DECISION ON THE ADMISSIBILITY AND MERITS

DELIVERED ON 11 JUNE 1999

CASE No. CH/96/29

THE ISLAMIC COMMUNITY IN BOSNIA AND HERZEGOVINA

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 11 May 1999 with the following members present:

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

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

Having considered the 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 ("the General Framework Agreement");

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. This case concerns the destruction of 15 mosques in Banja Luka in 1993 and other alleged violations of the rights of the applicant, the Islamic Community in Bosnia and Herzegovina (henceforth "the Islamic Community" or "the applicant"), in the city of Banja Luka. The Islamic Community maintains, *inter alia*, that after the entry into force of the General Framework Agreement on 14 December 1995 the municipal bodies of Banja Luka destroyed and removed remains of the mosques, desecrated adjoining graveyards - or allowed these acts to happen - and failed to take certain action requested by the applicant for the protection of the rights of its members. In particular, the Municipality has refused the Islamic Community permission to rebuild destroyed mosques. The applicant alleges that these actions, in addition to violating its property rights and the freedom of religion of its members, have discriminated against it on the grounds of the religion and national origin of its members.

2. The application raises issues primarily under Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and Article 1 of Protocol No. 1 to the Convention. 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

3. The application was introduced and registered on 4 December 1996. The applicant is represented by the Reisu-l-ulema, Dr. Mustafa Cerić. The applicant's legal representative is Mr. Enver Zečević, a lawyer in Sarajevo. The application included a request for provisional measures ordering the respondent Party immediately to enable Muslims in Banja Luka free expression of religion in previous places of worship, to provide temporary premises for Muslim worship in Banja Luka until the mosques had been rebuilt, to refrain from further destruction of the remains of the mosques, to refrain from any action to change the purpose of the sites of the destroyed mosques, to prevent the building of any objects except mosques on those sites, and to refrain from any activities violating the human rights of Muslims in the area of Banja Luka.

4. On 12 December 1996 the Chamber decided to request more information from the applicant. The Chamber also decided not to issue an order for provisional measures. The Registry requested information from the applicant on 17 February and 11 April 1997. On 25 April 1997 the applicant submitted additional information. The Chamber again considered the case on 6 June 1997 and decided to request more information from the applicant. On 26 June 1997 the applicant answered the Chamber's request.

5. On 8 September 1997 the Chamber decided to transmit the application to the respondent Party for observations on its admissibility and merits pursuant to Rule 49(3)(b) of the Rules of Procedure. The respondent Party submitted its observations on 22 September 1997. The applicant submitted observations in reply on 28 September and 26 October 1997 and maintained its request for provisional measures.

6. On 10 October 1997 the Chamber decided to request the Office of the High Representative, UNESCO and the Commission to Preserve National Monuments in Bosnia and Herzegovina, established under Annex 8 of the General Framework Agreement, to submit any relevant information in their possession. The Chamber also requested the Human Rights Ombudsperson to investigate certain allegations in the application. The Chamber decided not to order any provisional measures at that time.

7. On 10 December 1997 the Commission to Preserve National Monuments submitted information regarding the destruction during the war of the mosques in Banja Luka. On 11 December 1998 the Commission submitted copies of minutes from its June 1998 meeting at which it had added the site of the Ferhadija mosque in Banja Luka to its list of national monuments, and a copy of a letter to the Entity authorities asking them to protect the sites of destroyed monuments. In this letter the Commission had recommended planting hedges around the protected areas.

8. On 18 January 1998 the applicant submitted further observations and another request for

provisional measures. On 23 February 1998 the Chamber requested further information from the applicant. This information was submitted on 12 March 1998.

9. On 4 April 1998 the Chamber decided to request more information from the respondent Party, to hold a public hearing on the admissibility and merits of the case in June or July 1998, and to refuse the applicant's request for provisional measures.

10. On 28 April 1998 the Human Rights Ombudsperson responded to the Chamber's request for assistance by submitting information obtained during a meeting between the Ombudsperson's office and officials of the Banja Luka Municipality.

11. On 9 May 1998 the respondent Party responded to the Chamber's request for more information. On 14 May 1998 the Chamber decided to hold a public hearing in July 1998.

12. On 6 July 1998 the respondent Party informed the Chamber that its Agent had resigned and therefore it requested that the proceedings be postponed. On 9 July 1998 the President decided to postpone the public hearing and to issue an order for provisional measures, pursuant to Rule 36(2), ordering the respondent Party to take all necessary action to refrain from the construction of buildings or objects of any nature on the sites of the mosques and on the cemeteries and other Islamic sites indicated in the application, and not to permit any such construction by any other institution or person, whether public or private. The respondent Party was further ordered to refrain from the destruction or removal of any object remaining on the sites of the mosques and on the cemeteries and other Islamic sites indicated in the application, and not to permit any such destruction or removal by any other institution or person, whether public or private.

13. On 11 August 1998 the applicant requested the disqualification of the Chamber's member Popović, referring to his position as Vice-President of the Government of the Republika Srpska when the mosques were destroyed and his alleged comments on television in the summer of 1996 to the effect that mosques would "never again be built in Banja Luka." On 7 September 1998 the Chamber rejected the applicant's request in so far as it concerned Mr. Popović's position as Vice-President of the Government of the Republika Srpska. The Chamber requested the applicant to submit evidence substantiating the alleged statement of Mr. Popović in 1996. On 11 September 1998 the Chamber granted an extension of the time-limit by which the applicant could submit this information. No information was received.

14. On 8 September 1998 the Chamber decided to hold the public hearing in Banja Luka on 9 November 1998. The Chamber decided to summon the following witnesses to testify: Mr. Đorde Umičević, Mayor of Banja Luka; Mr. Slobodan Bućma, Secretary for Urban Planning and Environment in the Banja Luka Municipality; the Mufti or other leader of the Islamic Community in Banja Luka; and Mr. Hamzalija Kapetanović, then Secretary of the Islamic Community Council in Banja Luka. Mr. Ahmed Kapidžić, architect and former Director of the Institute for Urban Planning of the City of Sarajevo, was to be summoned as an expert.

15. On 13 October 1998 the Chamber rejected the remainder of the applicant's request to disqualify Mr. Popović, noting that the applicant had failed to substantiate its allegation.

16. On 20 and 21 October 1998 the Registrar summoned the parties, witnesses and experts under Article X(1) of the Agreement to a public hearing at the Restaurant and Catering School in Banja Luka.

17. On 21 October 1998 the Chamber was informed that Mr. Jovo Vojnović had been appointed Agent of the respondent Party.

18. On 27 October 1998 the Chamber was informed by the Director of the Restaurant and Catering School, Mr. Manojla Zrnić, that its premises would not be available for the public hearing. He claimed to have received a call from the office of Mayor Umičević instructing him not to rent the premises for the purpose of the Chamber's hearing.

19. On 4 and 5 November 1998 the participants in the proceedings were informed in writing that the public hearing would be held at the International Press Centre in Banja Luka. None of those

summoned objected to the change of venue. On 6 November 1998 the International Press Centre informed the Chamber that the hearing could not be held there either. Its manager, Mr. Neđo Vlaški, stated that one of the witnesses had pressured the Centre not to allow the hearing to take place at the Centre "or it would receive no more business."

20. On 7 November 1998 the Chamber decided to hold the hearing at the Agroprom Banka building in Banja Luka which had been provided with the assistance of the Organisation for Security and Co-operation in Europe. The witnesses and parties were informed of the new location on the same day. On the same day the Chamber was informed orally by the Agent of the respondent Party that he was resigning from that position with immediate effect and would not appear at the hearing.

21. Immediately before the oral proceedings were to begin on 9 November 1998, Mayor Umičević and Mr. Bućma, who had come to the previously scheduled venue, informed the Deputy Registrar that they would not attend the hearing at the Agroprom Banka building. They did not state any reasons for their decision but conceded having been informed of the final hearing venue the night before. Before the hearing was opened the Chamber noted the absence of any representative of the respondent Party. It found that, failing a justified cause, the holding of the hearing would nevertheless be consistent with the proper administration of justice pursuant to Rule 38.

22. There appeared on the applicant's behalf counsel Zečević assisted by Hfz. Ismet ef. Spahić, Deputy Reisu-l-ulema of the Islamic Community, Mr. Muhamed Salkić, Secretary-General of the *Rijaset* (administrative body of the Islamic Community) and Mrs. Meliha Filipović, counsel specialising in administrative and property law in the Republika Srpska. The Chamber also took witness and expert testimony (see paragraphs 48-70 below).

23. The Chamber deliberated on the admissibility and merits of the case on 10 and 11 November 1998, on 8, 10 and 11 February 1999, on 8 and 11 March 1999, on 12 April 1999 as well as on 10 and 11 May 1999. On the last-mentioned date the Chamber voted on the admissibility and merits of the case. On 19 May 1999 the applicant submitted additional factual information which was transmitted to the respondent Party for possible comments by 31 May 1999. Observations were received on 26 May 1999. On 7 and 9 June 1999 the Chamber considered and approved some factual amendments to its decision.

24. The members of the Chamber appointed by the Republika Srpska pursuant to Article VII(2) of the Agreement were absent from the Chamber session in March 1999, referring to the Resolution of the Republika Srpska National Assembly of 7 March 1999 on the decision of the Brčko Arbitration Tribunal. This Resolution ordered all elected or otherwise appointed representatives of the Republika Srpska in common institutions of Bosnia and Herzegovina to suspend their work "until the decision of the Arbitration Tribunal had been brought in line with the provisions of the General Framework Agreement for Peace in Bosnia and Herzegovina..." During its March session the Chamber recalled to its members Pajić and Popović that under Rule 3(1) of the Rules of Procedure members shall serve in their personal capacity as judges and may not be removed from office during their term as defined in Article VII(3) of the Agreement. The Chamber further stressed that as members do not serve as representatives of governments, the Resolution of the National Assembly of Republika Srpska could not apply to Mr. Pajić and Mr. Popović in their capacity as members of the Chamber.

III. ESTABLISHMENT OF THE FACTS

A. Facts as presented by the applicant

1. Events prior to 14 December 1995

25. The applicant was afforded religious and educational autonomy in 1909 when Bosnia and Herzegovina was part of the Austro-Hungarian Empire. From 1919 to 1992 the autonomy of the Islamic Community was limited. By decision of its Restoration Assembly of 28 April 1993 the functions and autonomy of the Islamic Community of the Republic of Bosnia and Herzegovina were re-established and the resources were taken over by the present Islamic Community in Bosnia and Herzegovina. On 5 May 1993 the applicant was, in its present capacity, registered as a legal person by the Municipality of Sarajevo.

26. Under Articles I and II of its Constitution (as amended on 26 November 1997) the applicant is the sole, united and autonomous community of all Muslims in Bosnia and Herzegovina, Bosniaks abroad and Muslims who accept this community as their own. It may acquire, protect and augment its property independently, including endowments (*vakuf)* (Articles VI and XIII). It protects the religious rights of Muslims (Article X) and has authority to represent them (Article XVIII).

27. The applicant has been administering endowments from the beginning of its existence in Bosnia and Herzegovina, that is to say, from 1882. These possessions constituted inalienable property until 1946, when the endowments and other property of religious institutions, including all buildings and other facilities, were expropriated and transferred to the State (Article 7 of the Law on Land Reform and Colonisation; Official Gazette of the then People's Republic of Bosnia and Herzegovina, No. 2/46). Certain real property was left to the respective religious institutions, depending on its significance and historic value.

28. On the basis of the 1958 Law on Nationalisation of Rented Buildings and Building Land (Official Gazette of the then People's Republic of Bosnia and Herzegovina, No. 52/58) certain residential buildings, apartments and office premises were nationalised and transferred into social ownership. Nationalised land was recorded in the Land Registry as socially-owned. This nationalisation did not include buildings and spaces used for religious activities and buildings used for accommodating religious dignitaries.

29. The 1958 nationalisation deprived the applicant of all property in Banja Luka except for its mosques and the surrounding land. The organ administering the endowments belonging to the applicant was dissolved. Nevertheless, the entries in the Land Registry remained in the name of the Endowment of the Islamic Community. The Islamic Community in Banja Luka was further allowed to retain a right to use a certain number of apartments. The apartments were situated in the close vicinity of mosques and were to be inhabited by persons performing the function of imams. The apartment in the so-called "yellow building" at Zdravka Čelara street No. 8 next to the Ferhadija mosque was used for free by the applicant up to an earthquake in 1969 which rendered it uninhabitable. The building itself, including certain business premises on the ground floor, was nationalised. A further building at Mirka Kovačevića Street which the applicant used for religious instruction was also nationalised.

30. If, on nationalised building land, an already constructed building had not been nationalised, the owner of that building retained the right to use the land under the building as well as the surrounding land serving the needs of that building. This right was recorded in the Land Registry in the name of the owner of the building for as long as the building endured on the land. The said right relative to the sites of the mosques in Banja Luka had been registered in favour of the applicant prior to their destruction.

31. Nationalised building land not yet used for construction remained with the former owner until transferred into the possession of a municipality or another person, *inter alia*, for construction purposes. Until such a transfer of possession the previous owner retained a permanent right to use that land, including the right to lease it.

32. On 22 April 1975 a general urban plan was adopted for the city of Banja Luka. It appears that subsequently a detailed regulatory plan was adopted for various city areas.

33. Before the hostilities preceding the General Framework Agreement some 30,000 Muslims lived in the Banja Luka region. They performed their religious practice in 15 mosques in Banja Luka: Ferhadija (Ferhat-Pasha's), Arnaudija, Gazanferija, Sefer Bey's, Osmanija, Hadži-Perviz, Sofi Mehmed-Pasha's, Hadžibegzade's, Hisečka (Mehdibeg), Behram Efendija's, Hadži-Zulfikar's, Stupnica, Dolačka-Hadži-Omer's, Šabanaga's and Hadži-Kurt's. At least 12 of these mosques were registered, as enjoying special protection, by the Institute for the Protection of the Cultural-Historic and Natural Heritage of Bosnia and Herzegovina. The majority of the mosques were built in the sixteenth and the seventeenth centuries, the oldest being about 420 years and the youngest about 180 years old.

34. There was no war activity in Banja Luka in the 1990s, but all 15 mosques in Banja Luka were

destroyed between 9 April 1993 and the end of September 1993. Remains were removed from the sites of Ferhadija, Arnaudija, Gazanferija, Sefer's Bey's and Dolačka-Hadži Omer's. The destruction of the mosques and the removal of remains took place at night during the period when the city was blockaded and a curfew was in force.

35. On 18 February 1994 the Municipal Assembly of Banja Luka decided that a new regulatory plan for the areas "South IV-VII" would be drawn up for adoption between 1994 and 2000 (Official Gazette of the Republika Srpska, No. 1/94). The decision to draw up such a plan was coupled with a ban on construction within the relevant areas during a period of three years. Most of the sites of the destroyed mosques, including Ferhadija, Arnaudija and Gazanferija, were located within those areas.

2. Events after 14 December 1995

36. After the entry into force of the General Framework Agreement on 14 December 1995, only some 3,000 to 4,000 Muslims remained in Banja Luka. Following the destruction of the 15 mosques in Banja Luka, the closest mosque is located in Ključ, about 80 kilometres away in the Federation of Bosnia and Herzegovina. The Muslims now worship in an allegedly inadequate office space in the only remaining building of the Islamic Community on the site of Ferhadija.

37. An extract from the official property map issued on 28 May 1996 still indicated the Ferhadija mosque with adjoining structures and graveyard.

38. After the end of the hostilities the municipal bodies in Banja Luka allegedly continued the destruction of the remains of the applicant's mosques in Banja Luka, by throwing the remains into a garbage deposit and/or into the river Vrbas. More particularly, the applicant alleges that from 16 to 19 October 1996 poplar trees were cut down on the site of Ferhadija. The yellow building was pulled down, and various material was removed by the company Čistoća ("JKP") following an order issued by the Municipality. Čistoća renders services to citizens related to cleanliness and other matters and is a public company.

39. On 16 October 1996 the Board of the Islamic Community in Banja Luka complained to the Municipality, seeking protection of its property rights and compensation for the damage caused by the company Čistoća. No decision has been issued by the Municipality.

40. In an extract from the official property map of the Banja Luka Municipality issued on 6 November 1996 the Ferhadija mosque and adjoining structures no longer appeared.

41. On 3 March 1997 the applicant submitted seven requests to the Municipality of Banja Luka for urban planning approval of the erection of fences around the sites of Ferhadija, Arnaudija, Gazanferija, Sefer Bey's, Hadži Perviz, Stupnica and Hisečka and their adjoining cemeteries. The applicant submitted that the cemetery sites were being used as parking lots and garbage dumps. The applicant further submitted seven requests for approval of the intended construction of the aforementioned mosques on their respective sites. There has been no official decision in response to any of the above requests. Allegedly, media in the Federation of Bosnia and Herzegovina reported, in April 1998, that Mayor Umićević was strongly opposed to any reconstruction of the Ferhadija mosque.

42. On 27 March 1997, on the basis of Articles 8(2) and 54(1) of the Republika Srpska Law on Environmental Planning, the Municipal Assembly decided to amend its decision of 18 February 1994 to draw up a regulatory plan for the areas "South IV-VII." Until a new regulatory plan had been adopted these areas were, with some exceptions, to be regarded as reserved ones for the purposes of Articles 8 and 9 of the said Law. Under Article 9 this designation entailed a ban on construction until the adoption of the regulatory plan or for a maximum of five years. The sites of the seven mosques included in the applicant's request of 3 March 1997 are located within the areas designated as reserved.

43. Having found out that the building on Mirka Kovačevića street used for religious instruction until the 1958 nationalisation was no longer being used by the Municipality, the applicant requested its return, but there was never any response.

44. On 20 July 1998 the then Mufti Halilović of Banja Luka died. The applicant requested permission from the Municipality to bury him on the site of the Ferhadija mosque. The request was denied in writing on the following day, as the burial would have taken place in the centre of the city and a law had prohibited burials at that location since 1945. An appeal was lodged but the applicant's legal representative was told that it had been rejected. The burial then took place in Sarajevo.

45. On 25 July 1997 the applicant requested the Commission to Preserve National Monuments to designate the sites of the Ferhadija mosque and four other mosques in Banja Luka as national monuments. In June 1998 the Commission designated Ferhadija as a protected site.

B. Facts as presented by the respondent Party

46. In respect of events occurring before 14 December 1995, the respondent Party confined itself to arguing that the Chamber lacked competence *ratione temporis* to examine them (see also paragraph 120 below).

47. The respondent Party further stated (in September 1997) that after 14 December 1995 the Mufti of Banja Luka had been working freely and had been able to conduct religious rituals. The respondent Party further submitted (in May 1998) that the Municipal Assembly would decide, at one of its forthcoming sessions, on the applicant's respective requests for the erection of fences around seven sites and the reconstruction of seven mosques.

C. Oral testimony

1. Mr. Jusuf Dedić (witness)

48. Witness Dedić, a religious official (Imam) of the Islamic Community in Banja Luka since 1992, stated that up to the war the Islamic Community had been entitled to dispose freely of all of its property in Banja Luka. This entailed carrying out repair works on the sites of the mosques and fencing them in. He confirmed the facts as alleged in the application in respect of the events in May 1993.

49. The witness confirmed that at present there are no mosques in Banja Luka and its close surroundings, the nearest mosque being situated in Ključ. The Muslim believers now practice their religion in an inadequate space on the ground floor of the Mufti's Office in Banja Luka. This room can accommodate about 200 people at a time. Many more would attend the prayers if the premises were adequate.

50. According to the witness, the authorities have not prohibited them from practising their religion in the aforementioned room. There was a disturbance on 23 July 1998, during the common prayer following the death of the late Mufti Halilović, when some thirty persons intruded with their shoes on and chased out believers.

51. Under Muslim rules every believer shall pray in a mosque five times a day. During the war the believers could, for security reasons, not be publicly invited to prayers (by *ezan*) in spite of the religious rules requiring such a procedure. For the same reason and for want of any permission to this end, there have been no such public invitations even after 14 December 1995, and only the noon prayer has been organised. Currently, no religious instruction in Islam is provided in Banja Luka, there being very few Muslim children in the city.

52. The witness further testified that in October 1995 "the old building" on the site of Ferhadija was destroyed and poplar trees were cut down. Further destruction took place in the daytime and debris was removed to unknown city dumps partly in the night time. Heavy vehicles such as trucks were used. The police did not appear on the site in connection with these works. Around the same time some marble slabs covering graves in certain Muslim cemeteries were removed, especially at Stupnica, and some tombstones were destroyed.

53. In July 1998 the Banja Luka authorities forbade the burial of the late Mufti Halilović on the

site of Ferhadija, referring to a prohibition on burials at that cemetery in force since 1945. There was no official written refusal. The witness and others were presented with a list of cemeteries indicating where burials were prohibited and where they were still allowed. Burials could still take place at least at the Muslim cemetery at Stupnica and at the Muslim cemeteries Sitari and Novoselija (at Behram Efendija) as well as at the mixed cemetery Novo Groblje. All of these cemeteries are located in the immediate vicinity of Banja Luka. However, according to the witness the capacity of these cemeteries has been almost exhausted and some of them are not fenced in. No permission was requested for the burial of the late Mufti on any site in Banja Luka other than Ferhadija.

54. According to the witness, nothing remains on the sites of Ferhadija, Arnaudija, Hisečka and Novoselija. The witness had seen cars driving over the site of the Ferhadija mosque. At Novoselija (Behram Efendija) a garage has been built and heavy vehicles park there. Buses occasionally park on the site of the Hisečka mosque. In the course of irrigation works in 1998 a remaining wall of the Arnaudija mosque was pulled down together with a drinking-fountain and a gate. Some ruins remain on the sites of the Šeher and Stupnica mosques. On the site of the Gazanferija mosque two small mausoleums still remain.

55. The witness finally testified that the applicant's requests for protection of the sites of destroyed mosques and for the erection of fences around them had not been dealt with by the authorities. Believers fenced in some of the graves in the spring of 1998. However, at several locations these fences were pulled down and removed, especially at the sites of Gazanferija and Stupnica. The applicant informed the police, who came to inspect the damage but did nothing more, following which the repaired fences were again damaged. The entrance into the site of Stupnica was turned into a dump site.

2. Mr. Hamzalija Kapetanović (witness)

56. Witness Kapetanović was previously the Treasurer, and from September 1995 until 2 November 1998, Secretary to the Board of the Islamic Community in Banja Luka. His office was in the Board's building on the site of Ferhadija.

57. The witness testified that the demolition of the mosques in question and the removal of some of their remains had taken place between 9 April and 9 September 1993. The Ferhadija mosque, Ferhat-Pasha's domed burial site as well as Barjaktar's and Hafiz-Kada's domed burial sites, horticulture and fences were levelled and the location cleansed before September 1993. Rubble and remains were removed by the public utility company "Put".

58. The witness further testified that, on 19 or 20 December 1995, three explosive devices were thrown into the water and sewage facility of the Board of the Islamic Community. Windows in the Board's building were broken and fences, tombstones and slabs were removed from the sites of several graveyards. Believers were assaulted and discouraged from entering the room in the Mufti's office for prayers. At funerals there were incidents of provocation during the escorting of the deceased and some believers were stoned after 14 December 1995. Those instances were reported by the Islamic Community to the police stations Centar and Majdan (later Obilićevo). There was never any response to those complaints or to the applicant's requests for permission to erect fences around the sites of destroyed mosques.

59. In April 1996 surveyors working on the Ferhadija site informed the witness that they were marking the location of the street to be built in front of the Express Restaurant near the Ferhadija site. On his way to work on 16 October 1996 around 7.45 a.m. the witness found heavy machinery (such as a bulldozer) on the site of Ferhadija, in the process of pulling down the yellow building. The applicant had not been notified that it would be destroyed. After protesting to the foreman, an employee of the public utility company Čistoća, the witness was told that the destruction had been ordered by the foreman's superior, and that the building belonging to the Board of the Islamic Community and located some fifteen metres away would be destroyed as well.

60. Fearing for his own safety, the witness left and, mistrusting the municipal organs, asked for the intervention by various bodies representing the international community. Meanwhile, the destruction of the yellow building continued. The cement path from the entrance gate was also

destroyed.

61. On arriving at work on 17 October 1996 the witness noticed that two poplar trees on the site had been cut during the night. He was later watching from his office window as the stump of one of them was being dug up at Hafiz-Kada's domed burial site and the bones of a skull and femur of an adult were removed with the soil. These remains were packed in a cement bag, thrown on a truck and covered with rubble. Following an intervention by the Office of the High Representative, the witness was informed by one of its officials that the building of the Board of the Islamic Community would not be levelled.

62. In 1997 the applicant requested the Municipality and the company Čistoća to carry out repair works on the Ferhadija site and to erect a new fence. The cement path from the entrance was later repaired by the company.

63. According to the witness, the yellow building on the Ferhadija site was an endowment of the Islamic Community until 1953. In the course of the nationalisation of part of its property the apartment on the first floor of this building was left to the applicant which was renting it out prior to its destruction. The business premises on the ground floor occupied by the company Vrbas were socially-owned, i.e. administered by the Municipality. The building was damaged in an earthquake in 1980 or 1981. The applicant was unable to repair it, as the company Vrbas was not interested in any such works. As a consequence the yellow building was in a bad state when pulled down.

64. The witness further confirmed that before the nationalisation the applicant had owned a building in Mirka Kovačevića Street which was used for religious instruction. The applicant's request for a return of the building received no reply from the Municipality.

65. At present a considerable number of believers have to pray in the corridors near the room in the building of the Board of the Islamic Community.

3. Mr. Ahmed Kapidžić (expert)

66. Mr. Kapidžić, architect and former Director of the Institute of Urban Planning in Sarajevo, was familiar with the general urban plan for the city of Banja Luka adopted on 22 April 1975. It had not been amended since and thus remained in force. The expert confirmed that item 37 places special emphasis on the protection of historic sites and objects. Item 37(3) classifies such sites and objects by various degrees of protection. Protection of the first degree is afforded to, among other objects, the ten sacred sites of Ferhadija with a domed burial site and a clock tower, Arnaudija mosque with a domed burial site and graveyard, Behram Efendija's mosque at Desna Novoselija, Hadži-Zulfikar's or Tulek's mosque, Hadži-Kurt's mosque, Sofi-Mehmed-Pasha's mosque, Hadžibegzade's mosque, Gazanferija mosque, Besim's mosque and Dolačka-Hadži-Omer's mosque, with their graveyards forming integral parts of the sites.

67. The expert had also been informed of the Municipality's decision of 1994 to draw up a detailed regulatory plan. He doubted whether that plan could cover all fifteen sites of the destroyed mosques. The regulatory plan being of a lower rank, it must be harmonised with the general plan. Until adoption of the new regulatory plan, there is a ban on construction, and only reconstruction of existing objects in the sense of maintenance is allowed.

68. The expert further testified that there is no legal possibility to change the purpose of the ten protected sites under the new regulatory plan in a way which conflicts with the general urban plan. The registration in the general urban plan of the aforementioned mosques as particularly protected objects means that they can be restored into their original state prior to the adoption of a regulatory plan. A permit to this effect is nevertheless required.

69. In the opinion of the expert, the adoption of a regulatory plan requires about one year, as opposed to at least three years for the adoption of a general urban plan.

70. The expert finally testified that general plans (and only such plans) would designate objects for military purposes as "reserved areas", marking them as "white spots". The expert was unaware of

any other objects having been designated as "reserved areas".

D. Observations by the Human Rights Ombudsperson

71. At a meeting on 25 March 1998 between one of the Ombudsperson's senior lawyers and Mr. Bućma, in his capacity as Secretary for Urban Planning and Environment of the Banja Luka Municipality, and Mr. Gavranović, Secretary to the Municipal Assembly, Mr. Bućma stated that about one month earlier he had met with Mufti Halilović regarding the applicant's request for permission to fence in the site of Ferhadija. They had apparently agreed that a request to this effect would be granted but only on a temporary basis. This arrangement had been reported to the Municipal Agency for Urban Planning which, according to Mr. Bućma, had supported it. Mr. Bućma had then brought the matter before the Municipal Board's Commission for Urban Planning and Environment, where, so Mr. Bućma stated on 25 March 1998, the arrangements had allegedly been cancelled because of "the political obstruction showed by the members of the Commission".

72. Mr. Bućma and Mr. Garanović further stated on 25 March 1998 that a sort of temporary measure was currently in force on the plots of land at issue in the case before the Chamber, thereby preventing any construction thereon until March 1999. The applicant's requests to such an end could not therefore be granted. As for the future designation of the plots in question, Mr. Bućma found it normal that religious buildings should be planned for construction in accordance with the number of members of the respective religious groups. Some of the plots in question might be maintained as religious sites, whereas some others might be designated for other use.

E. Documentation from the Office of the High Representative

73. In its Human Rights Monthly Report for July 1998, the Human Rights Coordination Centre of the Office of the High Representative stated the following of relevance to the applicant's case:

> "15. Demonstrations in Banja Luka following death of Mufti: Mufti Ibrahim Halilović, head of the Banja Luka Islamic Community and who remained in Banja Luka throughout the war, died of a heart attack on 20 July. The Islamic Community in BiH, in consultation with the family, initially decided to bury the Mufti at the site of the former Ferhadija Mosque in Banja Luka (destroyed during the war) but the municipal authorities refused. On 23 July, a group of approximately 500 Bosnian Serbs gathered in Banja Luka to prevent the funeral, shouting anti-Muslim slogans. Some international community monitors were assaulted, although none was seriously injured. The local police reportedly failed to respond. The Reiss decided to forgo the possibility of burial in Banja Luka and that the burial would take place in Sarajevo. The ceremony and burial were carried out on 24 July in Baščaršija, Sarajevo, without incident."

74. The Human Rights Monthly Report is based on the regular and special reporting of inter-governmental and non-governmental organisations.

F. Documentation from the Commission to Preserve National Monuments

75. The mandate of the Commission to Preserve National Monuments as provided for in Article IV of Annex 8 to the General Framework Agreement is as follows:

> "The Commission shall receive and decide on petitions for the designation of property having cultural, historic, religious or ethnic importance as National Monuments."

76. Article V (5) provides as follows:

> "In any case in which the Commission issues a decision designating property as a National Monument, the Entity in whose territory the property is situated (a) shall make every effort to take appropriate legal, scientific, technical, administrative and financial measures necessary for the protection, conservation, presentation and rehabilitation of the property, and (b) shall refrain from taking any deliberate measures that might damage the property."

77. During its session in June 1998, the Commission to Preserve National Monuments, in

addition to designating the site of the Ferhadija mosque as a protected site (see paragraph 45 above), approved the text of a letter addressed to the authorities in both Entities of Bosnia and Herzegovina, asking them

> "to undertake rigorous and complete protection of the sites of cultural and religious monuments of historical value that were totally destroyed. This protection requires that no constructions or use of any other sort encroach on the perimetre of the destroyed monument, or threaten its integrity."

78. The Commission strongly recommended that this protection take the form of the planting of hedges around the protected area. It finally requested that the measures be taken urgently by the services concerned.

G. RELEVANT DOMESTIC LAW

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

79. Under Article 2 of Annex II to Annex 4 to the General Framework Agreement 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.

80. According to Article 12 of the Constitutional Law on the Implementation of the Constitution of the Republika Srpska (Official Gazette of RS, No. 21/92), laws and other regulations of SFRY and 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, will be applied until the issuance of relevant laws and regulations of the Republika Srpska.

2. Religious communities

81. The status of a religious community is regulated by the Law of the Socialist Republic of Bosnia and Herzegovina ("SRBiH") on the Legal Status of Religious Communities (Official Gazette of SRBiH, No. 36/76). The religious communities are separated from the State (Article 3). Within religious communities, their bodies or organisations it is forbidden to perform activities of social concern and 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).

82. 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).

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

84. Article 28 of the Republika Srpska Constitution guarantees the freedom of religion. Religious communities shall be equal before the law and shall be free to conduct religious activities and services. The Serbian 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

85. 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) stipulates 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 the building land on conditions provided by law and regulations issued on the basis of 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).

86. 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 not yet constructed land for the purpose of construction as well as a permanent right to use building land already used for construction while the building endures on the land (Article 21(1) and (3) and Article 40(1)).

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

88. 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).

89. 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 scope of action of 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

90. 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.

91. Natural and cultural-historic heritage areas shall be protected by *lex specialis* 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).

92. 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).

93. 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 as well as other areas under construction or cultivation.

94. 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)).

95. Urban planning approval shall be given on the basis of the regulatory plan. Approval for temporary objects or temporary purposes shall be given only exceptionally 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 a requested planning approval, unless otherwise prescribed by provisions of the Law on Environmental Planning (Article 135(1)).

5. The Republika Srpska Law on Environmental Planning

96. The Law on Environmental 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. Under Articles 8 and 9 of the Republika Srpska Law the detailed purpose of reserved areas of significance for future development need not be specified. Reserved areas may also be designated for a temporary purpose. The competent assembly may designate reserved areas even before adopting a plan including such areas.

97. Within reserved areas construction is not allowed, with the exception of structures warranted by current maintenance, annexes for the purpose of providing basic hygiene, reconstruction which does not have the character of a new building, and construction required for the conservation of buildings. This prohibition shall last until the appropriate plan has been adopted, but no longer than five years (Article 9).

98. Under Article 54(1) a new regulatory plan is drawn up on the basis of a decision of the competent assembly.

99. The procedure for requesting urban planning approval is governed by the Law on Administrative Procedure unless differently prescribed (Article 80(1)).

100. 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, to 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).

6. The Law of the Socialist Republic of Bosnia and Herzegovina on the Protection and Utilisation of Cultural-Historic and Natural Heritage

101. Under the Law on Protection and Utilisation of Cultural-Historic and Natural Heritage (Official Gazette of SRBiH, Nos. 20/85 and 12/87) property within the meaning of this law shall enjoy special protection and shall be used on conditions and in a manner prescribed by law (Article 6). Such protection involves, *inter alia*, preventing destruction of the property, prohibiting every activity which would lead directly or indirectly to changing it, and conserving and renovating protected property (Article 11).

102. Article 7(2) states that the competent socio-political communities shall provide conditions for protection and utilisation of assets of cultural and historic heritage.

103. Property within the meaning of this law which falls within the first or the second category is either of extraordinary significance for the history and culture of the nation and nationalities or property on the World Heritage List. The third category of cultural-historic heritage consists of other significant assets (Article 14).

104. Property enjoying special protection under this law shall be entered into a special register (Articles 40 and 41). Such property shall be maintained in its original state or in the state in which it

was found and be protected from all kinds of damage, extermination, destruction and decay which would change it (Article 46).

105. The Institute for the Protection of Cultural-Historic and Natural Heritage of Bosnia and Herzegovina shall submit an expert survey on protection and utilisation of protected immovable property, so that such property can be entered into the relevant plans (Article 50(1)).

106. Property protected pursuant to regulations in force until this law became effective is considered protected until categorised under the provisions of this law (Article 110).

7. The Republika Srpska Law on Cultural Assets

107. The Republika Srpska Law on Cultural Assets was published on 23 June 1995 (Official Gazette of RS, No. 11/95) and came into force eight days later. It replaced the aforementioned Law on Protection and Utilisation of Cultural-Historic and Natural Heritage. Under Article 111 cultural assets protected pursuant to regulations in force on the day the Republika Srpska Law became effective are considered protected until recorded and categorised according to this law.

8. The Law on Administrative Procedure

108. According to Article 218 of the above-mentioned Law on Administrative Procedure (Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 47/86) any request submitted to an administrative organ is to be considered refused, if no decision has been made within one or two months (depending on the subject matter).

109. If the competent body does not deliver a decision within the above time-limit, the applicant has a right to appeal against this tacit refusal, i.e. "silence of the administration", to the higher administrative body, provided an appeal against the decision initially sought is allowed (Article 218).

9. The Republika Srpska Law on Administrative Disputes

110. According to Article 2 of the Law on Administrative Disputes (Official Gazette of RS, No. 12/94), a physical and legal person may initiate an administrative dispute if he considers that his right or personal interest based on law has been violated. According to Article 3, county courts, the Supreme Court of the RS and the RS Military Supreme Court are competent to resolve administrative disputes.

111. According to Articles 7 and 25 of the Law, an administrative dispute may be initiated against an administrative act of a second instance body. An administrative dispute may also be initiated against an administrative act of a first instance body, if an ordinary appeal against the decision is not allowed.

112. According to Article 9(1) of the Law, an administrative dispute cannot be initiated against administrative decisions in matters which a judicial body is competent to adjudicate.

113. According to Articles 23 and 25, an administrative dispute may be initiated within 30 days from the day of delivery of the administrative act. An administrative dispute may also be initiated if the first or second instance body did not issue a decision on the applicant's request or appeal within sixty days, or within seven days after the request for a decision has been repeated.

10. Decision on Graveyards and Funeral Activities in Banja Luka

114. On 20 June 1996 the Assembly of the Banja Luka Municipality, on the basis of Articles 19 and 20 of the Law on Communal Activities (Official Gazette of RS, No. 11/95) passed a decision on graveyards and funeral activities, providing the conditions and form of burials, exhumation of deceased, transfer of mortal remains from and to a graveyard and the conditions for closing and levelling a graveyard (Official Gazette of the Banja Luka Municipality, No. 5/96).

115. Article 2 (4) of the Decision entitles the municipal assembly to prohibit further burials in a graveyard. Such a graveyard is to be considered abandoned.

116. Article 4 of the Decision provides that burials may only be performed in a graveyard in use.

117. Article 48 provides an exception to Article 4. The deceased may be buried outside a graveyard in use, if special reasons and conditions exist and if such a burial would not be against the public interest and urban planning, sanitary and other regulations. The municipal organ competent for sanitary inspection affairs must approve such a burial.

IV. COMPLAINTS

118. The applicant essentially complains that the killing, expelling and displacement of Muslims in Banja Luka and the destruction of its 15 mosques in Banja Luka prior to the entry into force of the General Framework Agreement, the removal of the remains of those mosques, the desecration of adjacent graveyards, the destruction of the yellow building on the site of Ferhadija, the Municipality's ongoing refusal to permit the construction of seven mosques or even the erection of fences around the remains of those seven sites, the inability to worship on adequate premises, including making public calls to prayer, the local authorities' failure to protect Muslim believers during worship and funerals and the refusal to allow the burial of the late Mufti on the Ferhadija site, taken together, constitute discrimination against the applicant and its members on the grounds of religion and national origin in the enjoyment of their right to freedom of religion and the right to peaceful enjoyment of their possessions. Reference is made notably to the fact that the Islamic Community represents the religious and ethnic minority of Bosnian Muslims in Banja Luka, a city currently with a majority population of Serb descent. This discrimination has continued since the destruction of the mosques in 1993, as seen in the Municipality's ongoing policy of subjecting the applicant's members to humiliation.

119. As for provisions of international treaties applicable according to the Agreement, the applicant invokes specifically Article 9 of the Convention and Article 18(1) of the International Covenant for Civil and Political Rights ("the Covenant").

V. SUBMISSIONS OF THE PARTIES

A. The respondent Party

120. In so far as it has participated in the proceedings before the Chamber, the respondent Party submits that all events related to the destruction of the 15 mosques and the removal of the remains from their sites occurred before the Agreement came into the force and that the application was therefore not compatible *ratione temporis* with the Agreement.

121. In addition, the respondent Party stated (in September 1997) that after 14 December 1995 the Mufti of Banja Luka had been working freely and had been able to conduct religious rituals. The respondent Party further submitted (in May 1998) that the Municipal Assembly would decide, at one of its forthcoming sessions, on the applicant's respective requests for the erection of fences around seven sites and the reconstruction of seven mosques.

B. The applicant

122. The applicant maintains its complaints and further contends that it has no effective remedy whereby it could challenge the alleged violations. It is true that in the course of an administrative dispute the legality of a final administrative act may be examined by the competent court. However, as no such final act exists in the applicant's case, this remedy could not effectively be used. Nor does the applicant have an effective remedy against "the silence of the administration". Given that the Municipality's decision of 27 March 1997 amending the decision to draw up a regulatory plan continues to prohibit any construction, any opposition against such "silence" would be rejected. Finally, the applicant also refers to its position in the Banja Luka area, on account of which the outcome of any dispute could allegedly be foreseen in advance. In particular, any request for

reconstruction of Ferhadija lodged after the amendment indicated in the extract from the official property map of 6 November 1996 would be rejected as ill-founded, because this document no longer proves the previous existence of that mosque.

123. The applicant underscores that the authorities were under a legal obligation to take measures for the protection of its mosques and sites, most of them being protected cultural objects under Articles 7(2) and 46 of the 1985 Law on the Protection and Utilisation of Cultural-Historic and Natural Heritage.

124. The applicant suspects that the aim of the process for drawing up a regulatory plan for parts of Banja Luka is to change the purpose of the sites of destroyed mosques. The provisions of the Republika Srpska Law on Environmental Planning of 1996 allegedly do not impose any time-limit within which a regulatory plan must be adopted. The designation of an area as a "reserved" one may be extended indefinitely.

VI. OPINION OF THE CHAMBER

A. Admissibility

1. Competence *ratione personae*

125. 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.

126. 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 would lack such status.

127. The Chamber has held that a registered association could not in itself be regarded as a "victim" within the meaning of Article VIII (1) of the Agreement, where the case concerned alleged violations of procedural and property rights of individual members of the association and where the Chamber had not been provided with any letter of authority by which one or several individual members had authorised the association to act on their behalf before the Chamber (*United Association of Citizens-Pensioners in the Federation of Bosnia and Herzegovina v. The Federation of Bosnia and Herzegovina*, Case No. CH/98/736, decision of 13 October 1998, paragraphs 10-11, Decisions and Reports 1998).

128. In the present case the applicant alleges, *inter alia,* discrimination against its members in the enjoyment of their right to freedom of religion, as guaranteed by, among other applicable provisions, Article 9 of the Convention. The European Commission of Human Rights has found that a church body or an association with religious and philosophical objects is capable of possessing and exercising the rights contained in Article 9 and is in reality acting on behalf of its membership (see, e.g., *Chapell v. the United Kingdom*, decision of 14 July 1987, Decisions and Reports of the Eur. Comm. H.R. No. 53, pp. 241, 246; *X. and Church of Scientology v. Sweden*, decision of 5 May 1979, Decisions and Reports of the Eur. Comm. H.R. No. 16, pp. 68, 70).

129. The Chamber notes that under Article 1 of its Constitution the applicant is an independent religious community to which belong, among others, all Muslims in Bosnia and Herzegovina. The Chamber therefore finds that, for the purposes of Article VIII(1) of the Agreement, the applicant can legitimately claim status as a "victim" appearing on behalf its members in Banja Luka whose existence is not in dispute.

130. The applicant further complains of a violation of the right to the peaceful enjoyment of its possessions. The Chamber understands this complaint to have been brought not on behalf of

individual Muslim believers but by the Islamic Community in its own right, being recognised under domestic law as a legal person capable of possessing property (*see* paragraph 82 above). For this reason, the applicant may also claim status as "victim" in relation to the alleged violation of its rights under Article 1 of Protocol No. 1 to the Convention.

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. Competence *ratione temporis*

132. According to Article VIII(2)(c) of the Agreement, the Chamber shall dismiss any application which it considers incompatible with the Agreement. The Chamber must therefore address the question to what extent it is competent *ratione temporis* to consider this case, bearing in mind that some of the alleged violations occurred before the entry into force of the Agreement on 14 December 1995. In *Matanović* v. *The Republika Srpska* (Case No. CH/96/1, decision on the admissibility of 13 September 1996, Decisions 1996-97) the Chamber held that, in accordance with generally accepted principles of international law, it is outside the competence of the Chamber *ratione temporis* to decide whether events occurring before the coming into force of the Agreement on 14 December 1995 gave rise to violations of human rights. Evidence relating to such events may, however, be relevant as a background to events which occurred after the Agreement entered into force. Moreover, in so far as an applicant alleges a continuing violation of his rights after 14 December 1995, the case may fall within the Chamber's competence *ratione temporis* (*see Bastijanović* v. *Bosnia and Herzegovina and The Federation of Bosnia and Herzegovina*, Case No. CH/96/8, decision of 4 February 1997, Decisions 1996-97).

133. The applicant has alleged that the authorities of the respondent Party were responsible for, or allowed, the destruction of its 15 mosques in Banja Luka in 1993 as well as the killing, expelling and displacement of Muslims in the area prior to the entry into force of the General Framework Agreement. As these events occurred prior to 14 December 1995, the Chamber, agreeing with the respondent Party, finds that they are as such outside the Chamber's competence *ratione temporis*.

134. The applicant has further alleged that the authorities of Banja Luka have prevented the remaining Muslims in Banja Luka from practising their religion in appropriate conditions as they did before the war. The Muslim believers have not had public calls to prayer by a *mujezin* and have been limited to worshipping in the offices of the Islamic Community. The burial of the Mufti of Banja Luka on the site of the Ferhadija mosque was prohibited. In addition, the applicant alleges that the local authorities have failed to protect its members against assaults, provocation and other disturbances during worship and funerals. The applicant has further alleged that the authorities in Banja Luka were responsible for the destruction of the remains of the mosques which occurred after 14 December 1995, specifically the events of 16-18 October 1996. Finally, the applicant has alleged that the authorities' denial of permission to reconstruct seven of its mosques and to erect fences around the sites of destroyed mosques violates its rights under the Agreement.

135. The Chamber observes that the aforementioned complaints relate to a number of events which, taken as a whole, allegedly form a pattern of ongoing discrimination against the applicant's members in Banja Luka. For the purposes of Article VIII(2)(c) of the Agreement the Chamber is therefore competent *ratione temporis* to examine this alleged discrimination in so far as it has continued after 14 December 1995. In doing so the Chamber can also take into account, as a background, events prior to that date (see, e.g., *Eraković v. The Federation of Bosnia and Herzegovina*, Case No. CH/97/42, decision of 15 January 1999, paragraph 37).

136. The Chamber also considers itself competent *ratione temporis* to examine separately the alleged violation of the applicant's property rights, in so far as this has occurred or continued after 14 December 1995.

3. *Lis alibi pendens*

137. According to Article VIII(2)(b) of the Agreement, the Chamber shall not address any application

which is substantially the same as a matter which has already been examined by the Chamber or has already been submitted to another procedure of international investigation or settlement. Moreover, under Article VIII(2)(d) of the Agreement the Chamber may reject or defer further consideration of a case, if it concerns a matter currently pending before any other international human rights body responsible for the adjudication of applications or the decision of cases, or any other Commission established by the Annexes to the General Framework Agreement. The respondent Party has not made any objection based on these two provisions of the Agreement.

138. The Chamber notes that, following the applicant's request of July 1997 (see paragraph 45 above), the destruction and possible reconstruction of the mosques of Banja Luka have to some extent also been considered by the Commission to Preserve National Monuments established by Annex 8 of the General Framework Agreement. This Commission's mandate is to decide on petitions for the designation of property as a National Monument. It has declared the site of the Ferhadija mosque to be protected and has recommended that the authorities of the respondent Party protect totally destroyed sites of cultural and religious monuments of historic value. The Commission has strongly recommended that this protection take the form of the planting of hedges around such sites.

139. The Chamber finds that neither the decision of the Annex 8 Commission to declare protected the site of the Ferhadija mosque nor its recommendation to the respondent Party directly addresses the question before the Chamber, namely whether some of the applicant's rights under the Agreement have been violated. Nor does Annex 8 afford to this Commission any jurisdiction to address alleged violations of rights protected by the Agreement.

140. The Chamber finds therefore that the actions taken by the Annex 8 Commission relative to sites of destroyed mosques in Banja Luka do not preclude the Chamber from examining the applicant's grievances relative to the rights and freedoms guaranteed by the Agreement. Moreover, even if related matters may remain pending before the Commission to Preserve National Monuments, the Chamber does not find it appropriate to reject or defer further consideration of this application.

141. It follows that, in so far as the Chamber has retained part of the application as falling within its competence *ratione temporis*, the admissibility requirements spelled out in Article VIII(2)(b) and (d) of the Agreement have also been met.

4. Requirement to exhaust effective domestic remedies

142. 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 applying the corresponding provision in Article 26 of the Convention (presently Article 35 of the Convention, as amended by Protocol No. 11 to the Convention), the European Court of Human Rights, in the case of *Akdivar and Others v. Turkey*, stated the following:

> "Under Article 26 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 (see judgement of 16 September 1996, Reports 1996-IV, p. 1192, paragraph 66)."

143. The European Court also stated 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 legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants (ibid., paragraph 69).

144. The Chamber has already found that these principles should also be taken into account when examining whether domestic remedies have been exhausted for the purposes of Article VIII(2)(a) of the Agreement (see, e.g., *Blentić v. The Republika Srpska,* Case No. CH/96/17, decision of 3 December 1997, paragraphs 19-21, with further reference, Decisions 1996-97).

145. In the present case the Chamber finds it established that the applicant, following various incidents, requested through its members in Banja Luka that the local police take measures with a

view to protecting both the applicant's own rights and those of its members as guaranteed by the Agreement. These incidents involved assault and disturbance of believers during worship and funerals and damage to the applicant's property. There is no indication that the police thoroughly and effectively investigated any of these incidents with a view to identifying the culprits.

146. The Chamber further notes that, on 3 March 1997, the applicant requested permission from the Municipality of Banja Luka to rebuild seven of the 15 mosques. At the same time, the applicant requested permission to build fences around those seven sites. This request was made following the termination of a three-year prohibition on construction resulting from the Municipality's decision of 18 February 1994 to draw up a regulatory plan for certain areas encompassing, *inter alia*, the sites of the aforementioned seven mosques. The applicant has not received any formal response to these requests. Furthermore, on 27 March 1997 the Municipal Assembly amended its decision of 18 February 1994 and reserved the relevant areas for purposes not stated. The Chamber notes that under Articles 8 and 9 of the Republika Srpska Law on Environmental Planning such designation triggers a ban on construction which remains in force.

147. In addition, the applicant claims to have requested, for the purpose of holding religious services, permission to use a building that had belonged to it prior to the nationalisation of part of its property in 1958. No answer has allegedly been received.

148. 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., *Čegar v. The Federation of Bosnia and Herzegovina*, Case No. CH/96/21, decision on admissibility of 11 April 1997, paragraph 12, Decisions 1996-97). In the present case, the respondent Party has not raised the issue of exhaustion of domestic remedies.

149. On the information available to it the Chamber cannot find it established that an effective remedy was or is at present available to the applicant which could afford redress in respect of the breaches alleged. The Chamber therefore concludes that the admissibility requirement in Article VIII(2)(a) of the Agreement has been met.

5. Conclusion

150. Summing up, the Chamber concludes that, in so far as the applicant complains about the destruction of its 15 mosques in Banja Luka in 1993 and about the killing, expelling and displacement of Muslims in the area prior to the entry into force of the General Framework Agreement, the application must be declared inadmissible under Article VIII(2)(c) as being incompatible *ratione temporis* with the Agreement. The Chamber further concludes that the remainder of the applicant's complaints are admissible.

B. Merits

151. 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.

152. Under Article II 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.

153. The Chamber has held in *Hermas v. The Federation of Bosnia and Herzegovina* (Case No. CH/97/45, decision on admissibility and merits of 16 January 1998, paragraph 82, 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. It will therefore first consider whether the respondent Party is in violation of the Agreement by having discriminated against the applicant's members in the enjoyment of their right to freedom of religion.

1. Discrimination in the enjoyment of the right to freedom of religion guaranteed by Article 9 of the Convention

154. The applicant alleges discrimination in part relating to the freedom of religion of its members and in part in relation to its own property rights. The Chamber understands the applicant as alleging that the discrimination in the enjoyment of the latter right directly affects the possibility for its members in Banja Luka to exercise their freedom of religion. For the purposes of examining whether discrimination has occurred in the enjoyment of the right to freedom of religion it would therefore be artificial to exclude the property-related aspects of the case.

155. The Chamber will consider this allegation of discrimination 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."

156. In examining whether there has been discrimination contrary to the Agreement the Chamber recalls the jurisprudence of the European Court of Human Rights with respect to Article 14 of the Convention, of the UN Human Rights Committee with respect to Articles 2 and 26 of the Covenant and of other international courts and monitoring bodies. Article 14 of the Convention and Article 2 of the Covenant stipulate that the enjoyment of the rights and freedoms set forth in the respective treaties shall be secured without discrimination on any ground. Article 26 of the Covenant goes further and guarantees an independent right to equality before the law, equal protection of the law, prohibition of discrimination and protection against discrimination. The European Court and the Committee on Human Rights have 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 explicitly enumerated in the relevant provisions, including religion or national origin. In previous cases, the Chamber has taken the same approach (see the above-mentioned *Hermas* decision, loc.cit., paragraphs 86 et seq., and *Kevešević v. The Federation of Bosnia and Herzegovina*, decision of 12 September 1998, paragraph 92, Decisions and Reports 1998).

157. 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 Serbian Orthodox Church as "the church of the Serb people and other peoples of Orthodox religion" and provides that "the State" shall assist the Orthodox Church materially and cooperate with it in all fields. The Chamber is not called upon to determine whether the privileged treatment afforded to the Serbian 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 subject the applicant's members is a further element to be borne in mind in the examination of whether their treatment as a whole amounts to discrimination.

158. The applicant alleges that its members are subjected to an allegedly ongoing pattern of discrimination in Banja Luka, a city with a majority population of Serb descent where, consequently, the applicant's members form an ethnic and religious minority. The applicant holds the local authorities responsible for this discrimination and refers to the killing, expelling and displacement of Muslims and the destruction of its 15 mosques, these events occurring prior to the entry into force of the General Framework Agreement. Reference is further made to the subsequent removal of remains of mosques, the alleged desecration of adjacent graveyards, the Municipality's ongoing refusal to permit the reconstruction of seven mosques or even the erection of fences around the remains of the sites of those mosques, the alleged inability to worship and to make public calls to prayer, the local authorities' alleged failure to protect Muslim believers against assaults, provocation and other disturbances during worship and funerals and the refusal to allow the burial of the late Mufti Halilović on the site of the Ferhadija mosque.

159. The Chamber has already delimited its competence *ratione temporis* and can only consider the alleged discrimination in so far as it is alleged to have continued after 14 December 1995 (see paragraphs 132-136 above). It must further be examined whether the alleged incidents after that date amount to discrimination imputable to the respondent Party under Article II(2) of the Agreement.

160. The applicant has alleged, *inter alia*, that its membership in Banja Luka is being denied the possibility of worship on adequate premises and does not have public calls to prayer because it is concerned about the believers' safety. It is not disputed that at present the closest mosque is located in Ključ, about 80 kilometres from Banja Luka, in the Federation of Bosnia and Herzegovina. The Chamber also finds it established that the believers' current religious premises in Banja Luka are inadequate for worship and that they have been unable to use the premises occupied by the applicant until 1958. Nevertheless, on the evidence before it the Chamber cannot find that the believers have been totally prevented from gathering for worship after 14 December 1995. However, the applicant's allegations go beyond this question.

161. Before scrutinising 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 the above-mentioned *Matanović* case, decision on the merits of 6 August 1997, paragraph 56, Decisions 1996-97, and *Marčeta v. The Federation of Bosnia and Herzegovina*, CH/97/41, decision of 3 April 1998, paragraph 65, Decisions and Reports 1998).

162. The authorities' effective refusal to permit the reconstruction of any of the seven mosques and the erection of fences around any of those sites is clearly imputable to the respondent Party. The Chamber cannot lose sight of the reasons underlying the applicant's requests to this effect. On various occasions in 1993 all 15 mosques in Banja Luka were destroyed during curfew, although the city was not in the war zone. Despite the repetitive character of these acts of destruction no attempt appears to have been made to prevent them and no official investigation into the responsibility for them appears to have been conducted by the local authorities. Twelve of the fifteen mosques with related structures had been placed under express protection by the authorities. From 18 February 1994 onwards construction on the seven sites had been banned for three years so as to permit the Municipality to draw up a new detailed plan for the area. From 19-20 December 1995 onwards the sites had nevertheless been the object of desecration by unknown perpetrators as well as of public works entailing the removal of parts of tombs, including their underground contents. Once the construction ban had ceased and in the absence of any plan re-designating the sites for other purposes the applicant sought firstly to obtain permission to protect the sites by fencing them in, and secondly to permit the reconstruction of the mosques. However, three weeks after these requests had been lodged the Municipal Assembly decided to reserve certain areas encompassing those sites, for purposes not stated, thereby triggering a new ban on construction.

163. The Chamber finds it established that the events on the site of the former Ferhadija mosque in October 1996 included the pulling down of the yellow building in which the applicant had been using an apartment, up to its devastation by an earthquake in 1969. The October 1996 events further included the destruction of part of the applicant's burial sites and other religious objects

remaining after the destruction of the Ferhadija mosque itself. The Chamber further considers it established that these acts were carried out by the public utility company Čistoća acting under the direct authority of the Municipality or at least with the connivance of the local authorities. Consequently, these acts are imputable to the respondent Party for the purposes of Article II(2) of the Agreement.

164. The Chamber further finds it established that from 19-20 December 1995 onwards the remains of some of the other destroyed mosques have also been removed, including objects on adjacent graveyards and fences which believers had erected around some of the sites. It has not been established that these measures have been taken either by an organ or official of the respondent Party of by an individual acting under the authority of such an official organ. Even so, it has not been shown that the authorities have taken any steps to investigate these incidents and to prevent their repetition.

165. Against this background, recalling the currently inadequate premises of Muslim believers in Banja Luka and not doubting that in their eyes the works on the site of Ferhadija and the use of some other sites as dumps and parking places amount to continuing desecration, the Chamber finds that the applicant's requests of 3 March 1997 require urgent and sympathetic consideration leading to a formal response from the Municipality. The applicant is entitled - as any religious community - to receive, in reply to its requests, reasoned decisions based on respect for its fundamental rights. The Chamber notes that in May 1998 the respondent Party submitted that the Municipal Assembly would decide, at one of its next sessions, on the applicant's respective requests. No such decision has been forthcoming and the respondent Party has given no reason for this delay.

166. The Chamber further notes *ex officio* that a Serbian Orthodox church is currently being constructed in the centre of Banja Luka opposite to Banski Dvor on the site of a church destroyed in World War II. It appears that this church is being built in an area not designated as reserved within the meaning of Articles 8 and 9 of the Republika Srpska Law on Environmental Planning. However, the respondent Party has not suggested any objective need to designate, three weeks after the applicant's requests of 3 March 1997, an area including the sites of seven destroyed mosques as a reserved space within which construction will remain prohibited until an appropriate plan has been adopted or until 2002.

167. Whilst the Muslim believers have not been outright prevented from gathering in worship, the Chamber finds it established that between 19-20 December 1995 and 23 July 1998 believers have been the subject of assault and provocation both at public funeral processions and during worship, without any intervention by the local police. The Chamber has furthermore found (in paragraph 145 above) that the applicant's complaints to the police have not triggered any proper investigation with a view to identifying the culprits.

168. The Chamber further notes that in March 1998 Mr. Bućma, Secretary for Urban Planning and Environment of the Banja Luka Municipality, suggested to a representative of the Human Rights Ombudsperson that a provisional agreement had been reached with the applicant in February 1998 to the effect that the site of the former Ferhadija mosque would be fenced in. This agreement had later been cancelled in the Municipal Board's Commission for Urban Planning and Environment, where, so Mr. Bućma stated on 25 March 1998, the arrangements had allegedly been cancelled because of "the political obstruction showed by the members of the Commission". This evidence gathered by the Human Rights Ombudsperson has not been challenged by the respondent Party.

169. The applicants have further alleged, without the respondent Party's rebuttal, that in April 1998 Mayor Umićevič publicly voiced his strong opposition to the reconstruction of the Ferhadija mosque. Nor can the Chamber overlook the incidents relating to its public hearing in the case (see paragraphs 16-21 above). Mr. Bućma and Mayor Umićevic both refused to appear at the final hearing venue, thereby failing to testify before the Chamber. Moreover, although not testifying under oath, the Director of one of the venues where the Chamber had originally intended to hold its hearing referred to pressure from Mayor Umićević's office as the reason for not being able to provide those premises to the Chamber.

170. The Chamber considers that the aforementioned behaviour of the highest municipal official of

Banja Luka and of its highest official in the field of urban planning, the attitude they have shown to the applicant's case before the Chamber as well as the statement of the Director of the Restaurant and Catering School amount to circumstantial evidence suggesting that the position of the Muslim believers in mainly Serbian-Orthodox Banja Luka is, for its authorities and officials, a political matter rather than a matter of freedom of religion.

171. The European Court has held that the need to secure true religious pluralism is an inherent feature of the notion of a democratic society. In the context of religious opinions and beliefs protection may be required to prevent and even punish improper attacks on objects of religious veneration (cf. *Otto Preminger-Institut v. Austria* judgement of 20 September 1994, Series A no. 295-A, pp. 17, 19-20, paragraphs 44 and 49).

172. In light of all the aforementioned considerations the Chamber finds it established that the Muslim believers in Banja Luka have been subjected to differential treatment if compared with the local Serbian Orthodox majority. 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, following the various requests and complaints submitted by the applicant, its authorities have taken reasonable steps to protect the applicant's members in Banja Luka from such discriminatory acts.

173. As there is no reasonable and objective justification for the differential treatment, the Chamber finds that the Banja Luka authorities have either actively engaged in and/or passively tolerated discrimination against Muslim believers due to their religious 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 the applicant's members elsewhere and, in particular, Muslim refugees and displaced persons from moving back to the Banja Luka area. 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.

174. Before considering whether there has been discrimination against the applicant in the enjoyment of its property rights the Chamber will also examine whether there has been a violation of the applicant's members' freedom of religion considered in isolation from the discrimination aspect.

2. Article 9 of the Convention in isolation

175. In considering the case under Article II(2)(a) of the Agreement in relation to Article 9 of the Convention in isolation the Chamber will have regard to the facts and circumstantial evidence on which it has based its finding of discrimination in the applicant's members' enjoyment of that right. For the purposes of its examination under Article 9 in isolation the Chamber will limit its examination to those allegations which it finds are to be considered exclusively under this provision.

176. 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 H.R., *Kokkinakis v. Greece* judgement of 25 May 1993, Series A No. 260-A, p. 17, paragraph 31). The European Commission of Human Rights has held that a State Church system cannot in itself be considered to violate Article 9 of the Convention, on condition that it includes specific safeguards for the individual's freedom of religion (see *Darby v. Sweden*, Report of Eur. Comm. H.R. of 9 May 1989, Series A No. 187, pp. 17-18, paragraph 45). The European Court has stressed, however, that the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate (see Eur. Court H.R., *Manoussakis v. Greece* judgement of 26 September 1996, Reports of Judgements and Decisions 1996-IV, fasc. 17, paragraph 47).

177. While religious freedom is, on the one hand, a matter of individual conscience, it also implies,

on the other hand, freedom to "manifest" one's religion. Bearing witness in words and deeds is bound up with the existence of religious convictions. The manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them. In democratic societies, in which several religions coexist within one and the same population, it may therefore be necessary to place restrictions on this freedom of manifestation in order to reconcile the interests of the various groups and ensure that everyone's belief is respected (cf. the aforementioned *Kokkinakis* judgement, loc.cit., paragraphs 31 and 33, and the *Otto Preminger-Institut* judgement, loc.cit., p. 17-18, paragraph 47).

178. At the public hearing the applicant also alleged violations of Articles 1 through 6 of the U.N. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief ("the Declaration"; U.N. General Assembly res. 36/55 of 25 November 1981). However, General Assembly declarations are not legally binding on states. Even if they were legally binding, this declaration would be inapplicable in the present case, as it is not one of the enumerated treaties listed in the Appendix to the Agreement. However, General Assembly declarations can offer guidance as to how to interpret legally binding conventions. Article 6 of the Declaration provides as follows:

> "In accordance with article 1 of the present Declaration, and subject to the provisions of article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, *inter alia*, the following freedoms:
>
> (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes. ..."

179. Whilst it is true that the applicant's members in Banja Luka have not been totally prevented from manifesting their belief in worship, any limitation of their right to freedom of religion must be shown to have been justified for the purposes of Article 9(2) of the Convention. For such justification to be at hand such a limitation must have been prescribed by law and be necessary in a democratic society for the pursuance of one or several of the legitimate aims enumerated in Article 9(2). In the assessment of the necessity for pursuing such an aim the Contracting Parties to the Convention are afforded a certain margin of appreciation. However, in delimiting the extent of that margin the Chamber must have regard to what is at stake, namely the need to secure true religious pluralism, an inherent feature of the notion of a democratic society. Considerable weight has to be attached to that need when it comes to determining whether the restriction was proportionate to the legitimate aim pursued (see the above-mentioned *Manoussakis* judgement, loc.cit., paragraph 44).

180. The applicant has alleged that the Muslim population of Banja Luka does not have adequate facilities for worship. Moreover, due to the local authorities' failure to protect Muslim believers against assaults, provocation and other disturbances during worship and funerals the believers fear for their safety when manifesting their religion. According to the evidence the believers, for security reasons, hold religious services for only one of the five required daily prayers and do not have public calls to prayer. Finally, the municipal authorities refused to allow the burial of the late Mufti Halilović on the site of the Ferhadija mosque.

181. The Chamber finds it established that the only place of Muslim worship in Banja Luka at present is clearly not designed for that purpose. It also appears to be grossly inadequate for the number of worshippers in the area, given its capacity to accommodate only some 200 of the 3,000-4,000 Muslims presently in the area. The Chamber has already found, against the background of earlier events, that the applicant is entitled to receive a reasoned decision based on respect for its fundamental rights in reply to its requests of 3 March 1997 for permission to reconstruct seven of the destroyed mosques. As matters stand today, the authorities' failure to decide on those requests amounts to a tacit refusal to even consider permitting the reconstruction of any of the destroyed premises intended for the celebration of divine worship.

182. The Chamber, recalling also that under the Declaration the right to religion includes the right to build a space for practising it, considers that the above refusal amounts to an interference with - or

a "limitation" of - the right of the Muslim believers in Banja Luka to manifest freely their religion as guaranteed by Article 9(1). Leaving aside the question whether this interference or limitation has been "prescribed by law", the Chamber cannot find it established that it served any of the legitimate aims enumerated in Article 9(2). Accordingly, there has been a violation of Article 9 of the Convention on account of the refusal to date of permission to reconstruct any of the destroyed mosques.

183. The Chamber has next considered whether the case, in addition to the above interference with the right of the applicant's members in Banja Luka under Article 9, also discloses a failure on the part of the respondent Party to secure positively that very right to the Muslim believers in that city. The respondent Party has asserted that after 14 December 1995 the Mufti of Banja Luka has been working freely and has been able to conduct religious rituals. The Chamber notes, however, that the applicant - rather than alleging a total prohibition of all worship - complains about the systematic failure on the part of the authorities to protect Muslim believers against assaults, provocation and other disturbances during worship and funerals, this failure subjecting them to fear and humiliation. The applicant also complains about the authorities' refusal to allow reconstruction of the mosques and the applicant's members' inability to have public calls to prayer.

184. It is well-established in the case-law of the European Court and Commission on Human Rights and in the case-law of the Chamber that, in addition to their obligation not to interfere with the exercise of human rights and fundamental freedoms, there is also a positive obligation on states to protect those rights and freedoms (see paragraph 161 above). In a case relating to Article 8 of the Convention the Chamber held that the authorities of the respondent Party had failed to take effective, reasonable and appropriate measures to deal with the difficulties posed by an assembly of people obstructing the applicant's return to his home. The police had remained completely passive and no attempt had been made to prosecute those responsible for the obstruction. Such a situation was incompatible with the rule of law and had therefore violated Article 8. Moreover, in relation to the right to freedom of assembly under Article 11 of the Convention, the European Court has held that a State is under a positive obligation to take reasonable and appropriate measures to protect lawful demonstrations from violence by counter demonstrators, although the authorities cannot guarantee a successful outcome and have a wide discretion as to the means to be used (see the aforementioned *Blentić* decision, loc.cit., paragraphs 28-29 with further reference).

185. The precise requirements of the positive obligation to secure the freedom of religion will depend on the circumstances. In the circumstances of the present case, however, the Chamber considers that the competent authorities are under an obligation to take into account the current plight of the Muslim community in Banja Luka and its background. In particular the Muslims of Banja Luka are faced with a situation where all their mosques have been illegally destroyed, vast numbers of their community have been displaced and other massive violations of their fundamental rights are widely believed to have taken place. Since the end of the war there continue to be manifestations of hostility against members of the Muslim community, as detailed elsewhere in this decision. No one with the duty to secure freedom of religion can or should ignore that background. It should be obvious to any authority with a genuine concern for the rights and freedoms of its citizens that such a background will produce a climate of fear which will deter the free practice of religion. The evidence heard by the Chamber confirms the existence of such a climate, which deters, for instance, the public call to prayer. In such a situation it is the obligation of the authorities, under Article 9 of the Convention, to take effective, reasonable and appropriate measures as a matter of urgency to remove the climate of fear and allow the practice of religion by all citizens in genuine freedom. In the present case that implies that they should have given urgent and sympathetic consideration to all requests for reconstruction of the destroyed mosques and for the preservation of the sites and any remains of the old structures in the meantime. Such requests should have been denied or delayed only for reasons of the most pressing social need. The Chamber finds no evidence of any such need.

186. The Chamber could hardly find a more extreme manner in which religious beliefs could be opposed than physical violence such as the stoning of believers participating in funeral processions and provocation through unauthorised intrusion on religious premises with the aim of interrupting worship. The Chamber has already found that on such occasions the local police has remained passive and the applicant's subsequent complaints have not triggered any proper investigation with a view to identifying those responsible for such acts (see paragraph 145 above). Nor has it been shown that the authorities have taken any other steps to protect Muslim believers against hostilities during

worship and funerals. As for the authorities' refusal to allow the burial of the late Mufti Halilović on the site of the Ferhadija mosque, the Chamber need not review this decision in itself. It is sufficient to note that even during the service following the Mufti's death believers were unable to gather for peaceful worship for want of protection by the authorities against intruders.

187. The Chamber concludes that the aforementioned incidents directed against Muslim believers during worship and funeral processions as well as the refusal to allow reconstruction of mosques and the erection of fences around the sites of destroyed mosques are the result of a failure by the respondent Party's authorities to secure to those believers the right to manifest freely their religion.

188. To sum up, the Chamber has found a violation of Article 9 of the Convention in part due to the respondent Party's unjustified interference with the right guaranteed by that provision and in part on account of the respondent Party's failure to secure that very right.

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

189. 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 and circumstantial evidence on which it has based its finding of discrimination in the enjoyment of the right to freedom of religion as protected, *inter alia*, by Article 9 of the Convention (see paragraphs 154-173). 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."

190. 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, e.g., the aforementioned *Blentić* decision, loc.cit., p. 89-90, paragraphs 31-32). Although States Parties to the Convention enjoy a wide margin of appreciation in judging what is in the general interest, that judgement must not be manifestly without reasonable foundation (see Eur. Court H.R., *James and Others v. the United Kingdom* judgement of 21 February 1986, Series A no. 98, p. 32, paragraph 46). In the assessment of whether an applicant has had to bear "an individual and excessive burden" it is also of relevance whether he has had the possibility of effectively challenging the measure taken against him (see Eur. Court HR., *Hentrich v. France* judgement of 22 September 1994, Series A No. 296-A, p. 21, paragraph 49).

191. 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 he 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 H. R., *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., *M.J. v. The Republika Srpska*, CH/96/28, decision of 7 November 1997, paragraph 32, Decisions 1996-97). 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.

192. 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 15 mosques then stood was nationalised. The mosques, tombstones and domed burial sites remained, however, the property of the applicant. The applicant was also allowed to use the apartment on the first floor of the yellow building on the site of Ferhadija. The Chamber furthermore notes that under Article 40(1) of the Law on Building Land as in force from 1986 onwards (see paragraphs 86-88 above) the applicant retained a right to use the land on the sites of the destroyed mosques as long as the buildings on them endured.

193. It further appears that in November 1996, shortly after the removal of the remains of the Ferhadija mosque, this mosque was expunged from the official property map of the Municipality. However, on the other evidence before it and in the absence of any argument to the contrary offered by the respondent Party, the Chamber cannot exclude that the right to use the land on the sites of the destroyed mosques, including Ferhadija, still existed at the time of the entry into force of the Agreement on 14 December 1995 and continues to exist pursuant to the Law on Building Land.

194. 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 worn-out state, 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. It is not within the Chamber's competence *ratione temporis* to determine the responsibility for the destruction of the applicant's mosques. However, given that the mosques were destroyed at night during curfew, these events were outside the applicant's control. Moreover, a legal definition common in former Yugoslavia 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 89 above). It is true that Article 43 stipulates a further condition of relevance: although the applicant enjoys, under Article 40(1), the right to use the land on the relevant sites, its right to use that land for new construction depends on whether the regulatory plan or general urban plan envisages such an activity. Whatever the contents of the regulatory plan apparently in force up to the Municipality's decision in 1994 to draw up a new plan to replace it, the Chamber recalls that a general plan of superior rank was adopted already in 1975 and remains in force. According to the expert's testimony, that plan not only recognises the existence of the 15 mosques, but affords them various degrees of protection (see paragraph 66). On the information before it, the Chamber is therefore satisfied that the applicant has, at least, a priority right to use the sites of the mosques under Article 43.

195. Be it based on Article 40 or Article 43 of the Law on Building Land, the Chamber finds that the applicant's right to use the land of the sites of destroyed mosques for construction 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. Furthermore, it appears to the Chamber that in respect of a majority of the sites the mosques enjoyed specific protection under the Law on Cultural Assets (see paragraph 33 above). Accordingly, the applicant enjoyed a further right under Article 111 of that law, if not to reconstruct the mosques then at least to renovate any objects still remaining on the sites.

196. The Chamber concludes that the objects on the land on which the destroyed mosques were situated and the other assets such as the right to use that land for construction 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 the respondent Party has interfered with these possessions.

(a) Deprivation

197. The Chamber has already found it established that after 14 December 1995 remains of some of the mosques belonging to the applicant were destroyed and ruins and items on the graveyards were removed. The Chamber has further found that those incidents, though not all directly emanating from an organ or official of the Republika Srpska, are nevertheless imputable to the respondent Party in the form of a failure to fulfil its positive obligation under the Agreement (see paragraphs 162-173

above). For the purposes of Article 1 of Protocol No. 1, these aforementioned events must therefore be considered to have involved a deprivation of the applicant's various possessions. In view of this finding the Chamber need not, for the purposes of this decision, determine whether the pulling down of the yellow building in October 1996 also involved a deprivation of a possession of the applicant.

198. The respondent Party has offered no argument to the effect that the deprivation found above was in the public interest and subject to the conditions provided for by law. Nor can the Chamber, of its own motion, find any such justification.

(b) Control of use

199. The Chamber will next deal with the Municipality's tacit refusal to permit the applicant to reconstruct seven of the destroyed mosques. This refusal appears to be based on the Municipal Assembly's decision of 27 March 1997 to reserve the area encompassing those mosques for future purposes, with the resultant prohibition of construction thereon. Whilst this re-designation of the sites is based on Articles 8 and 9 of the Republika Srpska Law on Building Land, the decision does not state the purpose for which the area in question has been reserved.

200. The control of use in issue has clearly not been aimed at securing the payment of taxes, other contributions or penalties within the meaning of the second paragraph of Article 1 of Protocol No. 1. Although the respondent Party has not offered any argument in this respect, the Chamber will consider *ex officio* whether any general interest has reasonably justified the refusal so far to allow any reconstruction of mosques.

201. It is a well-known fact that detailed urban plans seek to prevent chaotic construction in crowded urban areas. For this reason, construction is usually prohibited while such a plan is under consideration. In the present case, the Municipal Assembly of Banja Luka decided in 1994 that a new regulatory plan would be adopted and that construction would be prohibited in the affected areas until, at the latest, 22 February 1997.

202. The Chamber notes that the 15 destroyed mosques and their surrounding graveyards were hundreds of years old and held significant religious and cultural importance not just for the applicant and its members. They formed part of the cultural-historic heritage of Bosnia and Herzegovina as reflected in the general urban plan for Banja Luka adopted in 1975 and which affords ten of the mosques protection of the first degree. According to the expert evidence, the new regulatory plan cannot change this designation (see paragraph 68 above). Finally, the Chamber cannot overlook the expert testimony suggesting that the designation of reserved areas in crowded urban areas is an exception to normal practice.

203. In these circumstances it has been incumbent on the respondent Party to adduce exceptionally weighty reasons why, in 1997, it was in the general interest to re-designate the areas including the seven mosques, thereby effectively prohibiting any reconstruction of mosques. No such evidence has been adduced.

(c) Balancing of competing interests

204. Article 1 of Protocol No. 1 also recognises that there should be a "fair balance" between the applicant's rights and the public interest (see the aforementioned *Blentić* decision, loc.cit., paragraph 36). The Chamber has already found that the deprivation and control of use of the applicant's possessions have not been shown to be grounded on a public or general interest. Even assuming the existence of such an interest related to urban planning, the Chamber cannot find, in respect of the above deprivation of the applicant's possessions, that the Islamic Community's interests have been balanced fairly against any assumed public interest. This deprivation has therefore not been justified, regardless of any discrimination against the applicant or its members.

205. Furthermore, in respect of the above control of use of part of the applicant's possessions, the Chamber notes the length of the prohibition on reconstruction on the sites of seven of the mosques. This construction ban directly affects the applicant's possibility to avail itself of its right to use the land in question. To date, five years have effectively elapsed since this ban was issued, more than

three of which since the Agreement entered into force. This duration has been excessive and therefore fails the fairness test, regardless of any discrimination against the applicant or its members.

206. The Chamber has found above that the various acts and omissions resulting in a violation of the applicant's members' right to freedom of religion have been grounded on discriminatory considerations (see paragraphs 154-173 above). With respect to the applicant's property rights the Chamber finds that particularly the tacit refusal to allow reconstruction of any mosques is clearly aimed at preventing the applicant from providing its members in the Banja Luka area with adequate premises for the manifestation of their religion and ethnic identity. In such circumstances it would be illusory to look for a fair balancing of interests.

207. For all the above reasons, the Chamber finds that the deprivation of part of the applicant's possessions and the control of use of other possessions belonging to the applicant constitute a violation of Article 1 of Protocol No. 1 to the Convention already taken in isolation. Moreover, the applicant has also been discriminated against in the enjoyment of its rights under this provision.

4. Conclusion

208. Summing up, the Chamber has found that this case involves discrimination in the enjoyment of the applicant's members' right to freedom of religion under Article 9 of the Convention as well as in the applicant's enjoyment of its property rights under Article 1 of Protocol No. 1 to the Convention. The Chamber has also found violations of those substantive provisions in isolation.

VII. REMEDIES

209. 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.

210. The applicant requests that the respondent Party be ordered to reconstruct the 15 destroyed mosques in Banja Luka, Ferhat Pasha's, Safikaduna's and Halil Pasha's *turbeh* as well as the clock tower. It further requests that the respondent Party be ordered to refrain from taking any action which would even temporarily permit the construction of buildings or objects, other than mosques, on the sites of the mosques and to refrain from destroying or removing any immovable object remaining on the sites or from changing the purpose of the sites. Finally, the applicant requests that the respondent Party be ordered to provide adequate places for worship in Banja Luka until the mosques have been rebuilt and to enable the Muslims in Banja Luka to enjoy all civil rights and freedoms equally with all other citizens.

211. As to the final claim mentioned above, the Chamber has found the respondent Party to be in breach of its obligation to ensure to everyone within in its jurisdiction, without discrimination, the rights guaranteed in the Agreement. The discrimination found has been of a wide-scale character, being directed against the Muslim population of Banja Luka. 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. However, the respondent Party is already obliged by the Agreement to enable Muslims in Banja Luka to enjoy, without discrimination, now and in the future, the rights secured by the Agreement. The Chamber does not, therefore, consider it appropriate to make an order in general terms in that respect, as sought by the applicant.

212. The Chamber finds it appropriate to order the respondent Party to take immediate steps to allow the applicant to erect enclosures around the sites of the 15 destroyed mosques and to maintain those enclosures. The respondent Party is further ordered to take all necessary action to refrain from the construction of buildings or objects of any nature on the sites of the 15 destroyed mosques and on the cemeteries and other Islamic sites indicated in the application, and not to permit any such construction by any other institution or person, whether public or private, apart from

the applicant and persons acting under its authority. The respondent Party must further refrain from destroying or removing any object remaining on the sites of any of the 15 mosques and on the cemeteries and other Islamic sites indicated in the application, and not to permit any such destruction or removal by any other institution or person, whether public or private, apart from the applicant and persons acting under its authority.

213. The Chamber further finds it appropriate to order the respondent Party to swiftly grant the applicant, as requested, the necessary permits for reconstruction of seven of the destroyed mosques (Ferhadija, Arnaudija, Gazanferija, Sefer Bey's, Hadži-Perviz, Stupnica and Hisečka) at the location where they previously existed.

VIII. CONCLUSIONS

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

1. unanimously, to declare inadmissible the applicant's complaints relating to the destruction of its 15 mosques in Banja Luka in 1993 and to the killing, expelling and displacement of Muslims in Banja Luka prior to the entry into force of the General Framework Agreement;

2. by 11 votes to 2, to declare the remainder of the applicant's complaints admissible;

3. by 11 votes to 2, that the applicant's members in Banja Luka have been discriminated against in the enjoyment of their 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;

4. by 11 votes to 2, that the applicant has been discriminated against 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;

5. by 11 votes to 2, that there has also been a separate violation of the right of the applicant's members in Banja Luka 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;

6. by 11 votes to 2, that there has also been a separate violation of the applicant's right 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;

7. by 11 votes to 2, to order the respondent Party

(a) to take immediate steps to allow the applicant to erect enclosures around the sites of the 15 destroyed mosques and to maintain those enclosures;

(b) to take all necessary action to refrain from the construction of buildings or objects of any nature on the sites of the 15 destroyed mosques and on the cemeteries and other Islamic sites indicated in the application, and not to permit any such construction by any other institution or person, whether public or private, apart from the applicant and persons acting under its authority; and

(c) to refrain from destroying or removing any object remaining on the sites of any of the 15 destroyed mosques and on the cemeteries and other Islamic sites indicated in the application, and not to permit any such destruction or removal by any other institution or person, whether public or private, apart from the applicant and persons acting under its authority;

8. by 10 votes to 3, to order the respondent Party to swiftly grant the applicant, as requested, the necessary permits for reconstruction of seven of the destroyed mosques (Ferhadija, Arnaudija, Gazanferija, Sefer Bey's, Hadži-Perviz, Stupnica and Hisečka) at the location at which they previously existed; and

9. by 11 votes to 2, to order the respondent Party to report to it by 11 September 1999 on the steps taken by it to comply with the above orders.

(signed)
Leif BERG
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

Annex I Concurring Opinion of Mr. Aybay, joined by MESSRS. Balić and Deković
Annex II Partly Concurring and Partly Dissenting Opinion of Mr. Masenko-Mavi
Annex III Dissenting Opinion of MESSRS. Pajić and Popović

ANNEX I

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains separate concurring opinions of Mr. Rona Aybay and of MESSRS. Hasan Balić and Mehmed Deković.

CONCURRING OPINION OF MR. RONA AYBAY

Although I agree with the conclusion reached by the majority of the members, I am of the opinion that our judgement falls short in deciding on an important issue dealt with in paragraphs 157 and 176.

1. Whether having a "State Church" system can be considered discriminatory in itself or to violate Article 9 of the European Convention on Human Rights is, to me, an open question. The existence of a "State Church" system in some European countries can be attributed to certain historical developments peculiar to those countries. In its Report, referred to in paragraph 176, the European Commission of Human Rights, after stating that "a State Church system cannot in itself be considered to violate Article 9 of the Convention" felt it necessary to add that "[i]n fact, such a system exists in several Contracting States and existed there already when the Convention was drafted."

2. The history of Bosnia and Herzegovina indicates that this multi-ethnic and multi-religious country has lived for centuries under various *regimes* without having a "State Church". The concept of a "State Church" was introduced during the recent deplorable war in the beginning of 1993 and only in one of the Entities comprising the State of Bosnia and Herzegovina under the (Dayton) "General Framework Agreement". I think that the "State Church" system introduced in Republika Srpska should be evaluated in light of the peculiarities of Bosnia and Herzegovina.

3. Article 28 of the Republika Srpska Constitution aims not simply to designate a particular Church as the "State Church" in a more or less symbolic manner but goes far beyond that. Provisions contained in this article put the State under certain positive obligations with regard to the "State Church" such as assisting this Church materially and cooperating with it in all fields. It should be noted that the "Agreement" (Annex 6 of the Dayton "General Peace Agreement") attributes particular importance to preventing discrimination. "As confirmed by Article II(2)(b) of Annex 6, the prohibition of discrimination is a central objective of the Dayton Agreement to which the Chamber must attach particular importance." (*Hermas v. The Federation of Bosnia and Herzegovina*, CH/97/45, decision of 16 January 1998, paragraph 82, Decisions and Reports 1998). In addition to the protection provided by Article 14 of the European Convention, Article II(2)(b) of the "Agreement" provides for specific safeguards against discrimination under various international human rights instruments, including various conventions which specifically provide for protection against discrimination, such as the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). This approach clearly indicates the particular necessity of prevention of discrimination in Bosnia and Herzegovina. However, the privileged treatment afforded to the Serbian Orthodox Church under Article 28 of the Republika Srpska Constitution makes it impossible for the authorities in this Entity to refrain from discriminatory practices against the institutions or individuals who do not form part of that Church, unless these authorities overlook their positive obligations provided by the Constitution.

4. In light of the foregoing my conclusion is that the privileged treatment afforded to the Serbian Orthodox Church by the Constitution should be considered a permanent and inevitable source of discrimination.

(signed) Mr. Rona Aybay

CONCURRING OPINION OF MESSRS. HASAN BALIĆ AND MEHMED DEKOVIĆ

In accordance of Article 61 of the Rules of Procedure of the Human Rights Chamber for Bosnia and Herzegovina we herewith join the separate concurring opinion of judge Rona Aybay, which expresses our position too.

(signed) Mr. Hasan Balić
(signed) Mr. Mehmed Deković

ANNEX II

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the separate opinion of Mr. Viktor Masenko-Mavi.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF MR. VIKTOR MASENKO-MAVI (IN MEMORIAM VLATKO MARKOTIĆ)*

In this case, like in other cases in which the issue of discrimination has been raised, the Chamber has unnecessarily overcomplicated the reasoning in part of its judgment. I am unable to share the approach adopted for interpreting the provisions of Annex 6 related to the Chamber's competence, especially under Article II, because it seems to me illogical and leads to reasoning difficult to understand by the applicants.

According to this approach the issue of discrimination should always be dealt with under subparagraph (b) of Article II(2). This, as I have stated already (see the *Marčeta* case), is completely superfluous when the Chamber addresses cases of discrimination in respect of rights provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms. In these latter cases the application of Article 14 of the European Convention in conjunction with the relevant Articles of the Convention would be sufficient and would facilitate the clarity and understandability of our judgements. And it is not only a matter of understandability but also a matter of logic of the human rights protecting machinery established by the Dayton Agreement. At the very heart of this machinery lies first of all the obligation of Bosnia and Herzegovina to apply directly the provisions of the European Convention and its Protocols (See Articles I-II of Annex 6 read in conjunction with Article II(2) of Annex 4). One can hardly find any reasonable logic in interpreting Article II(2)(a) of Annex 6 as covering or referring to all rights of the European Convention save the right not to be discriminated against, specified in its Article 14. To my understanding subparagraph (a) of Article II(2) refers to the whole system of the rights provided by the European Convention, including the right not to be discriminated against. Hence when an issue of discrimination comes into play in respect of rights provided by the European Convention, Article 14 could serve as a sound and understandable base for dealing with it. The problem might be different when there would be an allegation of discrimination in respect of rights not provided by the European Convention: in this case it would be necessary to consider under Article II(2)(b) of Annex 6 clauses of non-discrimination set forth by other international human rights instruments mentioned in the Appendix of Annex 6.

The misunderstandings related to the Chamber's competence under Article II(2)(a) and (b) are probably connected with the fact that in the Appendix of Annex 6 the European Convention also has been mentioned. But I think that this list contains just a simple enumeration of those instruments which have to be considered by the Chamber. The competence of the Chamber, however, has been clearly defined by Article II of Annex 6. Subparagraph (a) of this Article singles out the competence of the Chamber to apply the European Convention as a whole (including Article 14), and subparagraph (b) empowers the Chamber to consider allegations of discrimination in respect of rights provided for in the listed international instruments, which list contains also the European Convention. But this latter fact should not be interpreted as if all allegations of discrimination should only be dealt with on the basis of subparagraph (b) of Article II. Such an interpretation runs counter to the competence established under subparagraph (a) of Article II, and overburdens the Chamber's judgements with unnecessary explanations and references to non-discrimination clauses picked out from different international instruments. This approach, which is based on the assumption that the more clauses of non-discrimination can be identified and referred to the more solid would become the judgments of the Chamber, is an erroneous one. The Chamber can and should apply non-discrimination clauses of

* This opinion should have been titled differently, namely: Partly concurring and partly dissenting opinion of Mr. Viktor Masenko-Mavi and Mr. Vlatko Markotić. My learned colleague and friend Vlatko Markotić had decided not only to join my opinion but suggested some amendments to it with the aim of presenting it as our joint opinion. We, in fact, save some minor points, had finalised the text. However, due to his sudden death on 25 April 1999 I have to sign this opinion alone. I am very sad not only because this opinion lacks the support of my colleague, but also because I have lost a sincere friend in Sarajevo. With this opinion I pay tribute to his extremely valuable activity in the Chamber. God bless you, my dear friend, and rest in peace.

other international instruments - in addition to the provisions of Article 14 of the European Convention - if there is a real need to do so (i.e., if the allegation of discrimination relates to rights not covered by this Convention), or if their application would result in some added value. Thus, for example, paragraph 156 of this judgment points out that Article 26 of the International Covenant on Civil and Political Rights goes further than Article 14 of the Convention because it guarantees an independent right to equality before the law and equal protection of the law. However, it has not been explained what is the added value of this reference, in what sense the notions of "equality before the law" and "equal protection" provide for more protection than the non-discrimination clause of Article 14.

Finally, I would like to point out that my doubts about the accepted approach of interpreting the competence of the Chamber under Article II of Annex 6 are strengthened also by the provisions of Annex 4 of the Dayton Agreement. Article II(2) of Annex 4 stipulates the direct applicability of rights and freedoms set forth by the European Convention in their totality, including Article 14. And Article II(4), which addresses the problem of non-discrimination, refers in fact to the same list of instruments as one can find in the Appendix of Annex 6. The only difference between these two lists is that the list provided for by Annex 4 does not mention the European Convention. This seems to me quite logical.

To my regret I am not in a position to agree with the conclusion reached by the majority in subparagraph 8 of paragraph 214. This order of the Chamber is too specific, or to put it another way, the Chamber has gone beyond the necessary reasonableness when ordering the respondent Party to grant the applicant the necessary permits for reconstruction of the seven destroyed mosques. I do not think that, on the one hand, it was necessary for the Chamber to specify the number of permits to be issued to the applicant. On the other hand, it would have been sufficient to order the respondent Party to process promptly the applicant's request for permission to reconstruct mosques. The pronounced order of the Chamber deprives the respondent Party of any reasonable measure of discretion. Therefore I dissent.

(signed) Mr. Viktor Masenko - Mavi

ANNEX III

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the separate opinion of MESSRS. Miodrag Pajić and Vitomir Popović.

DISSENTING OPINION OF MESSRS. VITOMIR POPOVIĆ AND MIODRAG PAJIĆ

In the case of Islamic Community v. Republika Srpska, we dissent from the Decision on Admissibility and Merits for the following reasons. The application of the Islamic Community was presented to the Human Rights Chamber on 3 December 1996, and concerns the alleged destruction of 15 mosques in Banja Luka and other alleged violations of human rights related to the destruction of the remains of the mosques and to the desecration of graveyards and, concerning the period after the Dayton Agreement came into force, the change of purpose of the land these objects had stood on, the refusal to issue reconstruction permits for these objects and other violations of discriminatory character on grounds of religion and of the ethnic origin of the applicant's members.

This application should have been rejected for the following reasons:

1. Competence *ratione personae*

The applicant had no active standing for submitting the application pursuant to Article VIII of the Agreement. Namely, Article VIII(1) of the Agreement determines that "the Chamber shall receive ... from any Party or person, non-governmental organization or group of individuals claiming to be the victim of a violation by any Party ..., for resolution or decision applications concerning alleged or apparent violations of human rights within the scope of paragraph 2 of Article II" of the Agreement. The status of the applicant as a legal person qualifies it to act as a non-governmental organization for the purpose of Article VIII(1) of the Agreement. However, a legal question arises as to whether the applicant can claim to be a "victim" in relation to the alleged violations. The issue of religious worship, burials at graveyards, etc. belongs to the so-called individual rights, and depends on each particular person, and not on any organization or association. To acquire active standing, the Islamic Community would have had to obtain authorization letters from the members whose right to freedom of religion is protected by Article 9 of the European Convention on Human Rights and Fundamental Freedoms. (This is the standpoint taken by the Chamber in the case of *United Association of Citizens-Pensioners in the Federation BiH v. The Federation of BiH*, case No. CH/98/736, Decision of 13 October 1998, paragraphs 10-11, Decisions and Reports 1998). Therefore, it is not disputed that pursuant to Article 1 of its Constitution, the applicant is an independent religious community to which, among others, belong all the Muslims in BiH. However, it is also an undisputed fact that not all the Muslims in BiH have to be believers, nor to exercise their rights as presented by the applicant. This means that the applicant should have obtained an authorization for the representation of possible victims who suffered violations of the stated rights.

2. Competence *ratione temporis*

Most of the events concerned, as for instance the alleged destruction of 15 mosques in Banja Luka during 1993, and the alleged killing and expelling and displacing of Muslims in that region, relate, as the Chamber majority concluded as well, to the period before the General Framework Agreement came into force, i.e. before 14 December 1995, and therefore fall outside the competence of the Chamber *ratione temporis*. In the course of the proceedings, the witnesses of the applicant confirmed all these claims, particularly stressing that after the Dayton Agreement came into force, there was no destruction of mosques, remains or other objects. Namely the representative of the applicant, Mr. Enver Zečević, subsequently submitted to the Chamber the land book excerpt and the procedural decision on the nationalization of the "yellow building". These show that neither had the "yellow building" been the property of the applicant, nor had it been allocated to it, but it constituted socially owned property 1/1, which entitled the Municipality of Banja Luka to the right of use. Also for these reasons, it can be concluded that part of the application should have been refused.

3. *Lis alibi pendens*

Pursuant to Article VIII(2)(b) of the Agreement, the Chamber shall not address any application which is substantially the same as a matter which has already been examined by the Chamber or has already been submitted to another procedure of international investigation or settlement. Apart from that, pursuant to Article VIII(2)(d), the Chamber shall reject or defer further consideration of the case, if the

issue concerned is pending before any other international body competent for considering applications or issuing decisions on the case, or any other commission established by Annexes to the General Framework Agreement. In the course of the proceedings before the Chamber, it has been indisputably established that the Commission to Preserve National Monuments in BiH, established on the basis of Annex 8 of the Dayton Peace Agreement for BiH, took a stand on taking strict measures for the full protection of the sites where cultural monuments existed, and particularly monuments of the first category. The conclusion of this Commission was that the protection of such sites should be visibly marked by planting hedges around the protected site. This means that an identical application has been discussed before the Human Rights Chamber. Therefore, we hold the opinion that, because of the stated reasons, and particularly bearing in mind the fact that a different Dayton Commission issued its conclusion, the case of the applicant should have been rejected.

4. Exhaustion of local remedies

Pursuant to Article VIII(2)(a) of the Agreement the Chamber has to consider whether efficient remedies existed and whether the applicant has demonstrated that it exhausted them. The Chamber established in the course of the proceedings that the applicant, on 3 March 1997, applied to the Municipality of Banja Luka for permission to build again seven of the 15 mosques. Consequently, the applicant did not submit a request for their reconstruction, as the Chamber stated in paragraph 1 of the decision, but for construction, which essentially changes the legal nature of the request. To be able to decide on the request of the applicant, the competent organ of the respondent Party was obliged to apply provisions of the Law on Building Land, the Law on Environmental Planning, the Law on Environmental Planning of the RS, the Law of the RS on Cultural Assets, the Law on Administrative Procedure, the Law on Administrative Disputes, the Decision on Graveyards and Funeral Activities, etc. which means that to be able to decide on the request at issue, it was necessary to render a decision on the basis of the regulatory plan for this part of the city. As the competent administrative organ did not issue the decision within the time allotted, the applicant had the possibility to appeal to the superior administrative organ against such tacit refusal on the grounds of "silence of the administration", pursuant to Article 218 of the Law on Administrative Procedure (Official Gazette of SFRY, No. 47/86). Pursuant to Article 2 of the Law on Administrative Disputes (Official Gazette of RS, No. 12/94), individuals and legal persons, and in the present case that means the applicant, are entitled to initiate an administrative dispute before the Supreme Court of RS, being competent in this dispute, if they consider their right established by law or personal interest violated. However, in the course of the proceedings, it was determined, and the issue was not in dispute between the Parties, that the applicant did not use these possibilities, i.e., it did not exhaust all remedies available in accordance with Article VIII(2) of the Agreement on Human Rights. For these reasons, the Chamber should have issued a decision rejecting this application on the ground of non-exhaustion of the remedies available.

Similarly, by acting as it did, the Chamber not just overstepped its authority and competence provided by the Agreement and the Rules of Procedure, but also went beyond reasonable limits when it " ordered the respondent Party to swiftly grant the applicant, as requested, the necessary permits for reconstruction of seven of the destroyed mosques". Therefore, it is not within the competence of the Chamber to determine the number of permits to be issued to the applicant, this being within the exclusive competence of the respondent Party and its jurisdiction. The issuance of such permits depends solely on the regulatory plan and not on the applicant, and deciding on such a request at this stage of the proceedings, is the last of issues to fall within the competence of the Human Rights Chamber. For all the aforementioned reasons, the Chamber could only have issued a decision to reject the application of the applicant, establishing that there was no violation of the human rights, contrary to what was established by the Chamber.

(signed) prof. dr Vitomir Popović
(signed) Miodrag Pajić