# DECISION ON THE ADMISSIBILITY AND MERITS
# (Delivered on 9 November 2000)

## CASE No. CH/98/1062

## THE ISLAMIC COMMUNITY IN BOSNIA AND HERZEGOVINA

**against**

## THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 11 October 2000 with the following members present:

Mr. Giovanni GRASSO, President
Mr. Viktor MASENKO-MAVI, Vice President
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Vitomir POPOVIĆ
Mr. Mato TADIĆ

Mr. Peter KEMPEES, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

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

## I. INTRODUCTION

1. In 1992 the Zamlaz mosque, the Riječanska mosque and the Divič mosque in Zvornik were destroyed. The Islamic Community in Bosnia and Herzegovina (henceforth "the Islamic Community" or "the applicant") maintains that the respondent Party violates its rights under Article 9 of the European Convention on Human Rights and Article 1 of Protocol No. 1 to the Convention by preventing it from using the sites and reconstructing the mosques. In particular, the application raises the question whether the applicant and its members have been discriminated against in the enjoyment of the rights guaranteed by the aforementioned provisions.

## II. PROCEEDINGS BEFORE THE CHAMBER

2. The application was introduced and registered on 12 November 1998. The Panel considered the case on 7 and 9 July 1999. On 10 July 1999 an order for provisional measures was issued with regard to the site of the Riječanska mosque, ordering the respondent Party to refrain from any construction on this site and not to permit any such construction by other parties.

3. The application was transmitted to the respondent Party on 13 July 1999. On 18 August 1999 the respondent Party's written observations were received. They were transmitted to the applicant on the same day.

4. On 20 August 1999 the applicant's reply was received. It included a request for further provisional measures in relation to the site of the Riječanska mosque. Furthermore, the applicant requested the Chamber to order the respondent Party to remove a building which had been constructed on the Zamlaz mosque site. This reply was subsequently transmitted for information to the respondent Party. On 21 September 1999 the applicant repeated the request for further provisional measures. The Chamber rejected it on 24 September 1999 and transmitted it to the respondent Party on 28 September 1999. On 21 October 1999 the Chamber sent a letter to the respondent Party reminding it of the order for provisional measures issued on 10 July 1999. On 18 January 2000 the respondent Party responded to this reminder stating that no construction work was carried out on the site of the former Riječanska mosque. This submission was transmitted to the applicant on 26 January 2000 and answered by the applicant on 3 February 2000.

5. On 7 April 2000 the applicant submitted a new request for provisional measures concerning a special lot (944/2) next to the site of the former "Riječanska" mosque. Furthermore, the applicant extended its complaints to the site where the Divič mosque once stood asking the Chamber to order the respondent Party to remove the Orthodox church which had been built there. Additionally, this submission contained a compensation claim in the amount of 100,000 *Konvertibilnih Maraka* (KM). According to information received from OSCE, lot 944/2 does not comprise property of the applicant. On 13 April 2000 the President of the Panel rejected this request for provisional measures.

6. On 14 April 2000 the Chamber requested further information from the applicant. A reply was received on 24 April 2000. On 12 May and 7 June 2000 the Chamber reconsidered the present cases and decided to hold a joint public hearing together with another case pending before it which concerns former mosque sites in Bijeljina (CH/99/2656). The hearing was held in Bijeljina on 4 July 2000. The following witnesses summoned by the Chamber gave evidence at the hearing: Mr. Minja Radović, Head of the Zvornik Urbanism Department; Mr. Stevo Savić, Mayor of the Zvornik Municipality and Mr. Husein Kavazović, Mufti of Tuzla. Mr. Smajo Kapidžić, an eyewitness from Zvornik suggested by the applicant, was summoned and failed to appear. Two geodetic engineers, Mr. Dragan Jovanović and Mr. Marko Lozić, were appointed as expert witnesses. They submitted a written report on certain questions before the hearing and also gave evidence at the hearing. The OSCE Human Rights Officer in Zvornik was asked to prepare statements on various questions as well. OSCE decided to prepare a written *amicus curiae* report. The applicant was represented by Mr. Esad Hrvačić, a lawyer from Sarajevo. The respondent Party was represented by Mr. Stevan Savić.

7. Following the oral hearing, a further order for provisional measures was issued on 7 July 2000 with regard to the site of the former Riječanska mosque, ordering the respondent Party to stop

the construction of buildings or objects of any nature on parcel 944/2. On 10 August 2000 the respondent Party asked the Chamber to withdraw this order for provisional measures stating that the building constructed there by the company "19 December" does not encroach on lot 944/2. On 2 October 2000 the Chamber received an additional written expert opinion from the expert witnesses withdrawing their statement given during the public hearing on the basis of which the order for provisional measures was issued and confirming the above opinion of the respondent Party. On 11 October 2000 the Chamber decided nonetheless to maintain its order for provisional measures of 7 July 2000 as it was not touched by the new information received on 2 October 2000.

## III. ESTABLISHMENT OF THE FACTS

### A. Facts as presented by the applicant

#### 1. Site of the former Zamlaz mosque

8. According to the applicant the Islamic Community is the owner of the site of the former Zamlaz mosque. The applicant claims that, after the entry into force of the Dayton Agreement, the respondent Party constructed a multi-storey building on this site without previously informing the applicant. The applicant states that the provisions on the basis of which the construction was undertaken were not known to it. The applicant claims that the new building prevents it from rebuilding the mosque which formerly stood on this site.

#### 2. Site of the former Riječanska mosque

9. The applicant is of the opinion that it is the owner of the site of the former Riječanska mosque. The applicant claims that an enclosure has been erected around that site and that construction work is planed on it. Moreover, the applicant complains that market stands have been erected there. Furthermore, the applicant points out that the construction of a handicraft centre has been commenced by the company "19 December" and that the applicant's plot no. 944/2 (32 $m^2$) next to the site of the former Riječanska mosque has been usurped for that purpose since the beginning of 2000.

#### 3. Site of the former Divič mosque

10. The applicant states that the Islamic Community is the owner of the site where the Divič mosque was formerly situated. However, a Serb Orthodox church was built on that location. The applicant claims that the new building prevents it from rebuilding the former mosque.

### B. Facts as presented by the respondent Party

#### 1. Site of the former Zamlaz mosque

11. In its written submissions the respondent Party states that the site of the Zamlaz mosque constitutes publicly owned land, pointing out that the site was formerly socially owned, and that the Vakuf of the Zamlaz mosque retained only a right to use it which right allegedly does not exist any longer. Notwithstanding, the representative of the respondent Party declared during the public hearing on 4 July 2000 that the applicant, as the previous owner of the mosque building, still has a priority right to use the site for construction. However, he emphasised that the applicant has never complied with the formal procedure in order to get the necessary licenses to rebuild.

12. The respondent Party states that the multi-storey building which has been constructed on the Zamlaz site was authorised during a session of the Municipal Assembly.

#### 2. Site of the former Riječanska mosque

13. The respondent Party contends in its written submissions that the site of the Riječanska mosque constitutes publicly owned land. The site was formerly socially owned, and the Vakuf of the

Riječanska mosque retained only a right to use it which right allegedly does not exist any longer. However, during the public hearing of 4 July 2000 the representative of the respondent Party conceded that the applicant, as the previous owner of the mosque building, still has a priority right to use the site for construction.

14. The respondent Party denies that construction is planned or taking place on the Riječanska site and states that no building license has been issued for that purpose. Particularly, it emphasises that the company "19 December" is constructing its handicraft centre exclusively on lots 933/1, 930/1 and 930/2, which are owned by this company and which are located 10 meters away from lot 944/2.

15. However, the respondent Party admits that the site is currently illegally used as a car park by the Zvornik residents, announcing that this is going to be forbidden by the municipal authorities. Furthermore, the respondent Party states that in the beginning of 2000 the company "19 December" began work to build a new market on a nearby site and that therefore some small market stands have provisionally been moved to the site of the Riječanska mosque. They will be taken back to their former place as soon as the new town market is finished.

### 3. Site of the former Divič mosque

16. The respondent Party contends that the site of the Divič mosque constitutes publicly owned land. The site was formerly socially owned, and the Vakuf of the Divič mosque retained only a right to use it which right allegedly does not exist any longer. However, during the public hearing of 4 July 2000 the representative of the respondent Party conceded that the applicant, as the previous owner of the mosque building, still has a priority right to use the site for construction.

## C. Written report and oral observations of expert witnesses

### 1. Status of the sites according to the land book and the cadastre register

17. It appears from the written reports of the geodetic engineers Mr. Dragan Jovanović and Mr. Marko Lozić that the site of the former Zamlaz mosque (i.e. lots 6/41, 6/315 and 6/316) is registered in the land book – which contains information on the legal status of the sites - as state property with a right of use in favour of the state-owned company "ODGP Inženjering Zvornik". This is in pursuance of a procedural decision of the Assembly of the Municipality of Zvornik of 30 June 1997. The location of the former Riječanska mosque (i.e. lot 2/131) is registered in the land book as state property with a right of use in favour of the applicant. The site of the former Divič mosque (i.e. lots 10/349 and 10/348) is registered in the land book as property owned by the applicant.

18. According to the cadastre register – which contains information on the factual status of the sites – the Zamlaz site is in the possession of "ODGP Inženjering Zvornik", the Riječanska site is in the possession of the applicant and the Divič site in the possession of the Serb Orthodox church.

### 2. Status of the sites according to building law

19. According to the written report of the expert witnesses, for the area of Zvornik there is an urban plan called "Zvornik 2000" which was revised on 9 March 1989 and a regulatory plan of 1976 called "Center".

20. The plan "Zvornik 2000" does not indicate the Zamlaz mosque although the mosque still existed when the plan was issued in 1989. It instead places the site of the former Zamlaz mosque within a zone of "high-rise construction". Correspondingly, on 30 June 1997 the municipality of Zvornik issued a procedural decision allocating the site in question to "ODGP Inženjering Zvornik". On 3 February 1998 "ODGP Inženjering Zvornik" received a building license. This occurred despite the fact that – according to the report submitted by OSCE - the graveyard which was a part of the mosque building was still intact in 1998.

21. The Riječanska mosque is indicated in the urban plan "Zvornik 2000".

22. "Zvornik 2000" provides for a religious object on the site of the former Divič mosque. On 9 July 1997 an urbanistic license for the construction of a Serb Orthodox church was issued. This building was constructed although there was apparently no building license and it is used as a church although there is no proper authorisation to do so. According to the expert witnesses, it was not possible to issue a building license for the church because such a license can only be given to the owner. Yet the site of the former Divič mosque (i.e. lots 10/349 and 10/348) is registered in the land book as property owned by the applicant. On the other hand, it was impossible for the authorities to issue authorisation for the use of the building as well because there was no building license.

### 3. Factual situation on the former mosque sites

23. It appears from the written reports of the expert witnesses and from their statements during the public hearing of 4 July 2000 that, on the site of the former Zamlaz mosque, a multi-storey building has been constructed. It contains business premises in the basement and apartments in four floors. The site of the former Riječanska mosque is partly used as a car park, partly as a market place with kiosks and streets on it. Lot 944/2 is not being built on by the company "19 December" (see paragraph 7 above). The Serb Orthodox church at the site of the former Divič mosque was built in 1998.

## D. Written *amicus curiae* report from OSCE

24. It appears from the written report of OSCE that the return process to the town of Zvornik is "rather slow but that there have been several minority returns registered".

25. According to OSCE, the Zamlaz mosque was destroyed in 1992. Since that time the area where the mosque was located has been used as a parking space. OSCE points out that the graveyard in the vicinity of the mosque was still intact until 1998. During the spring and summer months of 1998 "ODGP Inženjering Zvornik" started to undertake preparatory activities on the land in order to proceed with the construction of a residential building. An OSCE officer was an eyewitness when the employees of the above company removed the remaining parts of the graves where the Efendies were buried. On 25 June 1999 inhabitants moved into the new flats.

26. In relation to the Riječanska mosque OSCE reports that is was destroyed by Serb paramilitary forces in 1992 as well. No construction works are going on on the site, which is temporarily being used as a market place.

27. In relation to the Divič mosque OSCE informs the Chamber that it was destroyed by Serb paramilitary forces in 1992. In the meantime a Serb Orthodox church has been erected on the site.

## E. Oral testimony

### 1. Mr. Minja Radović (witness)

28. Mr. Radović was the Chief of the Zvornik Urbanism Department until 30 June 2000 and has previously worked with different international organisations. He is familiar with the urban and regulatory plans of the town of Zvornik. According to him none of the plans was changed after the end of the war. Mr. Radović testified that the urban plan indicates the Riječanska mosque. However, the Zamlaz mosque is not provided for. This mosque "was not planned to be kept but it was provided there to be a zone of high-rise construction". In relation to the Divič mosque Mr. Radović explained to the Chamber that it is not possible from the urban plan to see "whether it is provided for the mosque to remain".

29. In relation to the fact that the former site of the Zamlaz mosque was allocated to the company "ODGP Inženjering Zvornik" when the graveyard was still intact, Mr. Radović stated that this graveyard had not been in active use for the last 30-50 years. He explained to the Chamber that construction on graveyards is forbidden only for a period of 20 years after the last burial.

30. Concerning the Serb Orthodox church which was built on the site of the former Divič mosque Mr. Radović confirmed that there was only an urbanistic license for it but no building license. Thus the construction of the church was not in accordance with the law of the Republika Srpska.

### 2. Mr. Stevo Savić (witness)

31. Mr. Savić was Mayor of the Zvornik Municipality from January 1999 until the municipal elections of April 2000. He is currently working for Telekom Republika Srpska. He testified that all mosques in Zvornik were detroyed in 1992 and that currently not a single mosque is in use. Mr. Savić stated that during his time as Mayor the applicant requested neither the repossession of the mosque sites nor any permission to reconstruct the mosques. He had only had one "informal" meeting with the Mufti of Tuzla in which the problem of the detroyed mosques was discussed.

### 3. Mr. Husein Kavazović (witness)

32. Mr. Kavazović, Mufti of Tuzla since October 1992, informed the Chamber that since 1992 the greatest part of the Zvornik Municipality had been ethically cleansed. There had been a certain return process to the Municipality of Zvornik for the last two years but still not a single Muslim was living in the actual city of Zvornik.

33. Mr. Kavazović testified that the applicant had never submitted a formal request to the competent authorities in order to obtain permission for the reconstruction of the destroyed mosques. He was of the opinion that the applicant must be enabled to reconstruct those buildings without any formal procedures, pointing out that the applicant did not plan new buildings but wished only to reconstruct the facilities belonging to it. However, in actual fact the applicant had never tried to rebuild the destroyed mosques because the respondent Party had not enabled the applicant to approach the sites where the mosques once stood. Concerning the site of the former Zamlaz mosque Mr. Kavazović added that the applicant could not reconstruct the mosque because a multi-storey building had been erected there without the applicant's knowledge. The same applied to the Divič site where a church had been built. However, Mr. Kavazović emphasised that the applicant "tried in some way to stop the authorities of Zvornik from attacking and endangering the sites". In case of the Zamlaz site, the applicant had sent a letter to the Mayor of Zvornik requesting that the construction work be stopped.

34. In this context, Mr. Kavazović testified that the respondent Party "was not ready to talk about the mosques in Zvornik". He referred to the Chamber's decision in the "Banja Luka case" (i.e. case no. CH/96/29, *The Islamic Community in Bosnia and Herzegovina*, decision on the admissibility and merits of 11 June 1999, Decisions January-July 1999) and stressed that it had never been complied with by the respondent Party. Furthermore, he pointed out that the applicant had not tried to stop the disturbances on the sites in question before the judicial bodies because "there is no independent judiciary in the Republika Srpska".

## F. Relevant domestic law

### 1. Continuation of laws enacted prior to the General Framework Agreement

35. Under Article 2 of Annex II ("Transitional Arrangements") to Annex 4 to the General Framework Agreement (the Constitution of Bosnia and Herzegovina) all laws, regulations and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution of Bosnia and Herzegovina enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina.

36. According to Article 12 of the Constitutional Law on the Implementation of the Constitution of the Republika Srpska (Official Gazette of the Republika Srpska, No. 21/92), laws and other regulations of the then Socialist Federal Republic of Yugoslavia (SFRY) and the Socialist Republic of Bosnia and Herzegovina (SRBiH) which are consistent with the Constitution of the Republic and not inconsistent with laws and regulations enacted by the Assembly of the Serb People in Bosnia and Herzegovina, i.e. the People's Assembly, shall be applied until the issuance of relevant laws and

regulations of the Republika Srpska.

### 2. Religious communities

37. The status of a religious community is regulated by the Law of SRBiH on the Legal Status of Religious Communities (Official Gazette of SRBiH, No. 36/76). The religious communities are separate from the state (Article 3). Religious communities, their bodies or organisations are not allowed to become involved in matters of social significance or to establish organs for the purpose of such activities. An exception is made for the preservation of objects belonging to the religious communities and forming part of the cultural-historic and ethnological heritage (Article 6).

38. Religious communities may, in accordance with the law, own and acquire buildings and other property which serve the needs of worship and other religious matters or are needed to accommodate staff (Article 27).

39. For the purpose of construction and adaptation of religious objects (buildings) the religious communities are obliged to provide the necessary documentation as well as to obtain permission by the competent administrative authority (Article 28).

40. Article 28 of the Republika Srpska Constitution guarantees freedom of religion. Religious communities shall be equal before the law and shall be free to conduct religious activities and services. The Serb Orthodox church shall be the church of the Serb people and other peoples of Orthodox religion. The state shall support the Orthodox church materially and cooperate with it in all fields and, in particular, in preserving, cherishing and developing cultural, traditional and other spiritual values.

### 3. The Law on Building Land

41. The Law on Building Land (Official Gazette of SRBiH, Nos. 34/86 and 1/90; Official Gazette of Republika Srpska, Nos. 29/94 and 23/98) provides that no right of ownership can exist over building land in a city or town (Article 4). Building land cannot be alienated from social ownership, but rights defined by law may be gained over it (Article 5). The municipality governs and disposes of building land subject to conditions provided by law and regulations issued pursuant to the law (Article 6). Rights in respect of building land shall be asserted in proceedings before a regular court if not otherwise stated by law (Article 11).

42. The former owner of building land transferred into social ownership enjoys a temporary right to use land not yet used for construction, a priority right to use land not yet built on for the purpose of construction as well as a permanent right to use building land already used for construction as long as the building continues to exist on the land (Article 21(1) and (3) and Article 40(1)).

43. The permanent right to use the land may be transferred, alienated, inherited or mortgaged only together with the building. In case of expropriation of the building, the procedural decision on expropriation shall terminate the previous owner's right of permanent use of the land under the building and of the land serving for the regular use of the building (Article 42).

44. Subject to the above-mentioned possibility of expropriation, the permanent right to use the land lasts as long as the building remains on it. If the building is removed on the basis of a decision of a competent organ because of its deterioration, or is destroyed by *vis major*, its owner has the priority right to use the land for construction on condition that a regulatory plan or an urban development plan envisages the construction of a building over which one can have a property right. The owner of a building who removes it in order to build a new one has a similar priority right to use the land, again provided that the relevant plan envisages such construction (Article 43).

45. V*is major* may be defined as any natural occurrence or act committed by a human being which could not have been foreseen or prevented and causes damage. For a natural occurrence or act committed by a human being to qualify as *vis major* it is necessary: (1) that the occurrence is external to the dispute between the parties but influences their legal relationship; (2) that the occurrence was impossible to predict or prevent; and (3) that the occurrence has harmful

consequences either in terms of causing damage or in preventing a party from complying with its obligations (*Pravni Leksikon* (legal dictionary), *Savremena Administracija*, Belgrade 1970, p. 1289).

### 4. The Law on Environmental Planning of the Socialist Republic of Bosnia and Herzegovina

46. Under Article 11 of the above Law on Environmental Planning (Official Gazette of SRBiH, Nos. 9/87, 23/88, 24/89, 10/90, 14/90, 15/90, 14/91) a plan shall, as a rule, determine areas reserved for future development during or after the period covered by the plan. The purpose of such areas does not have to be specified. In reserved areas construction is prohibited. Reserved areas may be designated for a temporary purpose.

47. Natural and cultural-historic heritage areas shall be protected by special regulations with a view to preserving the historical authenticity, shape, relation and visual space of the protected area, entity or building (Articles 36 and 45). Protection of cultural-historic heritage shall involve, *inter alia*, conservation and restoration works. Legal protection is assured by the compulsory drafting of relevant plans and constant supervision by the responsible competent service (Article 46).

48. Plans are classified either as development plans (area plan, urban plan or urban order) or as operational plans (regulatory plan and urban project). Development plans are adopted for 10 years or longer. Operational plans regulate in detail the utilisation of land, construction and physical planning (Article 77).

49. The regulatory plan is the basis for any urban planning approval (e.g., a permit for construction or renovation) and regulates the detailed purpose of the areas covered, including any reconstruction of existing structures, monuments and structures of cultural-historic and natural heritage (Articles 89(1) and (3), 90(4) and 91(1) and (2)). A regulatory plan includes part of a city, smaller settlements and other areas under construction or cultivation.

50. The competent political assembly shall issue a preliminary decision to proceed with the development or revision of a regulatory plan. A draft plan shall be subject to public consultations following which a final draft shall be presented to the assembly (Articles 100(1) and 105(1)). The adopted plan shall be published in the Official Gazette (Article 107(1)).

51. Urban planning approval shall be given on the basis of the regulatory plan. Approval for temporary objects or temporary purposes shall be given only in exceptional cases and shall be limited in time. Approval must be given by the competent municipal body within 30 days from the date when the request was submitted, or within 60 days, if the request concerns construction and works which require the obtaining of prescribed agreements (Articles 123(1), 129(1), 131(1) and 134(4)). The Law on Administrative Procedure shall be applied in any proceedings regarding requested planning approval, unless otherwise prescribed by provisions of the Law on Environmental Planning (Article 135(1)).

### 5. The Republika Srpska Law on Physical Planning

52. The Law on Physical Planning in Republika Srpska entered into force on 25 September 1996 (Official Gazette of RS, Nos. 19/96, 25/96, 25/97, 3/98 and 10/98). It replaced the previously mentioned law of SRBiH.

53. According to Article 32, the organization, physical planning and use of an area and the construction of a settlement is governed by the adoption and the carrying out of plans. Plans within the sense of this law are: physical plans (physical plan of the Republic, physical plan of an area, physical plan of a municipality), urban development plans, regulatory plans and urban projects. Physical and urban development plans are long-term strategic planning documents by which basic goals, directions and instruments of development in an area and a settlement, respectively, are determined, and such plans are adopted for a period no shorter than 10 years. Regulatory plans and urban projects are technical regulatory planning documents which determine and define the conditions for the design and construction of a facility and upon which the area is directly adjusted for a planned purpose.

54. Pursuant to Article 46, the basis for the creation of a Regulatory Plan in an urban area is the Urban Development Plan, and for the areas outside the borders of an urban area such base is the Municipal Physical Plan and Regional Physical Plan, respectively. A Regulatory Plan is the basis for the creation of an Urban Project, for the issuance of an Urban Plan Approval, for the provision of construction land and for the parcelling of it as well as for other interventions in an area covered by the Plan. The Regulatory Plan is adopted by the Municipal Assembly (Article 49). According to Article 53, the preparation and creation of plans and their adoption shall take place according to this law and other regulations passed on the basis of it. The Minister shall prescribe more precisely the procedure and the way of preparation and creation of plans. Urban planning approval is governed by the Law on Administrative Procedure unless otherwise provided for (Article 80(1)).

55. According to Article 55, the competent body of the Municipality may prepare the necessary plans itself or designate some other body or organisation to be the preparer of the plan. During the formulation of a plan the preparer of the plan is obliged to provide cooperation and coordination with all interested parties, bodies or organizations competent for planning and programming development affairs. The mentioned bodies and organizations are obliged to provide all available data and other information necessary for the formulation of a plan (Article 56). According to Article 58, the assemblies competent to issue plans can appoint a commission for the design of a plan ("commission of the plan").

56. Under Article 60, the preparer of the plan determines the draft of the plan and exposes it for public scrutiny for at least 30 days. Opinions and written submissions on the draft plan can be given within this time limit. Simultaneously to the exposition of the draft plan for public scrutiny, a public discussion is to take place. The public must be informed at least eight days before of the place, the duration and the way of the public presentation of the draft plan. After the public scrutiny and after taking positions upon the written remarks to the draft plan the preparer of the plan establishes the proposed plan and delivers it to the competent Assembly for its adoption and issuance. Together with the proposed plan, the preparer of the plan is obliged to deliver to the competent Assembly reasoned opinions on the remarks to the draft plan which could not be accepted.

57. Pursuant to Article 62, the minister approves the proposal of the physical and urban plans, as well as the proposal of the regulatory plans before the adoption of the plan. He may refuse to approve those plans when he determines that the procedure for their issuance and the contents are not harmonized with the law and regulations issued pursuant to the law, that is, when he determines that the plans are not harmonized with the plans which present the basis for their design. If the minister does not issue an approval within 60 days or does not inform the Assembly competent for adopting and issuing the plan of the established irregularities, it shall be considered approved.

58. Article 64 orders that the decision on adoption of the plan shall be published in the Official Gazette. The plan is a public document, unless otherwise decided for some of its parts. It shall be exposed for constant public scrutiny with the administrative body competent for urban affairs. According to Article 68, changes and amendments to the plan are done through the procedure which is provided for adopting the plan. It can be seen from Article 68 that plan reviews are initiated by the preparer of the plan or by the minister. The plan review is performed in the way and through the procedure prescribed for plan design.

59. The construction of a building, the performance of any construction or other works at the surface or under the surface of the ground, as well as any change of purposes of the building land or the building is considered only after a previously obtained procedural decision on the approval of construction (hereinafter: building license, Article 90).

60. The administrative organ competent for building affairs may, either *ex officio* or at the request of an interested party, order the demolition of a building, or part thereof, if it has been established that due to its worn-out state, *vis major*, war activities or large-scale damage the object can no longer serve its purpose or is dangerous to the life or health of people, surrounding objects or traffic. The administrative organ may impose conditions and measures for the demolition. An appeal against a demolition order has no suspensive effect (Article 117).

## IV. COMPLAINTS

61. The applicant claims a violation of its rights under Articles 9 of the Convention and 1 of Protocol 1 to the Convention, as well as discrimination in the enjoyment of the rights guaranteed by those Articles. It complains that there is currently not a single mosque in Zvornik where its members can adequately worship.

## V. SUBMISSIONS OF THE PARTIES

### A. The respondent Party

62. The respondent Party states that the applicant did not exhaust the available domestic remedies. Moreover, it asks the Chamber to declare the application inadmissible as manifestly ill-founded and to withdraw the orders for provisional measures issued in relation to the Riječanska site on 10 July 1999 and on 7 July 2000.

### B. The applicant

63. As to the exhaustion of local remedies, the applicant states that, in light of the previous practice by Republika Srpska authorities, there was no effective domestic remedy available to protect its interests. The applicant stresses that its property was usurped with the connivance of the very bodies it was supposed to apply to. Furthermore, the applicant explains that it feared that such action might have been seen as a provocation by the respondent Party and might have produced the opposite effect to the aim sought by the applicant.

64. As to the question of ownership the applicant stresses that the destruction of the mosques was intentionally caused by the authorities of the respondent Party which where then in power. The applicant is of the opinion that it cannot have lost the ownership of the religious facilities as a consequence of the unlawful destruction because that would retrospectively legalise the destruction.

## VI. OPINION OF THE CHAMBER

### A. Admissibility

#### 1. Competence *ratione personae*

65. Before considering the merits of the case the Chamber must decide whether to accept the case, taking into account the admissibility criteria set out in Article VIII of the Agreement. Under Article VIII(1) the Chamber shall receive, from any Party or person, non-governmental organisation, or group of individuals claiming to be the "victim" of a violation by any Party, applications concerning alleged or apparent violations of human rights within the scope of Article II(2) of the Agreement.

66. The present applicant's status as a legal person in principle qualifies it to act as a non-governmental organisation within the meaning of Article VIII(1) of the Agreement. However, the Chamber must also ascertain whether the applicant can claim status as "victim" in relation to the respective violations alleged. The respondent Party has voiced no objection to the effect that the applicant lacked such status and the Chamber has already decided in a similar case that the Islamic Community meets the requirement of a "victim" within the meaning of Article VIII(1) of the Agreement both in relation to Article 9 of the Convention and to Article 1 of Protocol No. 1 to the Convention. In relation to Article 9 of the Convention the Chamber found that the Islamic Community is capable of possessing and exercising the rights contained in Article 9. Regarding Article 1 of Protocol No. 1 to the Convention the Chamber stated that the Islamic Community is under domestic law a legal person capable of possessing property (case no. CH/96/29, above mentioned in paragraph 34, paragraphs 128-131). It follows that the applicant may also claim status as "victim" of alleged discrimination in the enjoyment of the aforementioned rights. Accordingly, the applicant meets the requirement of a "victim" within the meaning of Article VIII(1) of the Agreement. The application is therefore compatible *ratione personae* with the Agreement within the meaning of Article VIII(2)(c).

**2. Requirement to exhaust effective domestic remedies**

67. According to Article VIII(2)(a) of the Agreement, the Chamber must also consider whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted. In the present case, the respondent Party states that the applicant should have formally requested permission for the reconstruction of the Zamlaz mosque, the Riječanska mosque and the Divič mosque.

68. In the Banja Luka mosques case the Chamber stated that normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. It found that in applying the rule on exhaustion of domestic remedies it is necessary to take realistic account not only of the existence of formal remedies in the national legal system but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant (case no. CH/96/29, above mentioned in paragraph 34, paragraphs 142-143).

69. In previous cases the Chamber has held that the burden of proof is on the respondent Party to satisfy the Chamber that there was a remedy available to the applicant both in theory and in practice (see, e.g., case no. CH/96/21, *Čegar*, decision on admissibility of 11 April 1997, paragraph 12, Decisions on Admissibility and Merits March 1996-December 1997).

70. In the present case the Chamber finds it established that the applicant has never formally requested permission to rebuild the mosques in question. On 10 July 1998 and on 25 August 1998 it allegedly wrote letters to the Zvornik Municipality asking for protection of the sites where the mosques once stood. In the case of the Zamlaz site, the applicant sent a letter to the then Major of Zvornik requesting him to stop the construction work; none of these letters contained a formal request for building licences. Only an informal meeting seems to have taken place between the former Mayor of Zvornik and the Mufti of Tuzla in this context.

71. However, the Chamber cannot view the question of domestic remedies in isolation from the factual context. First, the Zamlaz mosque, the Riječanska mosque and the Divič mosque were physically destroyed. Afterwards, new buildings were erected on some of the sites, namely a multi-storey building on the Zamlaz site and a Serb Orthodox church on the Divič site. The Riječanska site is nowadays partly used as a car park, partly as a market place by the citizens of Zvornik; the respondent Party promised to stop this illegal utilisation but has never done so.

72. Moreover, the legal status of the sites has been changed unilaterally at the expense of the applicant. The urban plan in force ("Zvornik 2000") does not indicate the Zamlaz mosque although it still existed when the plan was revised in 1989. Instead, high-rise construction is provided for this site. Accordingly, on 30 June 1997 a procedural decision was issued by the Assembly of the Municipality of Zvornik due to which decision the Zamlaz site is now registered in the land book as state property with a right to use in favour of the state-owned company "ODGP Inženjering Zvornik". On 3 February 1998 "ODGP Inženjering Zvornik" received a building license although the graveyard which was a part of the mosque building was still intact at that time. In relation to the Divič site which is in the ownership of the applicant, an urbanistic license for the construction of a Serb Orthodox church was issued on 9 July 1997. The respondent Party afterwards tolerated its construction in 1998 although there was apparently no building license for it.

73. Taking into account these facts the Chamber considers that it would have been useless for the applicant to request building licenses for the sites in question. Regarding the Zamlaz site, on the one hand, no mosque was provided for in the relevant urban plan, which would have been a legal pre-condition for the issuance of a building license for such a building. On the other hand, it was obvious that the applicant would not receive a building license for a site where the authorities of the respondent Party had already issued a building license for the construction of a multi-storey building which has been finished. The same applies in relation to the Divič site, on which a Serb Orthodox church has been constructed without any license.

74. Furthermore, the Chamber observes that it ordered the respondent Party, *inter alia*, to grant the applicant permits for reconstruction of seven destroyed mosques in Banja Luka in a decision delivered on 11 June 1999 (case no. CH/96/29, above mentioned in paragraph 34). However, none of these permits has been issued until now. Given the manifest failure of the respondent Party to secure to the applicant its rights as established in this final and binding decision of the Chamber itself, the Chamber finds that the applicant was justified in doubting the effectiveness of a formal request for building licenses for the Riječanska site as well as for the other two sites in question.

75. On the basis of all the aforementioned facts the Chamber concludes that the domestic remedies which were or are at present accessible to the applicant could not satisfy the requirement of effectiveness in respect of the breaches alleged. The Chamber therefore finds that the admissibility requirement in Article VIII(2)(a) of the Agreement has been met.

## B. Merits

76. Under Article XI of the Agreement the Chamber must next address the question whether this case discloses 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.

77. 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.

### 1. Article 9 of the Convention (freedom of religion), considered in isolation and as a matter of discrimination

78. The applicant alleges a violation of freedom of religion. In particular, the applicant claims discrimination in the enjoyment of this right. The Chamber understands the applicant's argument to be that the violation and the discrimination in the enjoyment of the latter right directly affects the possibility for the applicant and its members in Zvornik to manifest their religion.

79. The Chamber will consider the alleged violation and the allegation of discrimination under Article II(2)(a) and under Article II(2)(b) of the Agreement in relation to Article 9 of the Convention which reads as follows:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

80. Turning to the question whether Article 9 of the Convention applies, the Chamber recalls that the freedom protected by Article 9 is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it (see Eur.Court HR, *Kokkinakis*

*v. Greece*, judgement of 25 May 1993, Series A No. 260-A, p. 17, paragraph 31).

81. Alleging an interference with its right to religious freedom, the applicant first refers to the destruction of its three mosques which occurred prior to the entry into force of the General Framework Agreement (see paragraphs 25-27 above) and is not in dispute between the Parties.

82. However, the Chamber has a delimited competence *ratione temporis* and can only consider an alleged violation in so far as it is claimed to have happened or continued after 14 December 1995. It will therefore only examine whether events which took place after that date amount to a violation imputable to the respondent Party under Article II(2) of the Agreement.

83. The applicant has drawn the Chamber's attention to the construction of a multi-storey building after the entry into force of the Dayton Agreement on the site where the Zamlaz mosque once stood. The applicant claims that the new building prevents it from rebuilding the mosque. Moreover, the relevant urban plan "Zvornik 2000" does not indicate the Zamlaz mosque although it still existed when the plan was revised under the authority of the respondent Party on 9 March 1989. The plan indicates high-rise construction for this site as the mosque - according to a statement of the former Chief of the Zvornik Urbanism Department made during the public hearing - "was not planned to be kept". On 30 June 1997 a procedural decision was issued by the authorities of the respondent Party according to which the site was registered in the land book as "state property" with a right of use in favour of the state-owned company "ODGP Inženjering Zvornik". This company received a building license from the respondent Party on 3 February 1998 although there was still an intact graveyard on the site; employees of the mentioned company later removed the remaining parts of the graves without being prevented by the respondent Party.

84. In relation to the site of the former Riječanska mosque, the applicant states that an enclosure was erected around that site after the entry into force of the Dayton Agreement and that construction work is planned for it. Moreover, the applicant complains that market stands have been erected there and that part of it is illegally used as a car park. The applicant alleges, and the respondent Party does not deny, that no steps have been taken by it to stop this. Furthermore, the applicant states that the construction of a handicraft centre has been commenced and that the applicant's plot no. 944/2 (32 $m^2$) next to the site of the former Riječanska mosque has been usurped for that purpose since the beginning of 2000. However, the latter statement has not been confirmed by the two geodetic engineers appointed by the Chamber.

85. Regarding the Divič site, the applicant states that an urbanistic license for the construction of a Serb Orthodox church was issued on 9 July 1997 - i.e. after the entry into force of the Dayton Agreement - by the competent authorities of the respondent Party although the site is registered in the land book as property of the applicant. In 1998 the respondent Party tolerated the construction of this church although there was apparently no building license for it.

86. Before assessing the alleged acts and omissions of the respondent Party's authorities the Chamber finds it necessary to recall the undertaking of the Parties to the Agreement to "secure" the rights and freedoms mentioned in the Agreement to all persons within their jurisdiction. This undertaking not only obliges a Party to refrain from violating those rights and freedoms, but also imposes on that Party a positive obligation to ensure and protect those rights (see case no. CH/96/29, above mentioned in paragraph 34, paragraph 161).

87. The Chamber recalls that it has already found, in the Banja Luka Mosques case, that the right to religion includes the right to create a space for practising it (case no. CH/96/29, above mentioned in paragraph 34, paragraph 182). It therefore finds that the issuance of a building license for a multy-storey building on the site of the Zamlaz mosque, the tacit acceptance of the removal of the remaining parts of the graveyard from that site and of the erection of the above building clearly amount to an interference with - or a "limitation" of - the right of the Muslim believers in Zvornik freely to manifest their religion, as guaranteed by Article 9(1) taken in isolation.

88. In relation to the Riječanska site, the Chamber finds that the above utilisation of the site prevents the applicant from using it for religious activities. All this happened at least with the connivance of the local authorities and is consequently imputable to the respondent Party for the

purposes of Article II(2) of the Agreement. Therefore, the Chamber finds that the applicant's right to religious freedom has also been interfered with as far as the Riječanska site is concerned.

89. Regarding the site where the Divič mosque once stood the Chamber finds that the applicant is prevented from using its property because a Serb Orthodox church has been erected on it. Although no building license was issued for that purpose, the respondent Party's authorities did not take action against the construction of that church. The Chamber therefore finds that there was an interference with the applicant's right to religious freedom in relation to the Divič site.

90. The above interferences are imputable to the respondent Party under Article II(2) of the Agreement.

91. Any interference with the right to freedom of religion must be shown to have been justified under Article 9(2) of the Convention. This means that such an interference must have been "prescribed by law" and must be "necessary in a democratic society" for the furtherance of one or more of the "legitimate aims" enumerated, exhaustively, in Article 9(2).

92. The Chamber notes that it is in dispute whether the interferences found were all "prescribed by law". It is of the opinion, however, that this matter can be left aside if it appears that the interferences did not serve a "legitimate aim" within the meaning of the above provision. It will therefore now turn to that aspect of the case.

93. The applicant alleges that the respondent Party acted in furtherance of discriminatory aims. In support of this contention, it states that firstly, the three mosques in question were physically destroyed. Afterwards, new buildings were erected on two of the sites, namely a multi-storey building on the Zamlaz site and a Serb Orthodox church on the Divič site. The Riječanska site is used partly as a car park, partly as a market place by the citizens of Zvornik. The respondent Party promised to stop this illegal utilisation but has never done so. Moreover, the applicant refers to the changes on the legal status of the sites which have, in its contention, been carried through at its expense. The applicant argues that this is part of a deliberate policy aimed at inhibiting Islamic worship in the municipality of Zvornik.

94. The respondent Party confines itself to stating that although the applicant was not permitted to reconstruct the mosques in question the only reason was that it never formally requested the necessary permission. The question of discrimination could therefore not arise.

95. The Chamber notes, firstly, that the respondent Party's argument on the point here at issue is identical to that on which its preliminary objection of failure to exhaust domestic remedies was based. The Chamber refers to its findings in paragraphs 67 to 75 above.

96. The Chamber then notes that the prohibition of discrimination is a central objective of the General Framework Agreement for Peace in Bosnia and Herzegovina to which it must attach particular importance. In the context of the present case, it is appropriate to have particular regard to the importance of preventing – and if necessary, stopping – discrimination on religious and ethnic grounds in order to enable refugees and displaced persons to return safely to their homes of origin, in accordance with the obligations entered into by the Parties under Article 1 (2) of Annex 7 to the General Framework Agreement.

97. In examining whether there has been discrimination the Chamber has consistently found it necessary first to determine whether the applicant was treated differently from others in the same or relevantly similar situations. Any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. There is a particular onus on the respondent Party to justify differential treatment which is based on any of the grounds enumerated in the relevant provisions, including religion or national origin (see case no. CH/97/45, *Hermas*, decision on admissibility and merits of 16 January 1998, paragraphs 86 et seq., Decisions and Reports 1998 and case no. CH/97/46, *Kevešević*, decision on the merits of 15 July 1998, paragraph 92, Decisions and Reports 1998).

98. Turning to the present case, the Chamber first notes that Article 28 of the Constitution of the Republika Srpska protects the freedom of religion and stipulates that religious communities are equal before the law and may freely perform their religious activities and services. However, the same provision singles out the Serb Orthodox church as "the church of the Serb people" and provides that "the State" shall assist the Orthodox church materially and co-operate with it in all fields. The Chamber is not called upon in this case to determine whether the privileged treatment afforded to the Serb Orthodox church in itself amounts to discriminatory treatment of institutions or individuals who do not form part of that church. However, the less favourable conditions to which the respondent Party's Constitution subjects the applicant's members is an element to be borne in mind in the examination of whether their treatment as a whole amounts to discrimination (cf. case no. CH/96/29, above mentioned in paragraph 34, paragraph 157).

99. In light of all the aforementioned considerations the Chamber finds it established that the Muslim believers in Zvornik have been subjected to differential treatment in comparison with Serbs of Christian Orthodox religion who, since the war, form the local religious majority. The above actions and omissions of the respondent Party's authorities caused a gradual deterioration of the applicant's situation in Zvornik in comparison with other religious denominations, in particular the Serb Orthodox church (cf., as an example, the Divić site where the former mosque was destroyed and a Serb Orthodox church erected instead). In the aforementioned exceptional circumstances the onus has been on the respondent Party to show that this treatment has been objectively justified in pursuance of a legitimate aim by means proportional to that aim. Failing such justification, it has been for the respondent Party to show that its authorities have taken reasonable steps to protect the applicant's members in Zvornik from such discriminatory acts. The respondent Party has failed to do so.

100. As there is no reasonable and objective justification for the differential treatment, the Chamber finds that the Zvornik authorities have both actively engaged in and passively tolerated discrimination against Muslim believers due to their religion and ethnic origin. This attitude of the authorities has hampered - and continues to hamper - the local Muslim believers' enjoyment of their right to freedom of religion as defined in the Convention, for reasons and to an extent which, seen as a whole, are clearly discriminatory. In addition, such a stance cannot but discourage refugees and displaced members of the Islamic Community of Zvornik from moving back to the Zvornik area where the rate of return is still marginal. It follows that the respondent Party has failed to meet its obligation under the Agreement to respect and secure the right to freedom of religion without any discrimination.

101. Since discrimination can never be a legitimate aim of interfering with human rights, the Chamber finds a violation of the right to freedom of religion in Article 9 of the Convention as well as discrimination in the enjoyment of this right.

**2. Article 1 of Protocol No. 1 to the Convention (right to property), considered in isolation and as a matter of discrimination**

102. The Chamber has next considered the case under Article II(2)(a) and (b) of the Agreement in relation to Article 1 of Protocol No. 1 to the Convention. It will again have regard to the facts on which it has based its finding of a violation and of discrimination in the enjoyment of the right to freedom of religion as protected, *inter alia*, by Article 9 of the Convention (see paragraphs 78-101). For the purposes of its examination under Article 1 of Protocol No. 1 the Chamber will limit its examination to those allegations which it finds are to be considered exclusively under this provision.

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."

103. Article 1 of Protocol No. 1 thus contains three rules. The first is the general principle of

peaceful enjoyment of possessions. The second rule covers deprivation of property and subjects it to the requirements of public interest and conditions laid out in law. The third rule deals with control of use of property and subjects this to the requirement of the general interest and domestic law. It must be determined in respect of all of these situations whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual applicant's fundamental rights (see case no. CH/96/17, *Blentić,* decision on admissibility and merits of 5 November 1997, paragraph 31, Decisions on Admissibility and Merits March 1996-December 1997).

**a. Possessions within the meaning of Article 1 of Protocol No. 1**

104. In order to invoke the right under Article 1 of Protocol No. 1 in respect of real property the applicant may be required to show that it had title to the property in question or, failing a title deed, that ownership has been established via lengthy unchallenged possession and occupation (cf. Eur. Court HR*, Holy Monasteries v. Greece*, judgement of 9 December 1994, Series A No. 301-A, p. 32, paragraphs 58-60). However, apart from rights *in rem* various economic assets and other rights *in personam* may also be considered "possessions" falling within the scope of protection of Article 1 of Protocol No. 1 (see, e.g., case no. CH/96/28, *M.J.*, decision of 7 November 1997, paragraph 32, Decisions on Admissibility and Merits March 1996-December 1997). Thus, the term "possessions" within the meaning of Article 1 of Protocol No. 1 may include rights not recognised as "property rights" in the domestic law of a Contracting Party.

**(a) Sites of the former Zamlaz and Riječanska mosque**

105. In the present case, the Chamber finds it established that in the course of the nationalisation in the then Socialist Federal Republic of Yugoslavia, the land on which the Zamlaz mosque and the Riječanska mosque then stood was nationalised. The mosques and the sites belonging to them, such as the graveyards, remained, however, the property of the applicant. The Chamber furthermore notes that under Article 40(1) of the Law on Building Land as in force from 1986 onwards (see paragraphs 42-44 above) the applicant retained a right to use the land as long as the buildings on them endured.

106. In relation to the Zamlaz mosque, the Chamber first notes that the graveyard was still intact in 1998. Therefore, the property of the applicant on this part of the land still existed according to Article 40 of the Law on Building Land (paragraph 42 above) when the Dayton Agreement entered into force.

107. Moreover, Article 43 of the Law on Building Land stipulates that if a building has not been expropriated but destroyed either by *vis major* or by decision of the competent authority in view of its poor state of repair, its owner retains a priority right to use the land for construction, on condition that a regulatory plan or urban development plan envisages the construction of a building over which one can have a property right. The destruction of the Zamlaz mosque and the Riječanska mosque was completely outside the applicant's control and is therefore – as the Chamber has already stated in case no. CH/96/29 (above mentioned in paragraph 34, paragraph 194) – included in the legal term *vis major*. Moreover, it has been stated by the Chamber in the same case (*ibidem*, paragraph 194) that a legal definition common in the former SFRY would not appear to exclude an occurrence such as the destruction of the applicant's mosques from being regarded as *vis major* for the purposes of Article 43 (see paragraph 45 above).

108. It is true that Article 43 sets a further condition which is of relevance: although the applicant enjoys, under Article 40(1), the right to use the land where the Zamlaz and the Riječanska mosques once stood, its right to use that land for new construction depends on whether the regulatory plan or general urban plan envisages such structures. In relation to the Riječanska site, the Chamber was informed by the expert witnesses heard during the public hearing that a mosque is indicated in the urban plan in force ("Zvornik 2000"). On the other hand, no mosque but only "high-rise construction" is provided for in the plan for the site where the Zamlaz mosque once stood. The Chamber notes, however, that the Zamlaz mosque still existed when the urban plan "Zvornik 2000" was revised in 1989. The Chamber finds that the omission of a religious building from the urban plan although it is still standing on the site in question cannot be such as to entail the loss of the priority right to use

the land within the meaning of Article 43. On the information before it, the Chamber is therefore satisfied that the applicant has a priority right to use the sites of the Zamlaz mosque and the Riječanska mosque under Article 43.

109. Whether based on Article 40 or on Article 43 of the Law on Building Land, the Chamber finds that the applicant's right to use the land of the Zamlaz and the Riječanska sites for reconstruction purposes is an enforceable right with an economic value which is to be considered a "possession" of the applicant for the purposes of Article 1 of Protocol No. 1.

**(b) Site of the former Divič mosque**

110. The Chamber notes that, according to the land book, the site where the Divič mosque once stood is the applicant's property.

**(c) Conclusion**

111. The Chamber concludes that the graveyard on the Zamlaz site and the other assets such as the right to use the Zamlaz site for construction, the right to use the Riječanska site and the right of ownership on the Divič site constituted, on 14 December 1995, "possessions" of the applicant within the meaning of Article 1 of Protocol No. 1. The Chamber must next consider whether, and if so, according to which rule of this provision, the respondent Party has interfered with the applicant's possessions.

**b. Interference**

112. In relation to the Zamlaz site, the Chamber finds that the removal of the graveyard from this site as well as afterwards the construction of the multi-storey building substantially interfered with the enjoyment of the applicant's possessions. Regarding the Divič site, the Chamber considers that the construction of the Serb Orthodox church on this site substantially interfered with the enjoyment of the applicant's property right. These actions constitute an extensive and definitive occupation of the land in question which the applicant has a priority right to use or to which the applicant has a property right, respectively. However, the respondent Party did not formally divest the applicant of its rights. These actions must therefore be considered to have involved a *de facto* deprivation of the applicant's possessions.

113. In relation to the Riječanska site, the Chamber notes first of all that the respondent Party did not effect either a formal or a *de facto* expropriation. The utilisation of this site as a car park and as a market place is supposed to be only of a temporary nature. The applicant may therefore recover the land as soon as the respondent Party puts an end to its illegal utilisation. Accordingly, it cannot be said that the applicant has been definitively deprived of its possessions. The failure of the respondent Party to prevent the citizens of Zvornik from using the Riječanska site partly as a car park and partly as a market place does not constitute a control of use either. However, the failure of the respondent Party to prevent the present inhabitants of Zvornik from using the Riječanska site partly as a car park and partly as a market place, undoubtedly makes it impossible for the applicant to use the site for the reconstruction of its mosque. It, therefore, constitutes an interference with the general principle of peaceful enjoyment of possessions under Article 1 of Protocol No. 1.

**c. Discrimination**

114. The Chamber has found above that the various acts and omissions resulting in a violation of the applicant's right to freedom of religion have been based on discriminatory grounds (see paragraphs 83-101 above). The same holds true with regard to the interferences with the right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the Convention. These interferences can, therefore, not be considered to be in accordance with the public interest.

115. The Chamber, therefore, finds a violation of the right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1 as well as discrimination in the enjoyment of this right.

### 3. Conclusion

116. In sum, the Chamber has found that this case involves violations of the applicant's right to freedom of religion under Article 9 of the Convention as well as of the applicant's right to peaceful enjoyment of its property rights under Article 1 of Protocol No. 1 to the Convention. The Chamber has also found discrimination in the enjoyment of both rights.

## VII. REMEDIES

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

118. The applicant requests that the respondent Party be ordered to remove within 90 days and at its own expense the constructed multi-storey building from the Zamlaz site, to authorise the reconstruction of the former Zamlaz mosque and to pay to the applicant the amount of KM 50.000 as compensation. In relation to the site of the former Riječanska mosque the applicant asks the Chamber to order the respondent Party to stop the construction work on lot 944/2, to authorise the reconstruction of the mosque and to remove the buildings already constructed. In relation to the site of the former Divič mosque the applicant asks the Chamber to order the respondent Party to remove within 90 days and at its own expense the Orthodox church built on that site, to authorise the reconstruction of the mosque and to pay to the applicant the amount of KM 50.000 by way of compensation. Furthermore, the applicant wants the respondent Party to be ordered to refrain from any further occupation of the sites in question.

119. As to the different claims mentioned above, the Chamber has found the respondent Party to be in breach of its obligation to ensure to everyone within its jurisdiction, without discrimination, the rights guaranteed in the Agreement. As earlier recalled, the prohibition of discrimination is a central objective of the General Framework Agreement to which both the Chamber and the parties must attach particular importance.

120. Thus, the Chamber finds it appropriate to order the respondent Party to allocate, within 6 months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, in consultation with the Islamic Community, and for its use only, a suitable and centrally located building site in the town of Zvornik to permit, upon request of the Islamic Community, the construction of a mosque to replace the former Zamlaz mosque.

121. In relation to the Riječanska site, the Chamber orders the respondent Party to remove from this site, within 1 month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, all market stands, to put an end to its utilisation as a car park and not to permit the use of the site for any purpose affecting or interfering with the rights of the Islamic Community. Further, the Chamber finds it appropriate to order the respondent Party to grant, within 3 months of the receipt of a request to that effect from the Islamic Community, the necessary permit for reconstruction of the mosque at the location at which it previously existed.

122. Regarding the site where the Divič mosque once stood, the Chamber finds it appropriate to order the respondent Party to allocate, within 6 months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, in consultation with the Islamic Community, and for its use only, a suitable building site in the vicinity of the former Divić mosque to permit, upon request of the Islamic Community, the construction of a mosque to replace the former Divić mosque.

123. As to the request of the applicant regarding compensation in the total amount of 100.000 KM the Chamber wishes to stress that it has no competence, *ratione temporis*, to award any compensation for the destruction of the mosques in 1992 or for any other pecuniary or non-pecuniary damages which it may have suffered before 14 December 1995. For the period after the entry into

force of the Dayton Peace Agreement, the Chamber finds it appropriate to order the respondent Party to pay to the applicant for the moral damages suffered an amount of 10.000 KM within 30 days from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure.

## VIII. CONCLUSIONS

124. For the reasons given above, the Chamber decides:

1. by 6 votes to 1, to declare the application admissible;

2. unanimously, that there has been a violation in Zvornik of the right of the Islamic Community to freedom of religion as guaranteed by Article 9 of the Convention considered in isolation, the respondent Party thereby being in violation of Article I of the Agreement;

3. unanimously, that there has been a violation in Zvornik of the right of the Islamic Community to the peaceful enjoyment of its possessions as guaranteed by Article 1 of Protocol No. 1 to the Convention considered in isolation, the respondent Party thereby being in violation of Article I of the Agreement;

4. unanimously, that the Islamic Community has been discriminated against in Zvornik in the enjoyment of its right to freedom of religion as guaranteed by Article 9 of the Convention, the respondent Party thereby being in violation of Article I of the Agreement;

5. unanimously, that the Islamic Community has been discriminated against in Zvornik in the enjoyment of its right to the peaceful enjoyment of its possessions as guaranteed by Article 1 of Protocol No. 1 to the Convention, the respondent Party thereby being in violation of Article I of the Agreement;

6. by 6 votes to 1, to order the respondent Party to allocate, within 6 months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, in consultation with the Islamic Community, and for its use only, a suitable and centrally located building site in the town of Zvornik to permit, upon request of the Islamic Community, the construction of a mosque to replace the former Zamlaz mosque;

7. by 6 votes to 1, to order the respondent Party to remove from the Riječanska site, within 1 month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, all market stands, to put an end to its utilisation as a car park and not to permit the use of the site for any purpose affecting or interfering with the rights of the Islamic Community and to grant, within 3 months of the receipt of a request to that effect from the Islamic Community, the necessary permit for reconstruction of the Riječanska mosque at the location at which it previously existed;

8. by 6 votes to 1, to order the respondent Party to allocate, within 6 months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, in consultation with the Islamic Community, and for its use only, a suitable building site in the vicinity of the site of the former Divić mosque to permit, upon request of the Islamic Community, the construction of a mosque to replace the former Divić mosque;

9. by 5 votes to 2,

a) to order the respondent Party to pay to the applicant, as monetary compensation for the moral damage suffered after 14 December 1995 in relation to all sites in question, KM 10.000 within 30 days from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure; and

b) that simple interest at an annual rate of 4% will be payable over this sum or any unpaid residue thereof from the day of expiry of the above time-limit until the date of settlement in full;

10. by 5 votes to 2, to order the respondent Party to report to the Chamber within 6 months from 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)
Peter KEMPEES
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel

In accordance with Rule 61 of the Chamber's Rules of Procedure, the dissenting opinions of Mr. Deković and Mr. Popović are annexed to this decision.

## ANNEX

In accordance with Rule 61 of the Chamber's Rules of Procedure before the Human Rights Chamber for BiH in the case no. CH/98/1062 of the Islamic Community of BiH as the applicant against the Republika Srpska as the respondent Party, this Annex contains the partly dissenting opinion with the Chamber's decision of Mr Mehmed Deković.

## DISSENTING OPINION OF MR. MEHMED DEKOVIĆ

In the above mentioned case of the Chamber, under the above number, by the Conclusion No. 9a the respondent Party is ordered to pay to the applicant, by way of compensation for suffered moral damage after 14 December 1995, in relation to all destroyed sacral facilities, 10.000 KM within 30 days from the day the decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure. The identical view is also stated in paragraph 123 within the context of the Remedies part VII.

A member of the Chamber and the author of this dissenting opinion considers the Chamber's decision in its part on compensation for moral injury to be inadmissible. Namely, as matters stand, the Chamber has already concluded that the applicant – the Islamic Community BiH is entitled, as a legal entity, to pecuniary compensation for the suffered moral – non-pecuniary injury in the amount of 10.000 KM, in my view, the two crucial issues arise. The first one, why the allegations concerning the ground on which the applicant's right to compensation was recognized are missing in the decision, as well as the reasons in respect of the amount of the compensation awarded. These reasons should have been stated in the decision especially bearing in mind that compensation for moral injury is awarded on several grounds. Had it been done so, it would be easier to understand the issue in connection with the amount of the compensation which is fixed. In other words, the amount awarded, in my opinion, is not only a bagatelle, but, in a certain way, it is offending the religious feelings of the applicant and its believers with respect to the manner how the violation of the right had occurred, which need not be specially elaborated, as it was said sufficiently about it in the reasoning of the decision. The amount awarded cannot give satisfaction for the destroyed sacral facilities, for the manner in which their sites were used afterward (parking lot, markets, construction of an orthodox church and the rest) and for taking no steps by the respondent to eliminate the consequences of their destruction. Therefore, the decision, in the part in which it is decided on compensation for moral injury, appears to be deficient.

I also disagree with the Chamber's conclusions ordering the Republika Srpska to carry out certain actions, e.g. the issuance of a building approval for construction but upon the Islamic Community's request only. This for two reasons. The first one, because I hold that the Chamber's decision and its order constitute the direct basis that the construction of the destroyed sacral facilities be permitted without a formal procedure, and the second, because obstructions have been made so far and no adequate decisions were issued by the competent administrative authorities upon the requests which had been filed (a striking example of the Ferhadija Mosque in Banja Luka).

In Sarajevo, 7 November 2000

(signed)
Mehmed DEKOVIĆ

**ANNEX**

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the separate dissenting opinion of Mr. Vitomir Popović.

**DISSENTING OPINION OF MR. VITOMIR POPOVIĆ**

I disagree with the Decision of the Human Rights Chamber for Bosnia and Herzegovina with the above number for the following reasons:

1. Article VIII(2)(a) of the Human Rights Agreement, as Annex 6 to the General Framework Agreement for Peace in BiH provides that: "The Chamber shall consider whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted."

Paragraph 70 of the Chamber's Decision reads as follows:

"In the present case the Chamber finds it established that the applicant has never formally requested permission to rebuild the mosques in question. On 10 July 1998 and on 25 August 1998 it allegedly wrote letters to the Zvornik Municipality asking for protection of the sites where the mosques once stood. In the case of the Zamlaz site, the applicant sent a letter to the then Major of Zvornik requesting him to stop the construction work; none of these letters contained a formal request for building licences. Only an informal meeting seems to have taken place between the former Mayor of Zvornik and the Mufti of Tuzla."

Rule 49 of the Chamber's Rules of Procedure, adopted on 13 December 1996, reads as follows:

"The Chamber may declare at once that the application is inadmissible under the second paragraph of Article VIII of the Agreement or may decide to suspend consideration of, reject or strike out the application under last paragraph of Article VIII."

Therefore,
the only decision which the Chamber could have issued in this concrete case was to declare the application inadmissible, in accordance with the above-quoted provisions of the Agreement and the Rules of Procedure, on the ground of non-exhaustion of domestic remedies, or to suspend its consideration – to suspend the proceedings until these remedies before the competent domestic organs of the Republika Srpska, as the respondent Party, were exhausted.

Acting in the manner stated in the decision and deciding on the merits the Chamber went outside the scope of its jurisdiction, which constitutes a violation of Article 1 of the Human Rights Agreement, as Annex 6 to the General Framework Agreement for Peace in BiH, which reads as follows:

"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 European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and the other international agreements listed in the Appendix to this Annex."

Therefore,
it is not the competence of the Chamber but of the Republika Srpska, as the respondent Party, to decide on allocation of building land and issuing of approvals for reconstruction and building of destroyed mosques, in accordance with its jurisdiction set forth in Article 1 of the Agreement.
I consider here, before all else, that in resolving such claims the following legislation of the Republika Srpska, or the one effective in the Republika Srpska, should be adhered to:

a) The Law on Building Land (Official Gazette of SR BiH 34/86 and 1/90; Official Gazette of the Republika Srpska number 29/94 and 23/98);
b) The Law on Physical Planning of SR BiH (Official Gazette nos. 9/87, 23/88, 24/89, 10/90, 15/90, 14/91);

c) The Law on Physical Planning of the Republika Srpska (Official Gazette of RS nos. 19/96, 25/96, 25/97, 3/98 and 10/98);
d) in accordance with regulation plan of Zvornik Municipality.

The Chamber came to a wrong conclusion when it held that the respondent Party was ordered to pay to the applicant, as monetary compensation in respect of moral damage suffered after 14 December 1995 in relation to all the sites in question, KM 10,000. The mistakes in the conclusion consist of the following:

a) This part of the applicant's request, according to Article VIII(2)(a) of the Agreement in connection with Article 49 of the Chamber's Rules of Procedure, should also be declared inadmissible for non exhaustion of domestic remedies or suspended – stop the proceeding until such remedies before competent organs – courts of the Republika Srpska, as the respondent Party, are exhausted.
b) The applicant's compensation claim in amount of KM 100,000 did not contain any "request for compensation of moral damage", so the Chamber exceeded its authority when it awarded a part of a request which had not been requested by the applicant. Besides, the Chamber did not present any valid argument which would specify this damage and, therefore, it is not possible to reach a conclusion as to whether it involves pecuniary or non-pecuniary damage. In a case if we consider the claim concerns the pecuniary damage, it is not established in an appropriate manner. Such pecuniary damage should be either indisputable between the Parties or damage established by an appropriate expert. The fact that the respondent Party contested the claim on the ground of non-exhaustion of remedies means it considers the claim to be contested as regards both the nature and the amount.
c) In case we consider that the claim concerns non-pecuniary damage in the concrete case, with reference to relevant provisions of the Law on Contractual Obligations, it could be concluded by legal analogy that it is about non-pecuniary damage. In that case such damage cannot be suffered by or awarded to legal persons but only to natural persons. The Islamic Community has the status of a legal person and not of a natural person and does not have any right to compensation of such damage.

2. For the remainder of my separate opinion I completely maintain my separate dissenting opinion stated in case number CH/96/29 Islamic Community v. the Republika Srpska of 11 June 1999 (Banja Luka mosques case).

In Sarajevo, 9 November 2000 Ph. D. Vitomir Popović