions also apply when occupancy right is in question. The deprivation of the applicant of his pre-war apartment was thus not proportionate to the legitimate aim pursued. The applicant was made to bear an "excessive burden".

112. Therefore, the Chamber concludes that the Federation of BiH overstepped the margin of appreciation enjoyed by public authorities and accordingly violated Article 8 of the Convention, by the application of Article 3a paragraph 1 of the Law on Cessation in the present case.

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

113. The applicant alleges a violation of the right to the peaceful enjoyment of his possessions. Article 1 of Protocol No. 1 to the Convention reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

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

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

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

(ii) Interference with the applicant's right

116. On 23 June 1996, the RBiH Army, whose legal successor is the Army of the Federation of BiH, deprived the applicant of the occupancy right over his pre-war apartment in accordance with the Law on Abandoned Apartments.

117. On 4 April 1998, the Law on Cessation entered into force and the applicant was able to initiate the procedure to repossess his pre-war apartment. The applicant duly submitted his request for repossession on 1 September 1998. However, the competent body failed to reinstate him.

118. On 4 July 1999, Article 3a of the Law on Cessation entered into force. As of that date, the applicant has been barred by law from repossessing his pre-war apartment.

119. The Chamber thus concludes that the Federation of BiH deprived the applicant of his possessions in the sense of Article 1 of Protocol No. 1 to the Convention.

(iii) Legality of the interference

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

121. The Chamber has established in paragraphs 98 and 100 above that the interference was unlawful prior to 4 April 1998 and again from 1 October 1998 until 4 July 1999, the date of the entry into force of Article 3a of the Law on Cessation. The interference was lawful in the short period between 4 April 1998, the date of the entry into force of the Law on Cessation and 1 October 1998, and again after 4 July 1999, the date of entry into force of Article 3a of the Law on Cessation (see paragraphs 99 and 101 above).

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

(iv) Is the interference in the public interest?

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

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

124. Nevertheless, respondent Parties have not been granted *carte blanche* when deciding upon appropriate measures of their social and economic policies. Those measures are still subject to the scrutiny of the European Court of Human Rights: (a) they must pursue a legitimate aim; and (b) there must be a "reasonable relation of proportionality between the means employed and the aim sought to be realised" (see the above-mentioned *James and others* decision, p. 34, paragraph 50). The latter requirement was expressed also by the notion of the "fair balance" that must be struck between the demands of the communal interest and the requirements of the protection of the individual's fundamental rights (see Eur. Court HR, *Sporrong and Lönnroth,* judgment of 23 September 1982, Series A no. 52, p.26, paragraph 69). There is no "fair balance" if the person concerned has had to bear "an individual and excessive burden" (see the above-mentioned *Sporrong and Lönnroth* decision, p.28, paragraph 73).

125. The Chamber notes that a wide margin of appreciation is granted to respondent Parties under Article 1 of Protocol No. 1 to the Convention. Nevertheless, the Chamber finds that the interference of the Federation of BiH with the applicant's right to the peaceful enjoyment of his possessions placed on him an "excessive burden" for the reasons stated in paragraph 111 above. The Chamber decides that the Federation of BiH has exceeded even that wide margin of appreciation.

126. Therefore, the Chamber concludes that the Federation of BiH violated Article 1 of Protocol No. 1 to the Convention in the present case.

c. Article 6 of the Convention

127. The applicant complains of the length of the proceedings before the competent authorities. Article 6 paragraph 1 of the Convention, so far as relevant, provides as follows:

> "1. In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

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

d. Article 13 of the Convention

129. The present case was transmitted to the respondent Parties under Article 13 of the Convention, which provides:

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

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

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

131. The applicant complains of being discriminated against with respect to the rights to respect for his home under Article 8 of the Convention and to the peaceful enjoyment of his possessions under Article 1 of Protocol No. 1 to the Convention. The Chamber has already established that the Federation of BiH violated those rights of the applicant (see paragraphs 112 and 126 above).

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

> "Alleged or apparent discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status arising in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to this Annex[16], where such violation is alleged or appears to have been committed by the Parties, including any official or organ of the Parties, Cantons, Municipalities, or any individual acting under the authority or such official or organ".

[16] 1948 Convention on the Prevention and Punishment of the Crime of Genocide; 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II thereto; 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Protocols thereto; 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto; 1957 Convention on the Nationality of Married Women; 1961 Convention on the Reduction of Statelessness; 1965 International Convention on the Elimination of All Forms of Racial Discrimination; 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto; 1966 International Covenant on Economic, Social and Cultural Rights; 1979 Convention on the Elimination of All Forms of Discrimination against Women; 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; 1989 Convention on the Rights of the Child; 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; 1992 European Charter for Regional or Minority Languages; 1994 Framework Convention for the Protection of National Minorities.

a. Definition of "discrimination"

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

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

b. Whether there is a difference in treatment

135. Prior to 4 July 1999, the date of the entry into force of Article 3a of the Law on Cessation, the applicant fell under the same legal regime as other individuals who had left their apartments during the 1992-1995 armed conflict in Bosnia and Herzegovina, as regards the question of repossession of pre-war apartments.

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

c. Whether the difference in treatment is justified

137. The difference in treatment will only be justified if it pursued a legitimate aim and if the measure employed was proportionate to the legitimate aim pursued. When the European Court of Human Rights interprets the provision of the Convention prohibiting discrimination (*i.e.* Article 14 of the Convention), it applies some of the same principles of interpretation applied also in relation to those Articles of the Convention with restriction clauses (such as Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention). In the present case, the Chamber will adopt a similar approach to that of the European Court of Human Rights in this respect. Accordingly, all it has said in paragraphs 103-112 and 123-126 above, regarding the legitimate aim and proportionality requirements, applies also when it comes to the alleged discrimination.

138. The Chamber has established in paragraph 136 above that the applicant has been treated differently on the ground of his status as a former JNA service member who did not join the RBiH Army or HVO. This difference in treatment has pursued a legitimate aim, namely the protection of the

housing needs of a war veteran, Z.M., and of his family. However, the Chamber is of the opinion that the measures employed were not proportionate to the legitimate aim pursued (for the discussion see paragraph 111 above).

139. Therefore, the Chamber concludes that the Federation of BiH discriminated against the applicant with respect to the rights to respect for his home under Article 8 of the Convention and to the peaceful enjoyment of his possessions under Article 1 of Protocol No. 1 to the Convention.

VIII. REMEDIES

140. The Chamber has established that the Federation of BiH violated the right of the applicant to respect for his home under Article 8 of the Convention, the right to the peaceful enjoyment of his possessions under Article 1 of Protocol No. 1 to the Convention and discriminated against the applicant in the enjoyment of those rights. According to Article XI(1)(b) of the Agreement, the Chamber must next address the question of what steps shall be taken by the Federation of BiH to remedy the established breaches. In this connection the Chamber shall consider, *inter alia,* issuing orders to cease and desist and monetary relief (including pecuniary and non-pecuniary damages).

141. The applicant requests repossession of his pre-war apartment.

142. The Chamber will order the Federation of BiH to take all necessary steps to ensure that the applicant is reinstated into his pre-war apartment without further delay and at the latest within three months from the delivery of the present decision.

143. Further, the applicant seeks compensation for pecuniary damages in the amount of KM 12,600 for the cost of renting of another apartment since 1992.

144. The respondent Parties object to the claim for compensation as not being substantiated.

145. The Chamber first recalls that its competence *ratione temporis* is limited to the period after 14 December 1995, the entry into force of the Agreement. This means that the Chamber cannot award any compensation for damages suffered before that date or relating to events occurring before that date. The Chamber also notes that the applicant lived in another person's house on a temporary basis until 25 December 2000, the date of return of the pre-war occupant of that house. In that period, the applicant did not have to pay for his accommodation. Since the applicant had to provide for his own accommodation as of 1 January 2001, the Chamber will order the respondent Party to compensate the applicant for the loss of use of his home. The Chamber considers it appropriate that this sum should be KM 200 per month up to and including May 2003 and should be paid to the applicant no later than three months from the delivery of the present decision. This sum should continue to be paid at the same rate until the end of the month in which the applicant regains possession of his apartment and these monthly payments should be made within 30 days from the end of the month to which they relate.

146. The Chamber will further award simple interest at an annual rate of 10% as of the date of expiry of the three-month and 30-day time limits set in paragraph 145 above on the sums awarded in the same paragraph or any unpaid portions thereof until the date of settlement in full.

IX. CONCLUSIONS

147. For the above reasons, the Chamber decides,

1. unanimously, to declare the application inadmissible insofar as it is directed against Bosnia and Herzegovina;

2. unanimously, to declare the application admissible against the Federation of Bosnia and Herzegovina insofar as the applicant complains of his inability to repossess his pre-war apartment;

3. unanimously, to declare the application inadmissible against the Federation of Bosnia and Herzegovina insofar as the applicant complains of not being recognised as the owner over the apartment;

4. by 12 votes to 1, that the right of the applicant to respect for his home within the meaning of Article 8 of the European Convention on Human Rights has been violated, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

5. by 12 votes to 1, that the right of the applicant to the peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1 to the European Convention on Human Rights has been violated, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

6. by 12 votes to 1, that the applicant has been discriminated against in the enjoyment of the rights to respect for his home within the meaning of Article 8 of the European Convention on Human Rights and to the peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1 to the European Convention on Human Rights, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

7. unanimously, that it is not necessary to examine the application under Article 6 of the European Convention on Human Rights;

8. unanimously, that it is not necessary to examine the application under Article 13 of the European Convention on Human Rights;

9. unanimously, to order the Federation of Bosnia and Herzegovina to ensure that the applicant is reinstated into his pre-war apartment without further delay and no later than 7 September 2003;

10. by 12 votes to 1, to order the Federation of Bosnia and Herzegovina to pay to the applicant 5800 Convertible Marks (*konvertibilnih maraka,* "KM"), no later than three months after the delivery of the present decision;

11. by 12 votes to 1, to order the Federation of Bosnia and Herzegovina to pay to the applicant 200 Convertible Marks (*konvertibilnih maraka,* "KM") for each further month that he remains excluded from his apartment as from June 2003 until the end of the month in which he is reinstated, each of these monthly payments to be made within 30 days from the end of the month to which they relate;

12. by 12 votes to 1, to order the Federation of Bosnia and Herzegovina to pay simple interest at an annual rate of 10% (ten per cent) on the sums specified in conclusion nos. 10 and 11 above or any unpaid portions thereof from the date of expiry of the three-month and 30-day time limits specified in the same conclusions until the date of settlement in full; and

13. unanimously, to order the Federation of Bosnia and Herzegovina to report to the Chamber on the steps taken to comply with the above orders no later than 7 September 2003.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber