DECISION ON ADMISSIBILITY AND MERITS

Case no. CH/99/1704

Vojislav RADEČ

against

BOSNIA AND HERZEGOVINA
and
THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, sitting in plenary session on 1 November 2004 with the following members present:

Mr. Jakob MÖLLER, President
Mr. Miodrag PAJIĆ, Vice-President
Mr. Želimir JUKA
Mr. Mehmed DEKOVIĆ
Mr. Andrew GROTRIAN

Mr. J. David YEAGER, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Meagan HRLE, Deputy Registrar

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

Noting that the Human Rights Chamber for Bosnia and Herzegovina ("the Chamber") ceased to exist on 31 December 2003 and that the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina ("the Commission") has been mandated under the Agreement pursuant to Article XIV of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina entered into on 22 and 25 September 2003 ("the 2003 Agreement") to decide on cases received by the Chamber through 31 December 2003;

Adopts the following decision pursuant to Articles VIII(2) and XI of the Agreement, Articles 5 and 9 of the 2003 Agreement and Rules 50, 54, 56 and 57 of the Commission's Rules of Procedure:

I. INTRODUCTION

1. The application concerns the applicant's attempts to enter into possession of his pre-war apartment located at Zagrebačka 15 in Sarajevo, which he purchased from the former Yugoslav National Army ("the JNA") Housing Fund (*Vojna Ustanova za upravljanje stambenih fondom JNA--- Beograd, Odeljenje Sarajevo*), according to a purchase contract signed on 13 February 1992. The applicant also seeks to be registered as the owner of the apartment.

2. The application appears to raise issues in connection with Articles 6 and 8 of the European Convention on Human Rights ("Convention") and Article 1 of Protocol No. 1 to the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER AND THE COMMISSION

3. The application was introduced to the Chamber on 8 March 1999 and registered on 9 March 1999.

4. On 16 April 2002 the applicant requested the Chamber to order the respondent Party to abolish all provisions preventing the registration of ownership based on purchase contracts, as well as to enable him to enter into possession of his pre-war apartment.

5. At it session on 4 September 2002 the Chamber decided to reject the applicant's request for provisional measures.

6. On 16 September 2002 the application was transmitted to the respondent Parties for their observations on the admissibility and merits in connection with Articles 6 and 8 of the Convention as well as Article 1 of Protocol No. 1 to the Convention, and Article II(2)(b) of the Agreement.

7. On 18 November 2002 the respondent Party the Federation of Bosnia and Herzegovina submitted its written observations on the admissibility and merits that were transmitted to the applicant on 2 December 2002 for his response. The respondent Party Bosnia and Herzegovina never submitted any response, therefore, throughout this decision, the term "respondent Party" in the singular refers to the Federation of Bosnia and Herzegovina.

8. On 24 December 2002 the applicant submitted his response to the observations of the respondent Party.

9. On 9 July 2004 and 16 July 2004 the Federation of Bosnia and Herzegovina submitted further observations that were transmitted to the applicant. On 27 July 2004 the applicant submitted his response.

10. By its letter of 29 July 2004 the Commission requested the Federation of Bosnia and Herzegovina to submit information as to whether the parliamentary procedure in relation to adoption of amendments to the Law on Sale of Apartments with an Occupancy Right were completed and to give its position with regard to the decision of the House of Representatives of the Federation of Bosnia and Herzegovina Parliament (see paragraph 43 below), in relation to Article 6 of the Convention. On 11 August 2004 and 19 August 2004 the Federation of Bosnia and Herzegovina submitted its response. However, it did not contain any comments on its position in relation to the stated decision of the House of Representatives of the Federation of Bosnia and Herzegovina Parliament.

11. On 19 October 2004 the Federation of Bosnia and Herzegovina informed the Commission that on 14 October 2004 the House of Representatives of the Federation of Bosnia and Herzegovina Parliament adopted the Law on Amendments of the Law on Sale of Apartments with Occupancy Right.

12. On 9 September 2004 and 1 November 2004 the Commission deliberated on the admissibility and merits of the application, and on the latter date adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

13. The applicant was the pre-war occupancy right holder over an apartment located at Zagrebačka 15 in Sarajevo. He was allocated the apartment in 1983 as a civilian serving with the JNA as a biochemist in the Military Hospital in Sarajevo. The applicant concluded a contract on use of the apartment on 19 October 1983.

14. On 13 February 1992 the applicant concluded the purchase contract for the apartment with the JNA Housing Fund in accordance with the Law on Securing Housing for the JNA. It is stated in the contract that the purchase price amounts to 0.00 Yugoslav dinars. The signatures on the contract were not verified before the competent court. The contract contains the stamp of the Tax Administration that is undated.

15. On 10 May 1992 the applicant left the apartment with his family and went to Belgrade. The documentation in the case file shows that the applicant ended his active military service on 31 July 1992.

16. On 24 September 1996 the apartment was declared permanently abandoned by the Headquarters of the Army of the Republic of Bosnia and Herzegovina. Mrs. R.H. presently uses the apartment as alternative accommodation.

17. On 10 August 1998 the applicant submitted a repossession request for the apartment to the Administration for Housing Affairs of Canton Sarajevo ("the Administration"). On 8 June 2000 the Administration issued a procedural decision rejecting the applicant's request "to regain his occupancy right" over the apartment as ill-founded under Article 3a paragraph 1 of the Law on Law on Cessation of the Application of the Law on Abandoned Apartments ("the Law on Cessation"). It is stated in the procedural decision that the applicant may not be considered a refugee or displaced person within the meaning of the Law on Cessation because on 30 April 1991 he was a civilian serving with the JNA and because he was not a citizen of Bosnia and Herzegovina on that day.

18. The applicant filed an appeal before the Canton Sarajevo Ministry for Housing Affairs ("the Ministry") against the procedural decision of 8 June 2000.

19. On 1 December 2000 the Ministry issued a procedural decision rejecting the applicant's appeal as ill-founded. The Ministry confirmed the decision of the Administration, stating that the applicant was, in accordance with the order of the Commander of the II Military Region on termination of active military service of 15 April 1992, in the JNA on 30 April 1991 and that he was not a citizen of Bosnia and Herzegovina. Therefore, in accordance with Article 3a, paragraph 1 of the Law on Cessation, the applicant cannot be considered a refugee or displaced person, and accordingly, he is not entitled to repossess the apartment.

20. On 6 March 2001 the applicant initiated an administrative dispute against the procedural decision of 1 December 2000 before the Cantonal Court in Sarajevo, requesting the court to annul the procedural decision in question, because he claims that he purchased the apartment in 1992.

21. On 4 July 2002 the Cantonal Court issued a judgement accepting the applicant's lawsuit, quashed the first and second instance procedural decisions and returned the case to the first instance organ for renewed proceedings. The Cantonal Court established that the applicant filed a repossession request for the apartment, and not a request for repossession of the occupancy right, while the first and second instance organs issued decisions as if the request for repossession of the occupancy right was filed. The Cantonal Court also established that the first and second

instance organs did not take into consideration provisions of the Constitution of Bosnia and Herzegovina, Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention. Neither of the parties filed an appeal against the stated judgment.

22. On 7 November 2002 the Administration issued a procedural decision in the renewed proceedings rejecting the applicant's repossession request for the apartment as ill-founded, referring to the same reasons as in the procedural decision of 8 June 2000 (see paragraph 17 above). On 25 December 2002 the applicant filed an appeal against the procedural decision of 7 November 2002.

23. On 11 August 2003 the Ministry issued a procedural decision rejecting the applicant's appeal as ill-founded, repeating the formerly presented position that the applicant cannot be considered a refugee or displaced person within the meaning of the Law on Cessation, because on 30 April 1991 he was a civilian serving with the JNA. The Ministry also stated that based on the procedural decision on retirement issued by the Federal Secretariat for National Defence (SSNO) Institute for Social Insurance of Military Insurance Holders of 10 August 1992, it was established that the applicant was released from active military service on 31 July 1992.

24. On 7 October 2003 the applicant initiated an administrative dispute against the Ministry's procedural decision of 11 August 2003 before the Cantonal Court. On 18 April 2004 the Cantonal Court issued a procedural decision suspending the proceedings due to the decision of the House of Representatives of the Federation of Bosnia and Herzegovina Parliament published in the Official Gazette of the Federation of Bosnia and Herzegovina no. 28/04, ordering suspension of all administrative and court proceedings related to repossession of military apartments until amendments to the Law on Sale of Apartments with Occupancy Right have been passed, and which are in the parliamentary procedure (see paragraph 43 below) .

25. On 19 July 2004 the applicant filed an appeal before the Supreme Court of the Federation of Bosnia and Herzegovina against the stated procedural decision of the Cantonal Court of 18 April 2004, alleging that the Cantonal Court had wrongly applied the substantive law, because in the present case, it was obliged to apply the provisions of the Law on Cessation and to issue a decision on the merits. The applicant also asserted that the House of Representatives did not have the power to derogate from existing laws in force.

26. On 17 October 2004 the Law on Amendments to the Law on Sale of Apartments entered into force, thereby putting out of force the Decision taken by the House of Representatives on suspension of proceedings related to military apartments (see paragraph 43 below).

27. On 29 October 2004 the applicant's representative stated that the procedural decision on suspension of the proceedings in the applicant's case was no longer in force, and that the proceedings before the Cantonal Court had been re-activated.

IV. RELEVANT DOMESTIC LEGISLATION

A. Relevant legislation of the Socialist Federal Republic of Yugoslavia and of the Socialist Republic of Bosnia and Herzegovina

1. Law on Securing Housing for the Yugoslav National Army

28. The applicant purchased the apartment under the Law on Securing Housing for the Yugoslav National Army (Official Gazette of the Socialist Federal Republic of Yugoslavia ("OG SFRJ") no. 84/90). This Law was passed in 1990 and came into force on 6 January 1991. It essentially regulated the housing needs for military and civilian members of the JNA.

29. Article 21 set forth the general manner in which the purpose price of the apartment was to be determined. The price was to be established taking into account the revaluated construction value, and reduced by the apartment's depreciation value, the revaluated amount of procurement and communal facilities costs of the construction land, and the revaluated amount of the housing construction contribution which was paid to the JNA Housing Fund. The Federal Secretary was also authorized to prescribe the exact methodology to determine the purchase price.

2. Instructions on the methodology to determine the purchase price for JNA apartments ("the Instructions")

30. These Instructions were published in the Military Official Gazette in April 1991 and set forth the manner of calculating the purchase price of apartments that were to be purchased from the JNA Housing Fund.

3. Guidelines for purchasing an apartment from the JNA Housing Fund ("the Guidelines")

31. These Guidelines were published in the Military Official Gazette in April 1991, and set forth the procedure to be followed in order to purchase an apartment from the JNA Housing Fund.

4. Law on Taxes on the Transfer of Real Estate and Rights

32. The Law on Taxes on the Transfer of Real Estate and Rights (Official Gazette of the Socialist Republic of Bosnia and Herzegovina ("OG SRBiH" nos. 6/78 and13/82) was in force at the time the applicant concluded the purchase contract with the JNA. Article 3 paragraph 1, point 18 provided that tax on the transfer of real estate does not incur on the purchase of apartments from the JNA Housing Fund.

B. Relevant legislation of the Republic of Bosnia and Herzegovina

1. Law on Abandoned Apartments

33. On 15 June 1992 the Presidency of the then Republic of Bosnia and Herzegovina issued a Decree with Force of 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). 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.

34. Article 2 set forth that apartments were to be considered abandoned if the pre-war occupancy right holder and his family members left the apartment, even if only temporarily. If the pre-war occupancy right holder failed to resume using the apartment within the applicable time limit laid down in Article 3 (*i.e.* before 6 January 1996), he or she was regarded as having abandoned the apartment permanently.

35. According to Article 10, as amended, the failure to resume using the apartment within the time limit would result in deprivation of the occupancy right. The resultant loss of the occupancy right was to be recorded in a decision by the competent authority.

2. Law on the Transfer of Real Estate

36. Article 9 of the Law on the Transfer of Real Estate (OG SRBiH nos. 38/78, 4/89, 29/90 and 22/91; OG RBiH nos. 21/92, 3/93, 17/93, 13/94, 18/94 and 33/94) provided that a contract on the transfer of real estate must be in written form and that signatures must be verified by the competent court. Paragraph 4, among other things, provides that written contracts on the transfer

of real estate that have been completely or substantially performed are valid even if the signatures of the contractual parties were not verified by the competent court.

C. Relevant legislation of the Federation of Bosnia and Herzegovina

1. The Law on Cessation of the Application of the Law on Abandoned Apartments ("The Law on Cessation")

37. The Law on Cessation entered into force on 4 April 1998 and has been amended on numerous occasions (Official Gazette of the Federation of Bosnia and Herzegovina ("OG FBiH") nos. 11/98, 38/98, 12/99, 18/99, 27/99, 43/99, 31/01, 56/01, 15/02 and 29/03). The Law on Cessation repealed the former Law on Abandoned Apartments.

38. According to the Law on Cessation, the competent authorities may make no further decisions declaring apartments abandoned (Article 1, paragraph 2). All administrative, judicial and other decisions terminating occupancy rights based on regulations issued under the Law on Abandoned Apartments are null and void (Article 2, paragraph 1).

39. All occupancy rights or contracts on use made between 1 April 1992 and 7 February 1998 were cancelled (Article 2, paragraph 3). A person occupying an apartment on the basis of a cancelled occupancy right or decision on temporary occupancy is to be considered a temporary user (Article 2, paragraph 3).

40. The occupancy right holder of an apartment declared abandoned, or a member of his or her household, has a right to return to the apartment in accordance with Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina (Article 3, paragraphs 1 and 2).

41. The former Article 3a paragraphs 1 and 2, which were in force between 4 July 1999 and 1 July 2003, provided as follows:

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

42. The present Article 3a, which came into force on 1 July 2003, provides as follows:

> "As an exception to Article 3, paragraph 1 and 2 of the Law, regarding apartments declared abandoned on the territory of the Federation of Bosnia and Herzegovina at the disposal of the Federation Ministry of Defence, the occupancy right holder shall not be considered a refugee nor have the right to repossess the apartment if after 19 May 1992, she or he remained in the active service as a military or civilian personnel of any armed forces outside the territory of Bosnia and Herzegovina, 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 Socialist Federal Republic of Yugoslavia before 14 December 1995.
>
> "A holder of an occupancy right from paragraph 1 of this Article will not be considered a refugee or have the right to repossess the apartment in the Federation of Bosnia and

Herzegovina, if she or he has acquired another occupancy right or other equivalent right from the same housing fund of the former JNA or newly-established funds of armed forces of states created on the territory of the former Socialist Federal Republic of Yugoslavia."

2. The Decision of the House of Representatives of the Federation of Bosnia and Herzegovina

43. The decision of the House of Representatives of the Federation of Bosnia and Herzegovina was published in the Official Gazette of the Federation of Bosnia and Herzegovina no. 28/04, and entered into force on 26 May 2004. In relevant part, this decision reads as follows:

> "… and to suspend all administrative and court proceedings for repossession of military apartments until amendments to the Law on Sale of Apartments with an Occupancy Right are adopted, which is presently in the parliamentary procedure."

3. The Law on Sale of Apartments with an Occupancy Right ("The Law on Sale of Apartments")

44. The Law on Sale of Apartments (OG FBiH nos. 27/97, 11/98, 22/99, 27/99, 7/00, 32/01, 61/01,15/02 and 54/04) first came into force on 6 December 1997. Articles 39a, 39b, 39c, 39d, and 39e came into force on 5 July 1999, the date of their publication in the Official Gazette of the Federation of Bosnia and Herzegovina, as a result of their imposition by the High Representative of Bosnia and Herzegovina. On 16 October 2004 the provisions regarding purchase of military apartments were significantly amended, specifically Article 39, 39a and 39e were amended. The original and amended form will be cited below.

45. Article 18

> "The value of the apartment shall consist of the construction value of the apartment, corrected by apartment's location coefficient. The construction value of an apartment shall be 600 DM per m2.
>
> The apartment's location coefficient shall be established by the competent Cantonal Government within the range from 0.80 to 1.20 depending on the area where the apartment is located, infrastructure supporting the area, the floor and other relevant facts."

46. Article 27 provides that the ownership right to an apartment shall be acquired upon registration of that right in the Land Registry books of the competent court.

47. The former Article 39 provided, 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."

48. The amended Article 39, in effect as of 16 October 2004, provides

> "A holder of rights from a purchase contract concluded with the former SSNO on the basis of the Law on Securing Housing for the JNA (Official Gazette of SFRY, no. 84/90) and bylaws adopted for its implementation, for apartments at the disposal of Federation Ministry of Defence, who concluded a written contract on purchase for the apartment before 6 April 1992 and handed it over to the relevant tax office for verification, and if the sale price was established in accordance with the laws in force at the moment of concluding the contract, and if he or she paid the price in full within the contractual deadlines, is deemed to have concluded a legally binding contract."

49. Article 39a provides as follows:

> "If the occupancy right holder of an apartment at the disposal of the Federation Ministry of Defence uses the apartment legally and he or she entered into a legally binding contract on purchase of the apartment with the Federal Secretariat for National Defence (SSNO) before 6 April 1992 in accordance with the Laws referred to in Article 39 of this Law, the Federation Ministry of Defence shall issue an order for the registration of the occupancy right holder as the owner of the apartment with the competent court."

50. Article 39b, in relevant part, provides,

> "In the event that the occupancy right holder referred to in Article 39a of this Law did not effect the payment of the total amount of the sale price of the apartment in accordance with the purchase contract, she or he shall pay the remainder of the amount specified in that contract to the Ministry of Defence of the Federation.
>
> ….
>
> "The provisions of Articles 39a of this Law and paragraphs 1 and 2 of this Article shall also be applied to contracts on the purchase of apartments concluded before 6 April 1992, in cases where the verification of signatures has not been done before the responsible court."

51. Article 39c provides:

> "The provisions of Articles 39a and 39b shall also be applicable to an occupancy right holder who has exercised the right to repossess the apartment pursuant to the provisions of the Law on Cessation of the Application of the Law on Abandoned Apartments (Official Gazette of the Federation of Bosnia and Herzegovina nos. 11/98 and 18/99)."

52. Article 39d provides:

> "A person who does not realise his or her rights with the Ministry of Defence, as provided for in this Law, may initiate proceedings before the competent court."

53. The former Article 39e provided:

> "The occupancy right holder who is not entitled to repossess the apartment or does not submit a claim for the repossession of the apartment in accordance with the provisions of Article 3 and 3a of the Law on Cessation of the Application of the Law on Abandoned Apartments and who entered into a legally binding contract on purchase of the apartment with the former Federal Secretariat for National Defence (SSNO) before 6 April 1992, shall have the right to submit a request to the Federation Ministry of Defence for compensation of the funds paid on that basis, unless it is proved that these funds were acknowledged for purchase of an apartment outside the territory of Bosnia and Herzegovina"

54. The amended Article 39e provides as follows:

> "A holder of rights from a purchase contract who concluded a legally binding contract as defined by Article 39, paragraph 1 of this Law, and who has abandoned his or her apartment in the Federation of Bosnia and Herzegovina and afterwards obtained a new occupancy right, or a corresponding right from the same housing stock or a newly established housing stock of armed forces of states created in the territory of the former Yugoslavia, loses rights to his or her previous pre-war apartment by obtaining the new apartment, and the relevant purchase contract shall be terminated, and he or she is not entitled to register his or her ownership to the apartment.
>
> A holder of rights from purchase contract who concluded a legally binding contract from Article 39, paragraph 1 of the Law, and who remained in armed forces after 14 December 1995 outside of the territory of Bosnia and Herzegovina, and who afterwards has not obtained a new occupancy right or a corresponding right, does not have the right to register his or her ownership

right from the concluded contract, but has a right to compensation from the Federation of BiH determined in accordance with Article 18 of this Law, reduced for depreciation.

A holder of rights from a purchase contract who concluded a legally binding contract as defined by Article 39, paragraph 1 of this Law, and whose current user concluded a contract on use or purchase contract in accordance with valid legal provisions, does not have a right to register his or her ownership right from the concluded contract, but has a right to compensation from the Federation of Bosnia and Herzegovina determined in the manner set forth in paragraph 2 of this Article, with the exception of the holder of rights from a purchase contract as defined in paragraph 1 of this Article."

4. Law on Civil Procedure

55. Article 54 of the Law on Civil Procedure (OG FBiH nos. 42/98, 3/99 and 53/03) provides as follows:

"A 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.

"Such a lawsuit may be initiated when a special regulation provides so, or 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.

"If the decision in the dispute depends on whether some legal interest, which during the lawsuit became disputable, 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 relationship, if the court before which the lawsuit is pending is competent for such a complaint.

"Filing the complaint under the provision in paragraph 3 of this Article shall not be deemed modification of the lawsuit."

V. COMPLAINTS

56. The applicant complains that his right to the peaceful enjoyment of his property in connection with Article 1 of Protocol No. 1 to the Convention has been violated. The applicant holds that Article 3a of the Law on Cessation is discriminatory and that the Law on Sale of Apartments violates his property rights. The applicant also specifically complains that the proceedings are taking too long, and that suspending the proceedings in 2004 violates his right of access to the court as protected by Article 6 of the Convention.

VI. SUBMISSIONS OF THE PARTIES

A. The Federation of Bosnia and Herzegovina

57. The respondent Party submitted its observations on the admissibility and merits of the application on 18 November 2002. The respondent Party does not dispute the facts, but points out that the applicant has not addressed the court in relation to his ownership, nor the Federation Ministry of Defense with a request to issue an order for registration of his ownership right over the apartment.

58. With respect to the admissibility of the application, the respondent Party states that the applicant's claim is premature because the applicant did not exhaust domestic remedies. The respondent Party holds that the applicant failed to file a request to the Federation Ministry of

Defense to issue an order for registration of his ownership right over the apartment in question. It also states that the applicant could have filed a request for urgency before the first instance organ to issue a decision in the renewed proceedings, which the applicant has also failed to do.

59. As to the merits of the application, the respondent Party states that there has been no violation of any articles of the Convention. With regard to Article 6 of the Convention, the Federation of Bosnia and Herzegovina alleges that, since the proceedings before the domestic organs are still pending, the domestic organs have not violated Article 6 of the Convention. As to Article 8 of the Convention, the Federation states that it cannot give its opinion in relation to this Article because the domestic organs have not still issued a final and binding decision in that respect. As to Article 1 of Protocol No. 1 to the Convention, the Federation of Bosnia and Herzegovina holds that the applicant must meet the requirements provided for in the Law on Sale of Apartments, according to which the applicant cannot register his ownership over the apartment if he has not exercised the right to repossess his apartment in accordance with the Law on Cessation. In relation to the alleged violation of Article II(2)(b) of the Agreement, the Federation holds that the applicant was not discriminated against in enjoyment of his rights and freedoms on any ground. Furthermore the Federation of Bosnia and Herzegovina passed a series of laws enabling all refugees and displaced persons to return to their homes regardless of their nationality, religious or other origin or political opinion.

B. The applicant

60. The applicant maintains his claims in full, and asserts that the respondent Party has violated his rights in connection with Articles 6 and 8 of the Convention, Article 1 of Protocol No. 1 to the Convention, as well as discriminated against him. The applicant especially stresses that the proceedings before the domestic organs have lasted too long, and since he is 70 years old, it is very important to him to enter into possession of his property as soon as possible.

61. In her letter of 27 July 2004 the applicant stressed, with regard to the Decision of the House of Representatives of the Parliament, that the rights and freedoms guaranteed by the Constitution of Bosnia and Herzegovina have been violated by such decision. The applicant also asserts that the House of Representatives did not have the powers to derogate, terminate or suspend the application of the Law on Cessation, because it is *lex specialis* and independent from all other laws. Moreover, the applicant considers that the stated decision is discriminatory in its character toward persons that possess the occupancy right or the ownership over their pre-war apartments. The Cantonal Court is obliged to apply the existing positive regulations, i.e., the Law on Cessation, and to issue a decision upon the applicant's appeal.

VII. OPINION OF THE COMMISSION

A. Admissibility

62. The Commission recalls that the application was introduced to the Human Rights Chamber under the Agreement. As the Chamber had not decided on the application by 31 December 2003, in accordance with Article 5 of the 2003 Agreement, the Commission is now competent to decide on the application. In doing so, the Commission shall apply the admissibility requirements set forth in Article VIII(2) of the Agreement. Moreover, the Commission notes that the Rules of Procedure governing its proceedings do not differ, insofar as relevant for the applicant's case, from those of the Chamber, except for the composition of the Commission.

1. Admissibility as against Bosnia and Herzegovina

63. In accordance with Article VIII(2) of the Agreement, "the [Commission] shall decide which applications to accept.… In so doing, the [Commission] shall take into account the following

criteria: … (c) The [Commission] shall also dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded, or an abuse of the right of petition."

64. The Commission notes that the applicant directs his application against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina.

65. In the previous cases decided by the Chamber on the subject 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, Baštijanović, 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 no. 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; case no. CH/97/60 *et al., Miholić and others,* decision on admissibility and merits of 9 November 2001, Decisions July–December 2001).

66. The Commission notes that in the present case the bodies responsible for the proceedings complained of by the applicant, such as the Administration for Housing Affairs of Sarajevo Canton, the Ministry of Housing Affairs of Sarajevo Canton, and the Ministry of Defence, engages the responsibility of the Federation of Bosnia and Herzegovina, 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).

67. The Commission therefore decides to declare the application inadmissible against Bosnia and Herzegovina.

2. Admissibility as against the Federation of Bosnia and Herzegovina

a. Exhaustion of domestic remedies in relation to the ownership claim

68. In accordance with Article VIII(2) of the Agreement, "the [Commission] shall decide which applications to accept…. In so doing, the [Commission] shall take into account the following criteria: (a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted …."

69. In its submission of 18 November 2002, the Federation of Bosnia and Herzegovina asserts that the applicant has not exhausted the domestic remedies available with regard to the registration of ownership over the apartment because he has not initiated court proceedings to determine the validity of his purchase contract (see paragraphs 57 and 58 above).

70. The Commission acknowledges that the Law on Civil Procedure provides a remedy to determine whether some right exists or not, or the authenticity of a document. The Commission recalls that previously the Chamber has found Article 54 of the Law on Civil Procedure (or Article 172, under the former Law on Civil Procedure) was an effective domestic remedy that must be exhausted in cases where the applicants did not have a purchase contract in their possession, but rather asserted that they were the owners based on the steps taken towards the purchase of the apartment in 1991 and 1992 (*see*, *e.g.,* case nos. CH/98/1160, CH/98/1177, CH/98/1264, *Pajagić, Kurozović and M.P*., decision on admissibility of 9 May 2003). The Commission has also adopted the same approach (*see*, *e.g*., case no. CH/99/1921, *Blagojević,* decision on admissibility of 16 January 2004). In such cases, the Commission considers it reasonable to expect that the applicant must bear the burden of initiating a lawsuit to determine the existence of a contractual relationship or of any contractual rights.

71. In the case at hand, the applicant has a purchase contract that appears, in all aspects, to be a valid contract. It has been signed by the parties and contains the stamp of the Tax Administration that is undated. The Commission considers that the burden of initiating proceedings to determine the validity of the contract should fall on the party who wishes to dispute the contract, and not on the contract holder who otherwise has no reason to doubt the validity of the contract he or she possesses.

72. The Commission concludes that, because the applicant possesses a purchase contract which appears on its face to be valid, initiating a lawsuit in accordance with Article 54 of the Law on Civil Procedure is not a domestic remedy that the applicant must exhaust, within the meaning of Article VIII(2)(a) of the Agreement.

3. Conclusion as to the admissibility

73. In summary, the Commission declares the application inadmissible *ratione personae* as directed against Bosnia and Herzegovina and admissible in all respects as directed against the Federation of Bosnia and Herzegovina.

B. Merits

74. Under Article XI of the Agreement, the Commission must next address the question of whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement. Under Article I of the Agreement, the parties are obliged to "secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms," including the rights and freedoms provided for in the Convention and the other international agreements listed in the Appendix to the Agreement.

1. As to the alleged violation of Article 1 of Protocol No. 1 to the Convention

75. The applicant alleges a violation of the peaceful enjoyment of his possessions with regard to the use and enjoyment of the apartment over which he was the pre-war occupancy right holder and which he purchased in February 1992.

76. Article 1 of Protocol No. 1 to the Convention provides 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."

77. Article 1 of Protocol No. 1 to the Convention thus contains three rules. The first rule enunciates the general principle that one has the protected right to the peaceful enjoyment of one's property. The second rule covers deprivation of property and subjects it to the requirements of the public interest and conditions laid out in law. The third rule recognises that States are entitled to control the use of property and subjects such control to the general interest and domestic law. It must then be determined in respect of these conditions whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual applicant's rights, bearing in mind that the last two rules should be construed in light of the general principle (*see*, *e.g.,* case no. CH/96/17, *Blentić,* decision on admissibility and merits of 5 November 1997, paragraphs 31-32, Decisions on Admissibility and Merits March 1996-December 1997). Thus, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

78. The Commission must first consider whether the applicant has any rights under the contract that constitute "possessions" for the purposes of Article 1 of Protocol No. 1 to the Convention. In this regard, the Commission refers to the Chamber's decisions in case no. CH/96/3 *et al., Medan and others*, decision on merits of 3 November 1997, Decisions on Admissibility and Merits March 1996–December 1997; and case no. CH/97/60 *et al. Miholić and others*, decision on admissibility and merits of 9 November 2001, Decisions July–December 2001. In the aforementioned cases, the Chamber consistently found that the rights under a contract to purchase an apartment concluded with the JNA, pursuant to the Law on Securing Housing for the JNA, constitute "possessions" for the purposes of Article 1 of Protocol No. 1 to the Convention. The Commission notes that in the present case the applicant concluded a contract under factual circumstances similar to those in the cases cited, and therefore, the Commission sees no reason to differ from the previous jurisprudence of the Chamber in this regard.

a. Interference with the applicant's rights

79. The Commission must next determine the nature of the interference, if any with the applicant's rights flowing from the purchase contract. The Commission notes that the respondent Party states that the applicant has not addressed the Federation Ministry of Defence with a request to be registered as the apartment's owner. The Commission is aware that the applicant has not requested the Federation Ministry of Defence (*Federalno ministarstvo odbrane*) to issue an order to be registered as the owner of the apartment. It is apparent from Article 39c of the Law on Sale of Apartments that the applicant would have no prospect of success if he were to do so, because this provision clearly requires the applicant to first repossess the apartment in accordance with the Law on Cessation before the Federation Ministry of Defence will issue the order for him to be registered as owner. In the present case the applicant has been unsuccessful in his attempts to repossess the apartment, and the provisions of the Law on Sale of Apartments therefore prevents him from realizing his contractual rights to the apartment. The Commission therefore concludes that the interference with the applicant's rights flowing from the purchase contract is caused by the Law on Sale of Apartments.

b. Public interest

80. The central issue of this case, and what the Commission must now examine, is whether the continuing interference with the applicant's property rights resulting from the Law of Sale of Apartments can be justified as "in the public interest."

81. When considering whether the taking of property is "in the public interest", it must be determined whether a "fair balance" has been struck between the demands of the general interest of the community and the requirements of the protection of the individuals' fundamental rights. Thus, there must be a reasonable relationship of proportionality between the means employed and the aim to be achieved. The requisite balance will not be found if the persons concerned had to bear "an excessive burden" (*see, e.g.*, Eur. Court HR, *Sporrong and Lönnroth v. Sweden,* judgement of 23 September 1982, Series A no. 52, pp. 26-28, paragraphs 70-73).

82. The European Court has acknowledged that in taking decisions involving the deprivation of property rights of individuals, national authorities enjoy a wide margin of appreciation because of their direct knowledge of their society and its needs. Further, the decision to expropriate property will often involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ. Therefore, the judgement of the national authorities will be respected unless it was "manifestly without reasonable foundation" (Eur. Court HR, *James and Others v. United Kingdom*, judgement of 21 February 1986, Series A no. 98, p. 40, paragraph 46).

83. 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: (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* judgement, 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. 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* judgement, p. 26, paragraphs 69 and 73).

84. In its submission received on 18 November 2002, the respondent Party does not provide any comments on the Law on Sale of Apartments specifically, but rather notes that the applicant has not fulfilled the conditions to be recognized as the owner of the apartment as set forth in the Law on Sale of Apartments and therefore, it has not violated Article 1 of Protocol No. 1 to the Convention. The Commission recalls that the amended Article 39 of the Law on Sale of Apartments sets forth a number of conditions that must be met for a purchase contract to be recognized as valid: (1) the apartment must be at the disposal of the Federation Ministry of Defence, (2) the purchase contract must be written, (3) concluded prior to 6 April 1992, (4) handed over to (*dostavljen*) the relevant tax office, (5) the sale price must be established by law in force at the time of its conclusion, and (6) the purchase price must have been paid within the contractual deadlines. This particular provision has not yet been applied in the applicant's case, as it has just recently entered into force. It would appear, however, that the applicant's contract would be considered "legally valid". The applicant's contract, on the backside, contains the stamp of the Tax Administration, although the stamp is undated. It is not clear what evidence will be sufficient to show that the contract was "handed over to" the competent tax administration. In all other respects, the applicant's contract clearly meets the more stringent requirements of the amended Article 39 of the Law on Sale of Apartments.

85. The Commission notes that the above-mentioned requirements set forth in Article 39 are only threshold requirements to establish the validity of one's contract. Once these conditions have been met, Articles 39a, 39c and 39e set forth more conditions for recognition of one's ownership.

86. The Commission recalls that Articles 39a and 39c of the Law on Sale of Apartments have not been amended. Article 39a specifies that only a person who concluded a legally binding contract with the JNA prior to 6 April 1992, and who legally uses the apartment may obtain the order from the Federation Ministry of Defence to be registered as the owner of the apartment. Article 39c provides that a person must repossess the apartment in accordance with the Law on Cessation before the Federation Ministry of Defence will recognize that person's ownership right to the apartment. The respondent Party has asserted no legitimate aim for these provisions, or even reasons supporting such an extraordinary requirement for contract holders. The Commission, *proprio motu*, cannot find any reason for conditioning one's ownership rights upon possession of the property, as provided for in both Articles 39a and 39c of the Law on Sale of Apartments. Lacking any legitimate aim, the Commission therefore must find that the requirement that a contract holder be legally in possession of the apartment before being permitted to register his or her ownership rights, is not "in the public interest". As such, Articles 39a and 39c of the Law on Sale of Apartments are not compatible with the requirements of Article 1 of Protocol No. 1 to the Convention.

87. The respondent Party generally submits that the applicant should have initiated civil proceedings to determine the validity of his purchase contract. The Commission recalls that Article 39d of the Law on Sale of Apartments provides that persons who do not realize their rights to the apartment through this Law may initiate court proceedings to do so. The respondent Party, however, did not submit any reasons why contract holders who are in possession of their apartment should have their contract recognized, while contract holders who are not in possession must initiate a civil dispute to have their contract declared legally valid. As discussed above, the Commission accepts that such a requirement is appropriate in cases where the purchase contract was never concluded, or is in some form incomplete or lost, *etc*., (*see*, *e.g*., case no. CH/99/1921, *Blagojević*, decision on admissibility of 16 January 2004). When, however, as in the present case, there are no apparent flaws in the purchase contract, the Commission considers that requiring the

applicant to initiate court proceedings places an excessive burden on the contract holder, and that this burden is not proportional to any legitimate aim. In coming to this conclusion, the Commission also bears in mind that the same burden is not placed on contract holders who are in possession of their apartment. Therefore, the Commission finds that the blanket requirement to initiate court proceedings as set forth in Article 39d of the Law on Sale of Apartments is not "in the public interest" and as such, it is incompatible with the requirements of Article 1 of Protocol No. 1 to the Convention.

88. The Commission notes that neither the previous, nor the amended Article 39e is of relevance to the case at hand, therefore, the Commission will not comment on the amended Article 39e in the present decision.

c. Conclusion

89. Having regard to the above, the Commission finds that the provisions set forth in Articles 39a, 39c and 39d of the Law on Sale of Apartments are not in the public interest, and therefore not compatible with Article 1 of Protocol No. 1 to the Convention. The Commission therefore finds a violation of the right to the peaceful enjoyment of the applicant's possessions under Article 1 of Protocol No. 1 to the Convention, the Federation of Bosnia and Herzegovina being responsible for this violation.

2. Alleged violation in connection with Article 6 of the Convention

90. Article 6 paragraph 1 of the Convention provides as follows,

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

91. In light of its finding above of a violation of Article 1 of Protocol No. 1 to the Convention, the Commission considers it unnecessary to also examine the application in connection with Article 6 of the Convention.

3. Alleged violation in connection with Article 8 of the Convention

92. Article 8 of the Convention provides as follows,

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

93. In light of its finding above of a violation of Article 1 of Protocol No. 1 to the Convention, the Commission considers it unnecessary to also examine the application in connection with Article 8 of the Convention.

4. Alleged violation in connection with discrimination

94. In light of its finding above of a violation of Article 1 of Protocol No. 1 to the Convention, the Commission considers it unnecessary to also examine the application under Article II(2)(b) of the Agreement with respect to the alleged discrimination.

VIII. REMEDIES

95. The Commission has established that the Federation of Bosnia and Herzegovina violated the right of the applicant to the peaceful enjoyment of his possessions flowing from the purchase contract that he concluded with the JNA in 1992 in connection with Article 1 of Protocol No. 1 to the Convention. Under Article XI(1)(b) of the Agreement, the Commission must next address the question of what steps shall be taken by the respondent Party to remedy the established breaches of the Agreement. In this connection the Commission shall consider issuing orders to cease and desist, monetary relief (including pecuniary and non-pecuniary damages), as well as provisional measures.

96. The Commission recalls that the applicant has not submitted a compensation claim.

97. In view of the finding of a violation of Article 1 of Protocol No. 1 to the Convention, the Commission considers it appropriate to order the Federation of Bosnia and Herzegovina to ensure that the applicant is allowed to repossess the apartment located at Zagrebačka 15 in Sarajevo and to ensure that the applicant is registered as the apartment's owner in the Land Registry books of the competent court within three months from the date of receipt of this decision. The Commission considers that this remedy is sufficient satisfaction for the violation found.

98. The Commission will also order the Federation of Bosnia and Herzegovina to submit to it, or its successor institution, a report on the steps taken by it to comply with these orders within four months of the date of receipt of this decision.

IX. CONCLUSIONS

99. For the above reasons, the Commission decides,

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

2. unanimously, to declare the application admissible in its entirety as directed against the Federation of Bosnia and Herzegovina;

3. unanimously, that the right of the applicant to the peaceful enjoyment of his possessions flowing from the purchase contract, 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 Human Rights Agreement;

4. unanimously, that it is not necessary to examine the application in connection with Articles 6 and 8 of the European Convention on Human Rights, and Article II(2)(b) of the Human Rights Agreement with respect to the alleged discrimination;

5. unanimously, to order the Federation of Bosnia and Herzegovina to ensure that the applicant is permitted to repossess the apartment, and to ensure that he is registered as the owner over the apartment at Zagrebačka 15 in Sarajevo in the Land Registry books of the competent court within three months from the date of receipt of this decision; and,

6. unanimously, to order the Federation of Bosnia and Herzegovina to submit to the Commission, or its successor institution, a report on the steps taken by it to comply with these orders within four months of the date of receipt of this decision.

(signed)
J. David YEAGER
Registrar of the Commission

(signed)
Jakob MÖLLER
President of the Commission