DECISION ON ADMISSIBILITY AND MERITS

(delivered on 6 September 2002)

Cases nos. CH/98/1311 and CH/01/8542

Džavid KURTIŠAJ and M.K.

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 2 September 2002 with the following members present:

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

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

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

I. INTRODUCTION

1. The case is about the attempt of the applicants, who are husband and wife, to repossess an apartment in Sarajevo, Federation of Bosnia and Herzegovina, and to be registered as the owners.

2. Džavid Kurtišaj concluded a purchase contract of the apartment with the Yugoslav National Army (hereinafter "JNA") and on 17 February 1992 paid the full price. He was not registered as the owner due to the war. Džavid Kurtišaj submitted several unsuccessful requests to local bodies and to the CRPC in regard to his claims.

3. Džavid Kurtišaj was an active member of the JNA until 6 August 1999. The Administration of Housing Affairs of the Sarajevo Canton therefore held that he falls under Article 3a of the Law on Cessation of the Application of the Law on Abandoned Apartments in connection with Article 39e of the Law on the Sale of Apartments with an Occupancy Right. Article 3a came into force on 1 July 1999.

4. Article 3a essentially prevents persons who were in active military service with the JNA on 30 April 1991, who were not citizens of the Socialist Republic of Bosnia and Herzegovina as of that date, and who had not been granted refugee or other equivalent protective status in a country outside of the former Socialist Federal Republic of Yugoslavia ("SFRY") from repossessing apartments in the Federation of Bosnia and Herzegovina. Additionally, persons who remained in active military service of any armed forces outside the territory of Bosnia and Herzegovina after 14 December 1995 are barred from repossessing apartments in the Federation of Bosnia and Herzegovina.

5. On 12 November 1998, M.K. was taken to the police for entering into the apartment by force after the housing authority had locked and sealed the door. She claims that the police maltreated her.

6. The cases raise issues under Articles 3 and 8 of the European Convention on Human Rights ("the Convention") and Article 1 of Protocol No. 1 to the Convention, as well as of discrimination in the enjoyment of the rights guaranteed by these provisions.

II. PROCEEDINGS BEFORE THE CHAMBER

7. The original application was submitted by M.K. to the Chamber on 30 November 1998 and registered the same day (CH/98/1311). In the application form M.K. is named as the applicant.

8. On 11 January 2000 Džavid Kurtišaj informed the Chamber that, instead of his wife, he was to be considered to be the applicant, as his wife had applied on his behalf.

9. On 10 March 2000, the Chamber decided to treat Džavid Kurtišaj as the applicant and accordingly re-registered the case.

10. Case no. CH/98/1311 was transmitted on 24 March 2000 for observations to the respondent Party. On 24 May 2000 the Chamber received the submissions of the respondent Party.

11. On 10 July 2000 Džavid Kurtišaj filed a claim for compensation.

12. On 24 August 2000, the Chamber received from the respondent Party additional written observations on the claim for compensation.

13. On 2 April 2001, upon a request of Džavid Kurtišaj, the Chamber issued a provisional measure ordering the respondent Party to refrain from any action to evict the applicant Džavid Kurtišaj and his family from the apartment.

14. In April 2001 a new case file, no. CH/01/8542, was opened with M.K. as the applicant because her claims might raise issues not included in her husband's case. Case no. CH/01/8542

was transmitted for observations to the respondent Party on 21 December 2001. On 21 February 2002 the Chamber received the submissions of the respondent Party.

15. On 11 April 2002 the Chamber decided to join the cases pursuant to Rule 34 of the Chamber's Rules of Procedure.

16. The Chamber deliberated on the admissibility and merits of the applications on 8 May 2001, 11 April 2002, 3 July 2002 and 2 September 2002 and adopted the present decision on the latter date.

III. FACTS

17. On 10 February 1992 Džavid Kurtišaj entered into a contract to purchase from the JNA an apartment in Sarajevo (Grbavica), Đure Salaja No. 6, now Kemala Kapetanovića No. 6, over which he had an occupancy right. The contract was authorised by the First Instance Court II in Sarajevo on 13 February 1992 under no. 265/1992. Džavid Kurtišaj did not register his ownership rights with the Land Registry Office in Sarajevo because soon thereafter the armed conflict broke out. Džavid Kurtišaj paid the total amount of the sale price in accordance with the contract, as shown by a certificate on the payment dated 17 February 1992.

18. On 14 April 1992 the applicants and their family left the apartment as the apartment was close to the first front line. The applicants left Sarajevo on 18 June 1992 with a Military Convoy.

19. On 3 October 1997 Džavid Kurtišaj submitted a request for the repossession of his apartment to the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC). To the Chamber's knowlegde, this request has not been decided as of to date.

20. In February 1998 the applicants returned to Sarajevo, but another person, Lj.R., was living in their apartment. M.K. temporarily, from February 1998 until November 1998, resided in the apartment together with Lj.R. The other family members lived with relatives.

21. On 31 July 1998 Džavid Kurtišaj submitted a request for repossession, which was registered by the Administration for Housing Affairs in Sarajevo.

22. On 11 November 1998 Lj.R. left the apartment as she was told to do so by the Housing Organ of the Army of the Federation of Bosnia and Herzegovina. The Army locked the door and sealed the apartment. M.K. was not present in the apartment at that time. In the afternoon of the same day M.K. returned to the apartment and entered into the apartment forcing the seal. Since 11 November 1998 the applicants and their family have kept living in the apartment.

23. On 12 November 1998 M.K. was taken to the police for breaking the seal. She claims that she was assaulted by the police, threatened and verbally abused and forced to sign a document. She claims to have been repeatedly interrogated on other occasions by the police and that she was maltreated and verbally discriminated against because of her Albanian origin.

24. On 16 November 1998 the Army Housing Organ brought another person, Dž.P., into the apartment without any procedural decision, but he didn't stay, because the applicants were living in the apartment.

25. On 18 November 1998 Džavid Kurtišaj submitted a request for withdrawal of his request for repossession of the apartment to the Administration for Housing Affairs in Sarajevo because he had regained possession.

26. On 10 March 2000 Džavid Kurtišaj submitted a request to register his right of ownership over the apartment at the Department for Defence of the Federal Ministry of Defence of the Municipality Novo Sarajevo.

27. On 20 December 2000 the Administration for Housing Affairs of Sarajevo issued a decision rejecting the request for regaining the occupancy right over the purchased apartment.

28. On 10 January 2002 the Municipal Court II in Sarajevo sentenced M.K. to three months imprisonment for the criminal act of breaking the official seal on 11 November 1998. However, she does not have to serve the sentence if she does not commit any further criminal act within a one year probation period.

29. As a consequense of the provisional measure issued by the Chamber on 2 April 2001, which is still in force, both applicants and their family are currently living in the apartment.

IV. RELEVANT DOMESTIC LEGISLATION

A. Relevant legislation of the Socialist Federal Republic of Yugoslavia

30. Džavid Kurtišaj contracted to purchase his apartment under the Law on Securing Housing for the Yugoslav National Army (Official Gazette of the Socialist Federal Republic of Yugoslavia – hereinafter- "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 Yugoslav National Army ("JNA").

31. Article 20 of the Law provided that the holder of an occupancy right residing in an apartment of the JNA Housing Fund could purchase the apartment on the basis of a contract made with the authority responsible for the apartment. Article 21 laid out a formula for calculating the price payable for apartments so purchased. The price was based on a valuation of the apartment, subject to a number of deductions. In particular, provisions were made for a deduction in the purchase price based on the amount of contributions made by a particular purchaser to the JNA Housing Fund. Article 23 of the Law placed an obligation on the purchaser of an apartment to submit, within 30 days of the conclusion of the purchase contract, a request to the Land Registry to register the ownership of the apartment. This Law was never adopted as part of the law of Bosnia and Herzegovina.

32. Article 33 of the Law on Basic Ownership Relations provided that the ownership over immovables was acquired when the ownership was registered in a registry book (OG SFRY nos. 6/80 and 36/90). This Law was in force in the Federation of Bosnia and Herzegovina until 17 March 1998, when the Law on Basic Property Relations (Official Gazette of the Federation of Bosnia and Herzegovina-hereinafter "OG FBiH"-no. 6/98) entered into force.

B. Relevant Legislation of the Socialist Republic of Bosnia and Herzegovina and after 11 April 1992, following independence, the Republic of Bosnia and Herzegovina

33. On 15 February 1992 the Government of the Socialist Republic of Bosnia and Herzegovina issued a Decree imposing a temporary prohibition on the sale of apartments previously characterised as social property (Official Gazette of the Socialist Republic of Bosnia and Herzegovina-hereinafter "OG SR BiH" no. 4/92"). Article 1 of this Decree temporarily prohibited the sale of socially owned apartments located in the territory of the Socialist Republic of Bosnia and Herzegovina to holders of occupancy rights in them, where sales were being concluded in accordance with the Law on Securing Housing for JNA. Article 3 of the Decree declared invalid any purchase contract or other contract relating to a property right in such an apartment where that contract was inconsistent with the provisions of the Decree. Article 4 of the Decree prohibited courts and other state organs from notarising such contracts and from registering them either in property registers or in court registers. Article 5 of the Decree provided that the temporary prohibition on sales should remain in force until the entry into force of a law regulating *inter alia* the sale of apartments within the JNA's control, and at longest for a year following the date of issue of the Decree (15 February 1993).

34. On 11 April 1992 the Presidency of the Republic of Bosnia and Herzegovina issued the Decree with force of law according to which the Law on Securing Housing for JNA should not be applied in the territory of Bosnia and Herzegovina.

35. On 15 June 1992 the Presidency issued a Decree with Force of Law on Taking Over of Resources of the former SFRY into the Property of RBiH which provided that all property belonging to the JNA and other state organs of the Socialist Federal Republic of Yugoslavia located on the territory of Bosnia and Herzegovina should be considered as belonging to the Republic of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina –hereinafter- "OG RBiH" no. 6/92). This Decree thereby established that the Republic of Bosnia and Herzegovina was the *de jure* owner of apartments that had previously been alienated by the Socialist Federal Republic of Yugoslavia.

36. The Law on Abandoned Apartments, issued on 15 June 1992 as a Decree with force of law, was adopted as law on 1 June 1994 and amended on various occasions (OG RBiH nos. 6/92, 8/92, 16/92, 13/94, 36/94, 9/95 and 33/95). It governed the re-allocation of occupancy rights over socially owned apartments that had been abandoned.

37. According to the Law, an occupancy right expired if the holder of the right and the members of his or her household had abandoned the apartment after 30 April 1990 (Article 1). An apartment was considered abandoned if, even temporarily, it was not used by the occupancy right holder or members of the household (Article 2). There were, however, certain exceptions to this definition. For example, an apartment was not to be considered abandoned if the apartment was destroyed, burnt or in direct jeopardy as a result of war actions (Article 3 paragraph 2).

38. An apartment declared abandoned could be allocated for temporary use to "an active participant in the fight against the aggressor of the Republic of Bosnia and Herzegovina" or to a person who had lost his or her apartment due to hostilities (Article 7). Such temporary use could last up to one year after the date of the cessation of the imminent threat of war. A temporary user was obliged to vacate the apartment at the end of that period and to place it at the disposal of the authority that had allocated it (Article 8).

39. The occupancy right holder was to be regarded as having abandoned the apartment permanently if he or she failed to resume using it either within seven days (if he or she had been staying within the territory of the Republic of Bosnia and Herzegovina) or within fifteen days (if he or she had been staying outside that territory) from the publication of the Decision on the Cessation of the State of War (OG RBiH no. 50/95, published on 22 December 1995). The resultant loss of the occupancy right was to be recorded in a decision by the competent authority (Article 10 compared to Article 3 paragraph 3).

40. On 13 March 1993 the Presidency of the Republic of Bosnia and Herzegovina issued a Decree with the force of law on the Resources and Financing of the Army of Bosnia and Herzegovina which provided that the social resources of the former Socialist Federal Republic of Yugoslavia which had been used by the JNA were placed under the temporary use and management of the army of the Republic (OG RBiH nos. 6/93 and 17/93).

41. On 1 June 1994 the Assembly of the Republic of Bosnia and Herzegovina adopted all previously issued Decrees with legal force as Law (OG RBiH no. 13/94). Thus, all Decrees with legal force listed above were adopted as laws on this date.

42. On 12 July 1994 the Presidency of the Republic of Bosnia and Herzegovina issued a Decree with force of law amending the Law on Real Property Transactions (OG RBiH no. 18/94). Article 1 provided that contracts relating to real property transactions must be in writing and that the signatures of the contracting parties must be verified by a competent court. It further provided that any contract, relating to property transactions, that had been concluded in a manner that did not conform with the provisions of paragraph 1 of this Article shall have no legal force or effect. Article 3 of the Decree provided that written contracts concluded prior to the entry into force of the Decree were valid if the parties had fulfilled all obligations arising from the contracts completely or substantially. It further provided that contracts concluded prior to the entry into force of the Decree would be considered valid provided the parties had their signatures certified by a competent court within six months of the entry into force of the Decree.

43. On 25 November 1994 the Assembly of the Republic of Bosnia and Herzegovina introduced a Law on the Transformation of Social Property (OG RBiH no. 33/94). The effect of this Law was to transform all property that had formerly been categorised as socially owned property into state property. This Law entered into force on 25 November 1994 and was applied as of 1 January 1995.

44. On 3 February 1995 the Presidency of the Republic issued a Decree with force of law amending the Law on the Resources and Financing of the Army (OG RBiH no. 5/95). This Decree provided that for the protection of the housing fund of the army, until the issuing of the Law on Housing in the Republic, courts and other state authorities should adjourn proceedings relating to the purchase of apartments and other properties under the Law on Securing Housing for the JNA. This Decree came into force on 10 February 1995, the date of its publication in the Official Gazette.

45. On 22 December 1995 the Presidency of the Republic of Bosnia and Herzegovina issued a Decree with force of law amending the Law on the Transfer of Resources of the Socialist Federal Republic of Yugoslavia into the property of the Republic. This Decree provided that contracts for the sale of apartments and other property concluded on the basis of *inter alia* the Law on Securing Housing for the JNA were invalid. This Decree also provided that questions connected with the purchase of real estate, which was the subject of annulled contracts, would be resolved under a law to be adopted in the future. This Decree came into force on 22 December 1995. It was adopted as law by the Assembly of the Republic of Bosnia and Herzegovina on 18 January 1996 (OG RBiH no. 2/96).

C. Relevant Legislation of the Federation of Bosnia and Herzegovina

1. The Law on the Cessation of the Application of the Law on Abandoned Apartments

46. The Law on Abandoned Apartments was repealed by the Law on Cessation of Application of the Law on Abandoned Apartments ("the Law on Cessation") which entered into force on 4 April 1998 and has been amended on several occasions thereafter (OG FBiH- nos. 11/98, 38/98, 12/99, 18/99, 27/99, 43/99, 11/01 and 56/01).

47. According to the Law on Cessation, no further decisions declaring apartments abandoned are to be taken (Article 1). All administrative, judicial and other decisions terminating occupancy rights based on regulations issued under the old law are invalid. Nevertheless, decisions establishing a right of temporary occupancy shall remain effective until revoked in accordance with the Law on Cessation. Pursuant to the amendment of the Law of 13 April 1999, the High Representative decided that any occupancy right or contract on use made between 1 April 1992 and 7 February 1998 is cancelled. A person occupying an apartment on the basis of a cancelled occupancy right or decision on temporary occupancy is to be considered as a temporary user (Article 2). Also contracts and decisions made after 7 February 1998 on the use of apartments declared abandoned are invalid. Any person using an apartment on the basis of such a contract or decision is considered to be occupying the apartment without any legal basis (Article 16).

48. The occupancy right holder of an apartment declared abandoned has a right to return to the apartment in accordance with Annex 7 of the General Framework Agreement. Persons who left their apartments between 30 April 1991 and 4 April 1998, the date when the Law on Cessation entered into force, shall be considered to be refugees or displaced persons under Annex 7 of the General Framework Agreement (Article 3 paragraphs 1 and 2).

49. Article 3a provides for an exception to Article 3, paragraph 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. It provides as follows:

> "the occupancy right holder shall not be considered a refugee if on April 30, 1991 s/he 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 s/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 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."

Article 3a of the Law on Cessation came into force according to the High Representative's Decision of 1 July 1999.

50. All claims for repossession shall be presented to the municipal administrative authority competent for housing affairs (Article 4). With a few exceptions not relevant to the present application, the time-limit for an occupancy right holder to file a claim for repossession expired 15 months after the entry into force of the new law, i.e. on 4 July 1999 (Article 5 paragraph 1). If no claim was submitted within that time-limit, the occupancy right is cancelled (Article 5 paragraph 3).

51. Upon receipt of a claim for repossession, the competent authority, normally the municipal administrative authority for housing affairs, had 30 days to issue a decision (Article 6) containing the following parts (Article 7 paragraph 1):

1. a confirmation that the claimant is the occupancy right holder;
2. a permit for the occupancy right holder to repossess the apartment, if there was a temporary user in the apartment or if it was vacant or occupied without a legal basis;
3. a termination of the right of temporary use, if there was a temporary user in the apartment;
4. a time-limit during which a temporary user or another person occupying the apartment should vacate it; and
5. a finding as to whether the temporary user was entitled to accommodation in accordance with the Law on Taking Over the Law on Housing Relations.

52. Following a decision on repossession, the occupancy right holder is to be reinstated into his apartment not earlier than 90 days, unless a shorter deadline applies, and no later than one year from the submission of the repossession claim (Article 7 paragraphs 2 and 3). Appeals against such a decision could be lodged by the occupancy right holder, the person occupying the apartment and the allocation right holder and should be submitted to the Cantonal ministry responsible for housing affairs within 15 days from the date of receipt of the decision. However, an appeal has no suspensive effect (Article 8).

2. The Law on Sale of Apartments with an Occupancy Right

53. Relevant to the current cases, Article 39a of the Law on Sale of Apartments with an Occupancy Right (OG FBiH nos. 27/97 and 11/98) states that a person who entered into a contract to purchase a JNA apartment, who holds the occupancy right over said apartment, and is legally using the apartment shall be registered as that apartment's owner with the competent court by an order of the relevant housing authority within the Federation Ministry of Defence. Article 39c states that Article 39a shall also apply to an occupancy right holder who has "exercised the right to repossess the apartment under the Law on Cessation of the Application of the Law on Abandoned Apartments."

54. Article 39d states that if an individual fails to realise their rights to the apartment with the Federation Ministry of Defence, they may initiate proceedings before the competent court.

55. Article 39e provides that an individual who is not entitled to repossession of the apartment in accordance with the provisions of Articles 3 and 3a of the Law on the Cessation of the Application of the Law on Abandoned Apartments and who entered into a legally binding contract on the purchase of an apartment with the JNA 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.

3. Law on Housing Relations

56. Relevant to the current case, Article 19 of the Law on Housing Relations (OG SRBiH nos. 14/84, 12/87 and 36/89; OG RBiH nos. 2/93; OG FBiH nos. 11/98, 38/98 and 19/99) provides that only one person may be the occupancy right holder over one apartment. If the contract on use of the apartment is concluded by one of the spouses who lives in the household, the other spouse shall also be considered the occupancy right holder.

4. The Law on Administrative Proceedings

57. Under Article 216 paragraph 1 of the Law on Administrative Proceedings (OG FBiH no. 2/98) the competent administrative organ has to issue a decision within 30 days upon receipt of a request to this effect. Article 216 paragraph 3 provides for an appeal to the administrative appellate body if a decision is not issued within this time limit (appeal against "silence of the administration").

V. ALLEGED AND APPARENT VIOLATIONS OF HUMAN RIGHTS

58. The applicants complain of the fact that the housing authority within the Federal Ministry of Defence of the Novo Sarajevo Municipality refuses to issue the order and documents pursuant to which the competent court will register the applicants as the owners of the apartment. They request the Chamber to recognise the contract on purchase and the registration of their ownership rights over the apartment in the landbooks. They also complain of the fact that they did not receive any response on the request for repossession of the apartment and occupancy right. The Chamber has considered and communicated these complaints under Articles 8 of the Convention and Article 1 of Protocol No. 1 to the Convention.

59. M.K., in addition, complains of being maltreated physically and mentally by the police when she was taken to the police station on 12 November 1998 for entering the apartment after breaking the seal. The Chamber has considered and communicated these complaints under Article 3 of the Convention.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

60. The respondent Party suggests to strike out the cases since the applicants live in the apartment since 11 November 1998 and therefore regained possession of it. According to the respondent Party, the case of M.K. should in any case be struck out because her case is already to be considered through the application of her husband.

61. With respect to admissibility, the respondent Party argues that the Chamber should declare the case inadmissible because the applicants failed to exhaust domestic remedies which are provided for in Articles 39 and 39e of the Law on Sale of Apartments with an Occupancy Right. According to Article 39d of the Law on Sale of Apartments with an Occupancy Right, the applicants could have brought a civil action before the competent court in order to establish the validity of the legal transaction related to the purchase of the apartment.

62. With respect to the merits, the respondent Party argues that there cannot be a violation of Article 6 of the Convention, since the applicants didn't apply to a court. Article 8 of the Convention has not been violated since the applicants left their home of their own free will, without interference from the respondent Party, and are now living in the apartment together with their family. According to the respondent Party, Article 1 of Protocol No. 1 to the Convention has not been violated by the organs of the respondent Party since the applicants have not been deprived of their right to regain the possession of their apartment. In a time of constant lack of housing space, the interference with the right to property with the purpose of securing housing for those who are in need is justified. As an active officer in the Army of Yugoslavia until 1999, Džavid Kurtišaj realised the right to an apartment

in another state. Finally, the respondent Party argues that the Chamber should bear in mind the margin of appreciation granted to contracting States under the Convention. The applicants are not discriminated against. According to the respondent Party, as there has been no violation of anyone of the above mentioned rights of the applicants, there cannot be discrimination in the peaceful enjoyment of these rights.

63. With respect to the complaint of M.K. of a violation of Article 3 of the Convention, the respondent Party argues that this part of the application is manifestly ill-founded because the applicant did not offer evidence in support of her statements. M.K. was taken to the Public Security Center Novo Sarajevo in a completely legal manner. Also, when M.K. signed her statement, she didn't complain of the behaviour of the policemen and did not mention the issue of bad treatment to any of the officials.

64. The respondent Party concludes that the case should be declared inadmissible or manifestly ill-founded.

B. The Applicants

65. The applicants maintain the complaints made in their applications. They are of the opinion that the members of the Military Housing Fund and the Police try by any means to deny the acquired right to property of the applicants.

VII. OPINION OF THE CHAMBER

A. The request to strike out the applications

66. In accordance with Article VIII(3) of the Agreement, "the Chamber may decide at any point in its proceedings to suspend consideration of, reject or strike out, an application on the ground that … (b) the matter has been resolved; … provided that such a result is consistent with the objective of respect for human rights."

67. The respondent Party is of the opinion that the case should be struck out since the applicants are living in the apartment and the matter has thereby been solved. However, since the applicants live in their apartment due to a provisional measure issued by the Chamber and the nature of a provisional measure is not of a definitive character, the case is not solved.

68. Moreover, the applicants complain that they have not been able to obtain registration of the apartment as their property. This situation remains unsolved.

69. The Chamber will therefore not strike out the cases or any part of them.

B. Admissibility

70. Before considering the merits of these cases the Chamber must decide whether to accept them, 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. Under Article VIII(2)(c), the Chamber shall dismiss any application, which it considers manifestly ill-founded.

1. The alleged ill-treatment of M.K.

71. M.K. alleges that she was maltreated by the police after she was taken to the police station for breaking the seal of the apartment. She claims to have been assaulted, threatened, verbally abused and forced to sing a document. The respondent Party on the other hand states that the procedure for questioning was applied and no irregularities have occurred. Despite these statements of the respondent Party, M.K. has failed to substantiate these allegations. She has failed to submit any evidence which could support her allegations, nor has she explained why she hasn't complained

of the alleged behaviour of the police at the moment that it allegedly happened or any time later on. Therefore, the Chamber finds that this part of the application does not disclose any appearance of a violation of the rights and freedoms guaranteed under the Agreement. It follows that this part of the application is manifestly ill-founded, within the meaning of Article VIII(2)(c) of the Agreement. The Chamber therefore decides to declare the application insofar as it relates to violations of Article 3 of the Convention inadmissible.

2. Exhaustion of domestic remedies

72. The respondent Party objects to the admissibility of the applications on the ground that the applicants have failed to exhaust domestic remedies. Specifically, the respondent Party argues that Džavid Kurtišaj has withdrawn his request for repossession of the apartment to the Administration for Housing Affairs in Sarajevo because he regained possession. However, at the same time, the respondent Party argues that the Federal Ministry of Defence has properly applied Article 3a of the Law on Cessation in deciding that the applicants are not entitled to regain possession of the apartment in question. Accordingly, the Chamber notes that, even if the applicants had sought to avail themselves of further domestic remedies available to them, they would have no prospect of success as a result of the application of Article 3a of the Law of Cessation in conjunction with Article 39 of the Law on Sale of Apartments with an Occupancy Right. In these circumstances, the Chamber is satisfied that the applicants cannot be required to exhaust any further domestic remedies for the purposes of Article VIII(2)(a) of the Agreement (see e.g., case no. CH/98/800, *Gogić*, decision on admissibility and merits of 13 May 1999, paragraph 46, Decisions January–July 1999). The fact that Džavid Kurtišaj has withdrawn his request for repossession of the apartment to the Administration for Housing Affairs doesn't influence this reasoning since, as the respondent Party submits, the Administration for Housing Affairs could only have denied his request.

73. The Chamber considers that no other ground for declaring the application inadmissible has been established. Accordingly, it decides to declare the remainder of the case admissible.

C. Merits

74. 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.

75. 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, including by any official or organ of the Parties, Cantons, Municipalities or any individual acting under the authority of such an official or organ. The Chamber has consistently found (see, e.g. case no. CH/97/45, *Hermas,* decision on admissibility and merits of 18 February 1998, paragraph 118, Decisions and Reports 1998) that the prohibition of discrimination is a central objective of the General Framework Agreement to which the Chamber must attach particular importance.

76. Before considering the merits of this case, the Chamber clarifies that it considers the legal reasoning relied on by the Plenary Chamber in *Miholić & Others* (cases nos. CH/97/60 et al., decision on admissibility and merits, delivered on 7 December 2001, hereinafter: *Miholić & Others Cases*) to be jurisprudence which is to be applied in similar cases.

77. The Chamber also determines that since Džavid Kurtišaj concluded a purchase contract, the Chamber will focus on his rights as the owner of the apartment in order to establish whether his rights have been violated. As a consequence, there is no need to examine his rights as an occupancy right holder. Since M.K. did not conclude such a contract and since she cannot derive any rights from the contract her husband concluded, the Chamber decides that the application of M.K. does not raise

a separate issue under Article 8 of the Convention or under Article 1 of Protocol No. 1 to the Convention. Therefore, the Chamber will not examine the alleged violations of these articles with regard to M.K.

1. Article 1 of Protocol No. 1 to the Convention and discrimination in the enjoyment of the right to peaceful enjoyment of possessions

(a) Right to peaceful enjoyment of possessions

78. Džavid Kurtišaj (hereinafter: the applicant) alleges a violation of his right to peaceful enjoyment of his possessions and discrimination in the enjoyment of these rights. Specifically, the applicant alleges that he has been discriminated against in that he was prevented from repossessing and registering his apartment that he purchased from the JNA, whereas other persons who purchased apartments from the JNA are permitted, according to Articles 39a and 39c of the Law on Sale of Apartments with an Occupancy Right, to repossess their apartments and register their ownership (see paragraph 53 above). Since the Chamber finds that in the present case, as in the *Miholić & Others Cases* (see paragraph 143), the analysis of the allegation of discrimination is inextricably linked with the question of the justification of the interference with the applicant's enjoyment of his claimed possessions, the Chamber will consider the complaint under Article 1 of Protocol No. 1 to the Convention and the complaint of discrimination together. 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."

79. Article 1 of Protocol No. 1 thus contains three rules. The first rule enunciates the general principle that one has the protected right to 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 among other authorities, *Blentić,* case no. CH/96/17, decision on admissibility and merits, paragraphs 31-32, Decisions 1996-1997; case no. CH/96/29, *Islamic Community*, decision on admissibility and merits of 11 June 1999, Decisions January-July 1999). Thus, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

(b) Prohibition of discrimination

80. In order to determine whether the applicant has been discriminated against, the Chamber must determine whether the applicant was treated differently from others in the same or relevantly similar situation. Any differential treatment is to be deemed discriminatory if it has no reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The Chamber has consistently held that there is a particular onus on the respondent Party to justify otherwise prohibited differential treatment which is based on any of the grounds explicitly enumerated in Article 1(14) of the Agreement (see e.g. cases nos. CH/97/67, *Zahirović*, decision on admissibility and merits of 10 June 1999, paragraphs 120-121, Decisions January-June 1999 and CH/98/1309 et al., *Kajtaz and others,* decision on admissibility and merits of 4 September 2001, paragraphs 154 and 159).

(c) The existence of "possessions" under Article 1 of Protocol No. 1

81. The Chamber must first consider whether the applicant had any rights under his contract that constituted "possessions" for the purposes of Article 1 of Protocol No. 1. In this regard, the Chamber refers to its decisions in *Medan and Others*, *Podvorac and Others*, *Ostojić and 31 Other JNA Cases* and *Huseljić and Others* (*loc. cit.* paragraphs 32-34, case no. CH/96/2 et al, decision on admissibility and merits of 14 May 1998, paragraphs 59-61, Decisions and Reports 1998, case no. CH/97/82 et al, decision and admissibility and merits of 13 January 1999, paragraph 91, Decisions January-July 1999, and case no. CH/98/159 et al, decision on admissibility and merits of 14 April 1999, paragraph 37, Decisions January-July 1999). In the aforementioned cases, the Chamber has 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 Chamber notes that in the present case Džavid Kurtišaj has concluded such a contract under factual circumstances similar to those obtaining in the cases cited and therefore sees no reason to differ from its previous jurisprudence. As considered in paragraph 77, M.K. does not have any rights relating to the apartment which qualify as possessions for the purpose of Article 1 of protocol No. 1.

(d) Interference with the applicant's rights

82. The effect of the Decree of 22 December 1995 (adopted as law) was to annul the applicant's rights under his purchase contract. The Law on Cessation and the Law on Sale of Apartments with an Occupancy Right continue to deprive the applicant of his rights. The housing authority within the Ministry of Defence has refused to issue the order for the applicant Džavid Kurtišaj's registration as owner in the Land Books, which is necessary pursuant to Article 39a of the Law on the Sale of Apartments with an Occupancy right. Accordingly, the applicant has been continuously "deprived of his possessions" by the Decree, the Law on Cessation and the Law on Sale of Apartments with an Occupancy Right. Although the applicant is *de facto* living in the apartment, this kind of possession is not "legally using the apartment" as Article 39a requires in order to be able to be registered as the owner. It is accordingly necessary for the Chamber to consider whether these deprivations are justified under Article 1 of Protocol No. 1 as being "in the public interest" and "subject to conditions provided for by law".

(e) In the public interest

83. The Chamber recalls that it found in the case of *Medan and others* that the Decree of 22 December 1995, which effectively deprived the applicants in these cases of their apartments, in the first instance, might in principle be regarded as having pursued a legitimate aim. However, the Chamber has consistently held in all of its JNA apartments decisions that, even accepting the need to equalise the rights of all occupancy right holders to purchase apartments, the Chamber is not satisfied that there was any form of social injustice of such a magnitude as to justify retroactive legislation annulling the purchase contracts concluded under the Law on Securing Housing for the JNA (see *Medan and other loc. cit.* paragraph 37, *Podvorac and Others*, case no. CH/96/2 et al, decision on admissibility and merits of 14 May 1998, paragraphs 59-61, Decisions and Reports 1998, *Ostojić and 31 Other JNA cases* case no. CH/97/82 et al, decision and admissibility and merits of 13 January 1999, paragraph 91, Decisions January-July 1999, and *Huseljić and Others* case no. CH/98/159 et al, decision on admissibility and merits of 14 April 1999, paragraph 37, Decisions January-July 1999). The same reasoning applies in the case of the applicant now before the Chamber. Accordingly, the Chamber finds, as in the earlier JNA cases decided on the merits, that the Decree of 22 December 1995 violated the rights of the applicant under Article 1 of Protocol No. 1 to the Convention.

84. The Chamber further notes that in July of 1999, based upon an agreement with the OHR, the result of which was Article 3a of the Law on Cessation and an amendment to the Law on Sale of Apartments, the Federation of Bosnia and Herzegovina has begun to implement the Chamber's prior JNA decisions and register owners of JNA apartments. However, the applicant in the case now pending before the Chamber is still unable to enjoy possession of his apartment due to the

application of Article 3a of the Law on Cessation in connection with Article 39 of the Law on Sale of Apartments.

85. Accordingly, the applicant in this case now before the Chamber is being treated differently from other persons who purchased and can now register their ownership over JNA apartments. Therefore, the central issue of this case, and what the Chamber must now examine, is whether the continuing interference or deprivation of the applicant's property rights ensuing as a result of the application of Article 3a on the Law on Cessation in connection with Article 39 of the Law of Sale of Apartments can be justified as "in the public interest".

86. 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).

87. 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 reasonable 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).

(f) Legitimate aims

88. With respect to the Law on Cessation in conjunction with the Law on Sale of Apartments with an Occupancy Right, the respondent Party has submitted that the aim of these laws is twofold. First that the Laws are aimed at correcting the factual inequalities that existed between occupancy right holders over JNA apartments and all other occupancy right holders. Second, the aim was to protect the rights of others, namely active fighters and their families or persons who were forced to leave their homes due to the war hostilities.

89. As in the *Miholić & Other Cases* (see paragraph 153 and 154), the Chamber accepts with respect to the first aim put forth, as stated above, that the aim of putting all holders of occupancy rights on an equal footing as regards their right to purchase apartments might be regarded as a legitimate one. However, now as then, there is no evidence that the applicant was placed in an especially privileged position. With respect to the second aim put forth, the Chamber can also accept, in principle, that the national authorities' decision to give aid to its war veterans and families can be regarded as a legitimate one. However, as the Chamber also found in the *Miholić & Others Cases,* there is no evidence that the property is necessarily being used for this stated purpose.

(g) Proportionality

90. Assuming that these reasons can be regarded as legitimate aims, the Chamber must now examine whether there was a reasonable relationship of proportionality between the means employed and the aims sought to be realised. In other words, it must be established whether the applicant had to bear "an excessive burden" in pursuit of the stated aims. In this respect, the Chamber notes that the effects of Article 3a of the Law on Cessation and Article 39 of the Law on Sale Apartments with an Occupancy Right was to solidify the annulment of the applicant's contractual rights. In the case of the applicant it is the second paragraph of Article 3a that applies and thereby constitutes the basis for the refusal of the Ministry of Defence to recognize him as occupancy right holder under Article 3a. This refusal in turn bars the issuance of an order for his registration as owner. The Chamber will therefore look closely at the second paragraph of Article 3a, which is the key to the continued failure to recognize the applicant's rights under the purchase contract.

(h) Active military service in a foreign army after 14 December 1995

91. The second paragraph of Article 3a, by excluding them from being considered as refugees, denies persons who remained in active military service outside of Bosnia and Herzegovina after 14 December 1995 from registering and repossessing their JNA apartment. In this context, the respondent Party has stated that persons who fall into this category can have their housing needs met elsewhere. Therefore, considering the housing shortage in the Federation and the categories of persons in greater need for a solution of their housing problem, the deprivation of their right to the apartment is justified. However, as the Chamber previously has held in the *Miholić & Others Decison,* the fact that someone might possibly obtain an occupancy right elsewhere cannot bar that person from exercising their rights under a valid purchase contract in Bosnia and Herzegovina. The Chamber therefore cannot find that excluding this category of persons from the peaceful enjoyment of their possessions in Bosnia and Herzegovina is proportional to the stated aims.

92. Additionally, the Chamber finds that persons who served in the JNA and continued to serve in a foreign army are treated differently from former JNA members who joined the Army of the Republic of Bosnia and Herzegovina and then joined the Federation Army, with respect to recognition of valid purchase contracts. The Chamber considers that there is no reasonable relationship of proportionality with respect to this differential treatment and the accomplishment of the stated goals. It could potentially be reasonable and necessary to bar persons serving in a foreign army from the exercise of certain rights, however service in a foreign army is not a basis for stripping a person of an otherwise valid property contract. As such, the Chamber finds that the applicant, who has not been able to register his purchase contract and, as a consequence of that, to peacefully enjoy his apartment under this provision of Article 3a, has been discriminated against.

(i) Conclusion

93. The Chamber finds that the applicant, by the application of Article 3a of the Law on Cessation in connection with Article 39e of the Law on the Sale of Apartments with an Occupancy Right**,** was made to bear an "individual and excessive burden" that simply cannot be justified. This is particularly clear in light of the fact that the reasons for denying the applicant the enjoyment of his property rights were based, in part, on discriminatory grounds. As such, these interferences can not be considered to be in accordance with the public interest. The Chamber, therefore, finds a violation of the right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the Convention as well as discrimination in the enjoyment of this right, the respondent Party being responsible for those violations.

2. Article 8 of the Convention

94. The applicant alleges violations of his 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.
>
> 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."

95. Considering that the applicant is de facto living in the apartment, which is confirmed by the respondent Party which didn't state that the applicant would have been evicted if the Chamber had not issued the order for provisional measures, the Chamber finds it unnecessary to examine whether there has also been a violation under Article 8 of the Convention.

VIII. REMEDIES

96. Under Article XI(1)(b) of the Agreement the Chamber must address the question of what steps shall be taken by the respondent Parties to remedy the established breaches of the Agreement. In this connection the Chamber shall consider issuing orders to cease and desist, monetary relief as well as provisional measures. The Chamber is not necessarily bound by the claims of an applicant.

97. The applicant requests to be registered in the land books as the owner of the apartment. The breaches of Article 1 of Protocol No. 1 which the Chamber has found, arose initially from the Decree of 22 December 1995 and continued as a result of the Laws of the Federation, namely, Article 3a of the Law on Cessation of the Application of the Law on Abandoned Apartments and Article 39 of the Law on Sale of Apartments with an Occupancy Right. In these circumstances, the Chamber considers that it is the responsibility of the Federation to take necessary legislative or administrative action to render ineffective the annulment of the applicant's contract and enable the applicant to register his ownership over his apartment, thus permitting him to exercise his property rights. It will therefore make an order against the Federation to that effect.

98. Considering the fact that the applicant is de facto living in the apartment, the Chamber will not decide upon the request for reinstatement. The Chamber, however, prolongs the order for provisional measures issued on 2 April 2001 until the applicant is registered in the land books as the owner of the apartment.

99. The Chamber will further order the respondent Party to report to it within three months of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure on the steps it has taken to comply with this decision.

100. The applicants filed a claim for compensation because of material damage, suffered fear and the charges brought against M.K. and the maltreatment as a result of the interrogations undergone by her. The applicants didn't claim a specific amount of compensation.

101. The respondent Party is of the opinion that the claim for compensation is inadmissible because the claim is ill-founded and unsubstantiated by material evidence.

102. The Chamber considers that this decision and the finding of a violation of the rights of the applicant under Article 1 of Protocol No. 1 to the Convention constitute sufficient satisfaction. The Chamber therefore rejects the claim for compensation for non-pecuniary damage. Since the claim for pecuniary damage is not substantiated, this claim will also be rejected. With regard to compensation related to the alleged maltreatment of M.K., the Chamber considers that it can only award compensation if it finds a violation. It will therefore not award any compensation on account of this complaint.

IX. CONCLUSIONS

103. For the above reasons, the Chamber decides,

1. unanimously, to declare the application of M.K. inadmissible in respect of Article 3 of the Convention;

2. unanimously, to declare the remainder of the applications admissible;

3. by 4 votes to 3, that the right of Džavid Kurtišaj to peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1 to the Convention has been violated by the respondent Party and, further, that he has been discriminated against in his right to peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1 to the Convention, the respondent Party thereby being in breach of Article I of the Agreement;

4. unanimously, that it is not necessary to examine the application of Džavid Kurtišaj under Article 8 of the Convention;

5. by 5 votes to 2, to order the respondent Party to take all necessary steps, within 3 months of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, by way of legislative or administrative action, to render ineffective the annulment of the contract of Džavid Kurtišaj and to allow for registration of ownership of his apartment;

6. by 5 votes to 2, that the order for provisional measures issued on 2 April 2001 will remain in force until Džavid Kurtišaj is registered in the land books as the owner of the apartment;

7. unanimously, to order the respondent Party to report to it within 3 months of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure on the steps taken by it to comply with the above orders.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

Annex I Dissenting opinion of Mme. Michèle Picard

ANNEX I

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mme. Michèle Picard.

DISSENTING OPINION OF MME. MICHÈLE PICARD

I disagree with the majority that there has been a violation of the applicant's right to property in this case for the reasons that were stated in the partly dissenting opinion of Mr. Nowak, which I joined, in the Miholić decision (*Miholić & Others*, cases nos. CH/97/60 et al., decision on admissibility and merits, delivered on 7 December 2001). As in the Miholić case, the applicant bought the apartment only a few weeks before the outbreak of the war. He left Bosnia and Herzegovina with the JNA in June 1992 and remained in active service of the army of Yugoslavia until 1999. The non-recognition of his contract of purchase by the authorities of the Federation of Bosnia and Herzegovina is, in my opinion, within the broad margin of appreciation a state enjoys under Article 1 of Protocol No. 1 to the Convention.

(signed)
Michèle Picard