DECISION ON THE ADMISSIBILITY AND MERITS
(Delivered on 6 December 2000)

CASE No. CH/99/2656

THE ISLAMIC COMMUNITY IN BOSNIA AND HERZEGOVINA

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 5 December 2000 with the following members present:

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

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

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

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

I. INTRODUCTION

1. In 1993, the Atik mosque, the Dašnice mosque, the Salihbegović mosque and the Krpić mosque in Bijeljina and the Atik mosque in Janja were destroyed. The Islamic Community in Bosnia and Herzegovina (henceforth "the Islamic Community" or "the applicant") maintains that the respondent Party violates its rights under Article 9 of the European Convention on Human Rights ("the Convention") and Article 1 of Protocol No. 1 to the Convention by preventing it from using the sites and reconstructing the mosques. In particular, the application raises the question whether the applicant and its members have been discriminated against in the enjoyment of the rights guaranteed by the aforementioned provisions.

II. PROCEEDINGS BEFORE THE CHAMBER

2. The application was introduced and registered on 8 July 1999. It included a request for provisional measures ordering the respondent Party (i) to refrain from all construction on the site of the former Atik mosque in Bijeljina, and (ii) to refrain from any violation of any Vakuf real estate on the territory of the Bijeljina Municipality which was, until the outbreak of the war, in the possession of the Islamic Community. The Panel considered the application on 7 and 9 July 1999. On 10 July 1999 an order for provisional measures was issued with regard to the site of the Atik mosque in Bijeljina, ordering the respondent Party to refrain from any construction on that site and not to permit any such construction.

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

4. The applicant's reply, dated 19 August 1999, was received on 2 September 1999. The applicant extended its complaints to other mosques sites, namely the sites of the former Dašnice mosque, Krpić mosque and Salihbegović mosque requesting the Chamber to grant an order for provisional measures in relation to the sites of the former Dašnice and Krpić mosques. Moreover, the applicant made a request for an order for additional provisional measures in relation to the Atik mosque site in Bijeljina. The Chamber reconsidered the case on 10 September 1999.

5. On 8 October 1999 the Chamber decided to consider all complaints referring to possessions of the Islamic Community, administered by the Main Office for the Administration of Vakuf Property, in the Municipality of Bijeljina under the same case number (CH/99/2656). Furthermore, the Chamber decided to reject the additional provisional measures requested by the applicant taking into account relevant information received from the Organisation for Security and Co-operation in Europe (OSCE). On 21 October 1999 the extended complaints of the applicant were transmitted to the respondent Party for its observations. Additionally, the Chamber asked the applicant and the respondent Party to consider exploring the possibility of a friendly settlement.

6. On 9 November 1999 a further submission by the applicant was received, which was forwarded to the respondent Party on 1 December 1999. On 18 January 2000 the respondent Party replied to the submissions made by the applicant. The applicant's reply to these submissions was received on 2 February 2000. On 14 April 2000 the Chamber requested further information from the applicant. A reply was received on 24 April 2000.

7. On 18 May 2000 the applicant submitted a formal request to the Head of the Department of Housing Affairs in Bijeljina applying *inter alia* for the reconstruction of the Atik mosque, the Dašnice mosque, the Krpić mosque and the Salihbegović mosque.

8. On 12 May and 7 June 2000 the Chamber reconsidered the present case and decided to hold a joint public hearing together with another case pending before it which concerns former mosques sites in Zvornik (CH/98/1062). The hearing was held in Bijeljina on 4 July 2000. The following witnesses summoned by the Chamber gave evidence at the hearing: Mr. Jezdimir Spasojević, Head of the Bijeljina Urbanism Department; Mr. Petar Mihajlović, Company "Ekspres Promm"; Mr. Husein Kavazović, Mufti of Tuzla; Mr. Dragomir Ljubojević, Mayor of Bijeljinja and Mr. Ibrahim Imširević, an eyewitness from Bijeljina suggested by the applicant. Two geodesic engineers, Mr. Dragan Jovanović

and Mr. Marko Lozić, were appointed as expert witnesses. They submitted a written report on certain questions prior to the hearing and as well gave evidence at the hearing. Prior to the hearing, Mr. Francois Perez, the OHR Special Envoy to Bijeljina, and the OSCE Human Rights Officer in Bijeljina were asked to prepare statements on different questions as well. Both OHR and OSCE decided to prepare written *amicus curiae* reports. The applicant was represented by Mr. Esad Hrvačić, a lawyer from Sarajevo. The respondent Party was represented by its agent, Mr. Stevan Savić.

9. During the public hearing the applicant requested the Chamber to order the respondent Party, *inter alia*, to issue a building license for the reconstruction of the Janjica mosque in Bijeljina. It had also applied for the reconstruction of this mosque in its formal request to the Head of the Department of Housing Affairs in Bijeljina of 18 May 2000.

10. Following the oral hearing, a further order for provisional measures was issued on 7 July 2000 with regard to the site of the former Atik mosque in Bijeljina, ordering the respondent Party to stop all construction work within the boundaries of the "Atik" mosque site (lots 10/36, 11/3, 11/2, 11/198 and 11/271 k.o. Bijeljina).

11. On 12 October 2000 the respondent Party informed the Chamber that, on 24 August 2000, it had issued two procedural decisions ordering the investor and the company carrying out the construction activities for the investor to stop the construction on the Atik site in Bijeljina, as it had been established that the construction work was carried out contrary to the technical documentation upon which the authorisation of the construction was issued. On 10 November the Chamber asked both the applicant and the respondent Party to inform it about the current situation on the mosque sites. The applicant's answer was received on 15 November 2000.

III. ESTABLISHMENT OF THE FACTS

A. Facts as presented by the applicant

12. According to the applicant, the Islamic Community is the owner of the sites in Bijeljina where the Atik mosque, the Dašnice mosque, the Krpić mosque and the Salihbegović mosque stood before the war.

13. In relation to the Atik site in Bijeljina the applicant claims that in June 1999 the authorities fenced in about 1000 sq.m. of the site, removed the old *Gasulhana* (= the building for the preparation of mortal remains before burial) and started to construct a bank building. The applicant stresses that the construction works were not stopped after the issuance of the order for provisional measures by the Chamber on 10 July 1999. Concerning the site of the former Dašnice mosque the applicant states that a private company called "Express Promm" has built a business facility on it, on the basis of an agreement with the Bijeljina Municipality. Relating to the Krpić site the applicant points out that after the destruction of the mosque this site has been turned into a parking area, containing also eight small business facilities. Moreover, the applicant complains that the site of the Salihbegović mosque, which had been used as a flea market after the destruction of the mosque, is now used as a car park.

14. Furthermore, the applicant holds that the Islamic Community is the owner of the site of the former Atik mosque in Janja.

B. Facts as presented by the respondent Party

15. According to the written submissions of the respondent Party the sites in Bijeljina where the Atik mosque, the Dašnice mosque, the Krpić mosque and the Salihbegović mosque stood and the site of the former Atik mosque in Janja constitute publicly owned land. These sites were formerly socially owned, and the applicant retained only a right to use them which right allegedly does not exist any longer. Notwithstanding, during the public hearing of 4 July 2000 the representative of the respondent Party declared that the applicant as the previous owner of the mosque buildings still has a priority right to use the sites for construction.

16. The respondent Party is of the opinion that the construction activity next to the Atik site in Bijeljina does not invade the site of the Atik mosque (lot 11/271) or other Vakuf land. It emphasises that no object of permanent character but only two small kiosks are standing on the site of the Atik mosque, waiting to be assigned another permanent location. In relation to building law the respondent Party states that the new urban plan of Bijeljina envisages the construction of a theatre on the site of the Atik mosque (lot 11/271). However, the new urban plan has not yet been adopted by the Municipality Assembly and is not legally in force. No building license has been issued regarding the site at issue.

17. In relation to the site of the former Dašnice mosque the respondent Party stresses that the business facility of the company "Express Promm" has not been constructed on the property of the applicant but on the adjacent land, although it admittedly covers also a 1 meter wide area of the Vakuf lot. The respondent Party did not dispute that the site of the Salihbegović mosque had been turned into a flea market. It pointed out the temporary character of this market which has recently been removed.

C. Written report and oral observations of Expert Witnesses

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

18. It appears from the written reports of the geodesic engineers Mr. Dragan Jovanović and Mr. Marko Lozić that the former mosques *sites* in Bijeljina (i.e. lots 10/36, 11/3, 11/2, 11/198 and 11/271 in case of the Atik mosque; lots 20/16 and 20/59 in case of the Dašnice mosque; lots 16/111, 16/112 and 16/113 in case of the Krpić mosque; lots 2/140 and 2/141 in case of the Salihbegović mosque) are registered in the land book – which contains information on the legal status of the sites - as State property with a right to use in favour of the applicant. Moreover, the land book refers to the former *buildings* (i.e. the mosques and its accessories) on those sites and specifies them as property of the applicant. According to the cadastre register – which contains information on the factual status of the sites – the sites in question are in the possession of the applicant.

19. The site of the former Atik mosque in Janja (i.e. lot 1/79) is registered in the land book as property of the applicant. According to the cadastre register this site is in the possession of the applicant.

2. Status of the sites according to building law

20. As no precise information was given to them by the Municipality of Bijeljina, the experts only report to the Chamber that both an urban plan (of 1996) and a regulatory plan exist.

3. Factual situation on the former mosque sites

21. It appears from the written reports of the expert witnesses and from their statements during the public hearing of 4 July 2000 that there are three moveable kiosks and four moveable tables on the site of the former Atik mosque in Bijeljina. Furthermore, the Development Bank of Banja Luka is constructing a bank building which invades the Atik site for a total of 54 square meters. Fifty meters away from the construction line of this bank building a fence has been erected by which approximately 1000 square meters of the mosque land - including the part where the former *Gasulhana* stood - are made inaccessible.

22. On the site of the former Dašnice mosque business premises of about 150-200 square meters have been constructed by the company "Express Promm". They were, at least partly, constructed on mosque land. The site of the former Krpić mosque is partly covered by some kiosks and partly used as a parking lot. On the location of the former Salibegović mosque there is a flea market. On the site of the former Atik mosque in Janja there is a flea market as well. Furthermore, the building where the Imam lived still exists. It is in a good condition and some people live there.

D. Written *amicus curiae* report from the Office of the High Representative of 4 July 2000

23. The written report of Mr. PEREZ, Special Envoy to Bijeljina, shows that the return process to Bijeljina is slow.

24. Moreover, Special Envoy Perez has informed the Chamber that the current regulatory plan of Bijeljina considers the mosques sites in question as "green surfaces". No building is foreseen.

25. Special Envoy Perez states that all mosques in Bijeljina were destroyed in 1993. According to him 30 square meters of the site of the former Atik mosque in Bijeljina are used for the erection of the Development Bank of Banja Luka. Moreover, the site is partly used for containers and temporary constructions linked to the construction of the bank. 60 square meters of the site where the Dašnice mosque formerly stood are covered by a building of the company "Express Promm" which was constructed in 1995. In relation to the Salihbegović site he reports to the Chamber that most of the site is used for a flea market, 120 square meters of the site were used for the construction of a road and four small business facilities were erected. The site of the former Krpić mosque was turned into a parking area and is moreover used by eight temporary business facilities.

E. Written *amicus curiae* report from OSCE of 30 June 2000

26. On the one hand, the written report of OSCE characterises the return of Muslims to Bijeljina as "quite limited". On the other hand, it can be seen from this report that there is actually a certain return process going on.

27. In relation to the Atik site in Bijeljina, OSCE informs the Chamber that there are several kiosks located on it. Part of the Dašnice site is currently being used by local residents as an unofficial dump for domestic waste. Despite of requests by the International Community to remove it there is still a flea market on the Salihbegović site. The Krpić site is partly used as a parking lot, partly by kiosks.

F. Oral testimony

1. Mr. Jezdimir Spasojević (witness)

28. Mr. Spasojević was the Head of the Bijeljina Urbanism Department from February 1998 until May 2000. He declared to the Chamber that according to the Constitution of the Republika Srpska the applicant enjoyed the right to freedom of religion which includes the existence of religious facilities and that he thought that this right should be realised in practise. However, he emphasised that he could not issue any building license to the applicant when he was the Head of the Bijeljina Urbanism Department because the applicant had never submitted a formal request. Mr. Spasojević added that according to the Law on Physical Planning and the Law on Construction Land the applicant could have asked for amendments of the regulatory plan as well if in the plan no mosque was foreseen for a certain site. However, the applicant did not ask for such amendments either. Mr. Spasojević felt that he was not obliged to officially inform the applicant about those procedural requirements without being asked to.

29. In relation to the site of the former Atik mosque in Bijeljina Mr. Spasojević informed the Chamber that the building license for the theatre which is planned on this site would not be issued until the property issues relating to this site are resolved.

2. Mr. Petar Mihajlović (witness)

30. Mr. Mihajlović, the owner of the private company "Ekspres Promm", testified that his business facility covered about 60 square meters of the site of the former Dašnice mosque. He informed the Chamber that he was ready to pull down this part of the building. However, he rejected the opinion of the expert witnesses that the entire building was located on the Dašnice site.

3. Mr. Husein Kavazović, Mufti of Tuzla (witness)

31. Mr. Kavazović, Mufti of Tuzla since October 1992, informed the Chamber that before the war about 30.000 Muslims lived in the Municipality of Bijeljina. Today about 6.000-6.500 Muslims live there. However, there is a certain return process. Mr. Kavazović testified that all mosques in Bijeljina were destroyed and that currently not a single mosque is in use either in the city or in the Municipality of Bijeljina.

32. Mr. Kavazović testified that the applicant has never submitted a formal request to the competent authorities in order to obtain a permission for the reconstruction of the destroyed mosques. He is of the opinion that the applicant must be enabled to reconstruct those buildings without any formal procedures pointing out that the applicant does not plan any new building but wishes only to reconstruct the facilities belonging to it. Mr. Kavazović explained to the Chamber that the applicant had several talks with the respondent Party in order to get some protection for the sites where the mosques once stood. However, the applicant never tried to rebuild the mosques in question because it had no access to the sites.

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

4. Mr. Dragomir Ljubojević (witness)

34. Mr. Ljubojević has been the Mayor of Bijeljinja since May 2000. In his opinion the applicant has still a priority right to use the sites where the former mosques stood. Mr. Ljubojević pointed out that the applicant would receive the corresponding building licences if the legal procedure foreseen for the issuance of such a license were complied with.

5. Mr. Ibrahim Imširević (witness)

35. Mr. Imširević who works for the Islamic Community of Bijeljina on a voluntary basis was summoned upon a request of the applicant. He testified that all the mosques in question were destroyed during the night between 12 and 13 March 1993, i.e. during the sacred month of Ramadan. During the days immediately after the destruction the locations were diligently cleaned with some construction machines of the Army of the Republika Srpska. Mr. Imširević stated that the *Gasulhana* of the Atik mosque in Bijeljina was destroyed only in June 1999 when an additional wing to the bank building was built.

36. Mr. Imširević pointed out to the Chamber that in the second half of 1998 the applicant submitted a request to the Executive Board of the Bijeljina Municipality claiming for protection of the sites where the former mosques stood. He also informed the Chamber that this claim was repeated in a meeting with executive authorities of the Bijeljina Municipality on 14 September 1999. However, until now no steps have been taken to protect the sites.

F. Relevant domestic law

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

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

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

2. Religious communities

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

40. 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).

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

42. Article 28 of the Republika Srpska Constitution guarantees freedom of religion. Religious communities shall be equal before the law and shall be free to conduct religious activities and services. The Serb Orthodox Church shall be the church of the Serb people and other peoples of Orthodox religion. The state shall support the Orthodox Church materially and co-operate 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

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

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

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

46. 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).

47. V*is major* may be defined as any natural occurrence or act committed by a human being which could not have been foreseen or prevented and causes damage. For a natural occurrence or act committed by a human being to qualify as *vis major* it is necessary: (1) that the occurrence is external to the dispute between the parties but influences their legal relationship; (2) that the occurrence was impossible to predict or prevent; and (3) that the occurrence has harmful consequences either in terms of causing damage or in preventing a party from complying with its obligations (*Pravni Leksikon* (legal dictionary), *Savremena Administracija*, Belgrade 1970, p. 1289).

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

48. 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.

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

50. 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).

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

52. 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)).

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

5. The Republika Srpska Law on Physical Planning

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

55. According to Article 32, the organization, physical planning and use of an area and the construction of a settlement is governed by the adoption and the carrying out of plans. Plans within the sense of this law are: physical plans (physical plan of the Republic, physical plan of an area, physical plan of a municipality), urban development plans, regulatory plans and urban projects. Physical and urban development plans are long-term strategic planning documents by which basic

goals, directions and instruments of development in an area and a settlement, respectively, are determined, and such plans are adopted for a period no shorter than 10 years. Regulatory plans and urban projects are technical regulatory planning documents which determine and define the conditions for the design and construction of a facility and upon which the area is directly adjusted for a planned purpose.

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

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

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

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

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

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

62. The administrative organ competent for building affairs may, either *ex officio* or at the request of an interested party, order the demolition of a building, or part thereof, if it has been established

that due to its worn-out state, *vis major*, war activities or large-scale damage the object can no longer serve its purpose or is dangerous to the life or health of people, surrounding objects or traffic. The administrative organ may impose conditions and measures for the demolition. An appeal against a demolition order has no suspensive effect (Article 117).

IV. COMPLAINTS

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

V. SUBMISSIONS OF THE PARTIES

A. The respondent Party

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

B. The applicant

65. As to the exhaustion of local remedies, the applicant states that, in the light of the previous practice by Republika Srpska authorities, there was no effective domestic remedy available to protect its interests. The applicant claims that it submitted written requests to the respondent Party seeking for the protection of the Vakuf property and its repossession on 24 February 1997, on 21 November 1997 and on 20 April 1998 without receiving a reply by the respondent Party. Addressing the municipality in writing on this issue on 17 May 1999 and again in a meeting with the Municipal authorities on 13 September 1999 the applicant was told that on the site of the Atik mosque in Bijeljina a theatre was foreseen in the new urban plan and that no negotiation on this issue was possible. This statement allegedly discouraged the Islamic Community from submitting a written request for the reconstruction of the Atik mosque at that time. No attempt at using domestic remedies was made in relation to the other mosques sites either.

VI. OPINION OF THE CHAMBER

A. Admissibility

1. Competence *ratione personae*

66. 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.

67. The present applicant's status as a legal person in principle qualifies it to act as a non-governmental organisation within the meaning of Article VIII(1) of the Agreement. However, the Chamber must also ascertain whether the applicant can claim status as "victim" in relation to the respective violations alleged. The respondent Party has voiced no objection to the effect that the applicant lacked such status and the Chamber has already decided in a similar case that the Islamic Community meets the requirement of a "victim" within the meaning of Article VIII(1) of the Agreement both in relation to Article 9 of the Convention and to Article 1 of Protocol No. 1 to the Convention. In relation to Article 9 of the Convention the Chamber found that the Islamic Community is capable of possessing and exercising the rights contained in Article 9 as it is in reality acting on behalf of its membership. Regarding Article 1 of Protocol No. 1 to the Convention the Chamber stated that the Islamic Community is under domestic law a legal person capable of possessing property (case no.

CH/96/29, above mentioned in paragraph 31, paragraphs 128-131). It follows that the applicant may also claim status as "victim" of alleged discrimination in the enjoyment of the aforementioned rights. Accordingly, the applicant meets the requirement of a "victim" within the meaning of Article VIII(1) of the Agreement. The application is therefore compatible *ratione personae* with the Agreement within the meaning of Article VIII(2)(c).

2. Admissibility of the application in relation to the Janjica site

68. During the public hearing the applicant requested the Chamber to order the respondent Party, *inter alia*, to issue a building license for the reconstruction of the Janjica mosque in Bijeljina. On 18 May 2000 it had already filed a request for the reconstruction of this mosque with the Head of the Department of Housing Affairs in Bijeljina. The Chamber notes, however, that the applicant has not provided the Chamber with information to substantiate its claim in respect to this mosque site either during the written procedure or during the public hearing. It follows that the application is manifestly ill-founded in relation to the Janjica site. It must, therefore, be rejected, in accordance with Article VIII(2)(c) of the Agreement.

3. Requirement to exhaust effective domestic remedies

69. According to Article VIII(2)(a) of the Agreement, the Chamber must also consider whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted. In the present case, the respondent Party states that the applicant should have formally requested permission for the reconstruction of the Atik mosque, the Dašnice mosque, the Salihbegović mosque and the Krpić mosque in Bijeljina and the Atik mosque in Janja.

70. In the Banja Luka mosques case the Chamber stated that normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. It found that in applying the rule on exhaustion of domestic remedies it is necessary to take realistic account not only of the existence of formal remedies in the national legal system but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant (case no. CH/96/29, above mentioned in paragraph 31, paragraphs 142-143).

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

72. In the present case the applicant has only submitted a formal request to the Head of the Department of Housing Affairs in Bijeljina on 18 May 2000 applying for the reconstruction of the Atik mosque, the Dašnice mosque, the Krpić mosque and the Salihbegović mosque in Bijeljina. No other steps have been taken. In respect to the Atik mosque in Janja the applicant has never formally requested permission to rebuild it. The applicant allegedly submitted written requests to the respondent Party seeking the protection of the Vakuf property and its repossession on 24 February 1997, on 21 November 1997 and on 20 April 1998 but none of these letters contained a formal request for building licences. In a letter dated 13 September 1999 the applicant asked the respondent Party, *inter alia*, to protect its property from further devastation and to remove all facilities from the mosques sites. The applicant apparently had several informal talks with the respondent Party in order to get protection for the sites.

73. However, the Chamber cannot view the question of domestic remedies in isolation from the factual context. First, the Atik mosque, the Dašnice mosque, the Salihbegović mosque and the Krpić mosque in Bijeljina and the Atik mosque in Janja were physically destroyed during the night between 12 and 13 March 1993, i.e. during the sacred month of Ramadan. During the days immediately after the destruction the locations were diligently cleaned with some construction machines of the Army of the Republika Srpska. Afterwards, the Development Bank of Banja Luka started to construct a bank building which invades the Atik mosque site in Bijeljina for a total of 54 square meters. Fifty meters

away from the construction line of this bank building a fence has been erected by which approximately 1000 square meters of the mosque land - including the part where the former *Gasulhana* stood - were made inaccessible. Moreover, the respondent Party did not prevent the utilisation of another part of the Atik mosque site as a market place with moveable kiosks and tables. On the site of the former Dašnice mosque business premises of about 150-200 square meters have been constructed by the company "Express Promm" which lay at least partly on mosque land. The site of the former Krpić mosque is partly covered by some kiosks and partly used as a parking lot. On the location of the former Salibegović mosque there is car park. The respondent Party did not prevent the utilisation of the Atik mosque site in Janja as a flea market either.

74. Moreover, the Chamber notes that the new urban plan of Bijeljina is said to envisage the construction of a theatre on the site of the Atik mosque (see paragraph 14).

75. Furthermore, the Chamber observes that it ordered the respondent Party, *inter alia*, to grant the applicant permits for reconstruction of seven destroyed mosques in Banja Luka in a decision delivered on 11 June 1999 (case no. CH/96/29, above mentioned in paragraph 31). However, none of these permits has been issued until now. Given the manifest failure of the respondent Party to secure to the applicant its rights as established in this final and binding decision of the Chamber itself, the Chamber finds that the applicant was justified in doubting the effectiveness of a formal request for building licenses for the site of the former Atik mosque in Janja.

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

B. Merits

77. 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.

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

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

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

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

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others

and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

81. Turning to the question whether Article 9 of the Convention applies, the Chamber recalls that the freedom protected by Article 9 is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it (see Eur.Court HR, *Kokkinakis v. Greece*, judgement of 25 May 1993, Series A No. 260-A, p. 17, paragraph 31).

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

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

84. The Chamber has ascertained that in June 1999 about 1000 sq.m. of the Atik site in Bijeljina were fenced in and thereby made inaccessible. The old *Gasulhana* was removed and the construction of a bank building was started. The construction works, which invade the Atik site for a total of 54 square meters, were not stopped after the Chamber had issued an order for provisional measures on 10 July 1999. This has been confirmed by the expert witnesses (see paragraph 19 above). Following the public hearing of 4 July 2000 a further order for provisional measures was issued on 7 July 2000 ordering the respondent Party to stop all construction work within the boundaries of the Atik mosque site. On 24 August 2000 the respondent Party issued two procedural decisions ordering the investor and the company carrying out the construction activities for the investor to stop the construction on the Atik site in Bijeljina (see above paragraph 11). Moveable kiosks and tables are standing on another part of the site. Moreover, the new urban plan of Bijeljina is said to envisage the construction of a theatre, not a mosque, on the Atik site (see paragraph 16).

85. Concerning the site of the former Dašnice mosque the Chamber notes that a private company called "Express Promm" has built a business facility, on the basis of an agreement with the Bijeljina Municipality, which at least partly lays on the mosque land (see paragraph 22 above). This has been admitted by the owner of that company as well (see paragraph 30 above).

86. The Krpić site has been turned into a parking area, containing also eight small business facilities. The site were the Salihbegović mosque once stood was used as a flea market for a long time and is nowadays used as a car park. The Atik site in Janja is used as a flea market as well.

87. Moreover, it has been submitted to the Chamber that the current regulatory plan of Bijeljina does not provide for buildings on the sites in question (see paragraph 24 above).

88. Before assessing the alleged acts and omissions of the respondent Party's authorities the Chamber finds it necessary to recall the undertaking of the Parties to the Agreement to "secure" the rights and freedoms mentioned in the Agreement to all persons within their jurisdiction. This undertaking not only obliges a Party to refrain from violating those rights and freedoms, but also imposes on that Party a positive obligation to ensure and protect those rights (see case no. CH/96/29, above mentioned in paragraph 33, paragraph 161).

89. The Chamber recalls that it has already found, in the Banja Luka Mosques case, that the right to religion includes the right to create a space for practising it (case no. CH/96/29, above mentioned

in paragraph 33, paragraph 182). It therefore finds that the fencing in of about 1000 sq.m. of the Atik site in Bijeljina, the removal of the old *Gasulhana* from this site and the construction of a bank building encroaching on this site as well as the omission to remove the moveable kiosks and tables standing on it clearly amount to an interference with - or a "limitation" of - the right of the Muslim believers in Bijeljina freely to manifest their religion, as guaranteed by Article 9(1) taken in isolation.

90. Concerning the site of the former Dašnice mosque the Chamber notes that the company "Express Promm" has built a business facility situated at least partly on it, on the basis of an agreement with the Bijeljina Municipality. Therefore, the Chamber finds that the applicant's right to religious freedom has also been interfered with as far as the Dašnice site is concerned.

91. The Krpić site has been turned into a parking area, containing also eight small business facilities. The site were the Salihbegović mosque once stood is nowadays used as a car park. The same applies to the Atik site in Janja. The Chamber therefore finds that there is an interference with the applicant's right to religious freedom in relation to these sites as well.

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

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

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

95. The applicant alleges that the respondent Party acted in furtherance of discriminatory aims. In support of this contention, it firstly states, that the mosques in question were physically destroyed. Afterwards, new buildings were erected on two of the sites in Bijeljina, namely a bank building which invades the Atik site and a business building at least partly on the Dašnice site. The Krpić site has been turned into a parking area, containing also some small business facilities. The Salihbegović site is also used as a car park. The Atik site in Janja is used as a flea market. The applicant argues that this is part of a deliberate policy aimed at inhibiting Islamic worship in Bijeljina.

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

97. The Chamber notes, firstly, that the respondent Party's argument on the point here at issue is identical to that on which its preliminary objection of failure to exhaust domestic remedies was based. The Chamber refers to its findings in paragraphs 69 to 75 above.

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

99. In examining whether there has been discrimination the Chamber has consistently found it necessary first to determine whether the applicant was treated differently from others in the same or relevantly similar situations. Any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be

realised. There is a particular onus on the respondent Party to justify differential treatment which is based on any of the grounds enumerated in the relevant provisions, including religion or national origin (see case no. CH/97/45, *Hermas*, decision on admissibility and merits of 16 January 1998, paragraphs 86 et seq., Decisions and Reports 1998 and case no. CH/97/46, *Kevešević*, decision on the merits of 15 July 1998, paragraph 92, Decisions and Reports 1998).

100. Turning to the present case, the Chamber first notes that Article 28 of the Constitution of the Republika Srpska protects the freedom of religion and stipulates that religious communities are equal before the law and may freely perform their religious activities and services. However, the same provision singles out the Serb Orthodox Church as "the church of the Serb people" and provides that "the State" shall assist the Orthodox Church materially and co-operate with it in all fields. The Chamber is not called upon in this case to determine whether the privileged treatment afforded to the Serb Orthodox Church in itself amounts to discriminatory treatment of institutions or individuals who do not form part of that Church. However, the less favourable conditions to which the respondent Party's Constitution subjects the applicant's members is an element to be borne in mind in the examination of whether their treatment as a whole amounts to discrimination (cf. case no. CH/96/29, above mentioned in paragraph 33, paragraph 157).

101. In light of all the aforementioned considerations the Chamber finds it established that the Muslim believers in Bijeljina have been subjected to differential treatment in comparison with Serb Orthodox believers who, since the war, form the local religious majority. The above actions and omissions of the respondent Party's authorities caused a gradual deterioration of the applicant's situation in Bijeljina in comparison with other religious denominations, in particular the Serb Orthodox church. In the aforementioned exceptional circumstances the onus has been on the respondent Party to show that this treatment has been objectively justified in pursuance of a legitimate aim by means proportional to that aim. Failing such justification, it has been for the respondent Party to show that its authorities have taken reasonable steps to protect the applicant's members in Bijeljina from such discriminatory acts. The respondent Party has failed to do so.

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

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

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

104. The Chamber has next considered the case under Article II(2)(a) and (b) of the Agreement in relation to Article 1 of Protocol No. 1 to the Convention. It will again have regard to the facts on which it has based its finding of a violation and of discrimination in the enjoyment of the right to freedom of religion as protected, *inter alia*, by Article 9 of the Convention (see paragraphs 77-103). 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."

105. Article 1 of Protocol No. 1 thus contains three rules. The first is the general principle of peaceful enjoyment of possessions. The second rule covers deprivation of property and subjects it to the requirements of public interest and conditions laid out in law. The third rule deals with control of use of property and subjects this to the requirement of the general interest and domestic law. It must be determined in respect of all of these situations whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual applicant's fundamental rights (see case no. CH/96/17, *Blentić,* decision on admissibility and merits of 5 November 1997, paragraph 31, Decisions on Admissibility and Merits March 1996-December 1997).

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

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

107. 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 Atik mosque, the Dašnice mosque, the Krpić mosque and the Salihbegović mosque in Bijeljina then stood was nationalised. The mosques and the sites belonging to them, such as the *Gasulhana* on the Atik site in Bijeljina, remained, however, the property of the applicant. The Chamber furthermore notes that under Article 40(1) of the Law on Building Land as in force from 1986 onwards (see paragraphs 44-46 above) the applicant retained a right to use the land as long as the buildings on them endured.

108. In relation to the Atik site in Bijeljina, the Chamber first notes that the *Gasulhana* was still intact in 1999. Therefore, the property of the applicant on this part of the land still existed according to Article 40 of the Law on Building Land (paragraph 44 above) when the Dayton Agreement entered into force.

109. Moreover, Article 43 of the Law on Building Land stipulates that if a building has not been expropriated but destroyed either by *vis major* or by decision of the competent authority in view of its poor state of repair, its owner retains a priority right to use the land for construction, on condition that a regulatory plan or urban development plan envisages the construction of a building over which one can have a property right. The destruction of the Atik mosque, the Dašnice mosque, the Krpić mosque and the Salihbegović mosque in Bijeljina was completely outside the applicant's control and is therefore – as the Chamber has already stated in case no. CH/96/29 (above mentioned in paragraph 33, paragraph 194) – included in the legal term *vis major*. Moreover, it has been stated by the Chamber in the same case (*ibidem*, paragraph 194) that a legal definition common in the former SFRY would not appear to exclude an occurrence such as the destruction of the applicant's mosques from being regarded as *vis major* for the purposes of Article 43 (see paragraph 46 above).

110. It is true that Article 43 sets a further condition which is of relevance: although the applicant enjoys, under Article 40(1), the right to use the land where the Atik mosque, the Dašnice mosque, the Krpić mosque and the Salihbegović mosque in Bijeljina once stood, its right to use that land for new construction depends on whether the regulatory plan or general urban plan envisages such structures. However, the only information which the expert witnesses appointed by the Chamber could receive from the respondent Party was that both an urban plan and a regulatory plan do exist. The Chamber was informed only by the OHR Special Envoy to Bijeljina that the relevant regulatory

plan does not provide for mosques on the sites in question. The Chamber finds that the omission of religious buildings from the relevant plan cannot be such as to entail the loss of the priority right to use the land within the meaning of Article 43. The Chamber is therefore satisfied that the applicant has, at least, a priority right to use the sites above mentioned under Article 43. In this context, the Chamber recalls that the representative of the respondent Party stated during the public hearing of 4 July 2000 that the applicant as the previous owner of the mosque buildings still has a priority right to use the sites for construction.

111. Whether based on Article 40 or on Article 43 of the Law on Building Land, the Chamber finds that the applicant's right to use the land of the Atik, the Dašnice, the Krpić and the Salihbegović site in Bijeljina for reconstruction purposes is an enforceable right with an economic value which is to be considered a "possession" of the applicant for the purposes of Article 1 of Protocol No. 1.

112. The Chamber notes furthermore that, according to the land book, the site where the Atik mosque in Janja once stood is the applicant's property.

113. The Chamber concludes that the *Gasulhana* on the Atik site in Bijeljina and the other assets such as the right to use the Atik, the Dašnice, the Krpić and the Salihbegović sites in Bijeljina and the right of ownership on the Atik site in Janja constituted, on 14 December 1995, "possessions" of the applicant within the meaning of Article 1 of Protocol No. 1. The Chamber must next consider whether, and if so, according to which rule of this provision, the respondent Party has interfered with the applicant's possessions.

b. Interference

114. In relation to the Atik site in Bijeljina, the Chamber finds that the removal of the *Gasulhana* from this site as well as afterwards the construction of the bank building substantially interfered with the enjoyment of the applicant's possessions. The same applies to the construction of the business building on the Dašnice site. These actions constitute an extensive and definitive occupation of the land in question which the applicant has a priority right to use. However, the respondent Party did not formally divest the applicant of its rights. These actions must therefore be considered to have involved a *de facto* deprivation of the applicant's possessions.

115. In relation to the Krpić site, the Salihbegović site and the Atik site in Janja, the Chamber notes first of all that the respondent Party did not effect either a formal or a *de facto* expropriation. The utilisation of the Krpić site as a parking plot and a business area with small business facilities as well as the utilisation of the Salihbegović site as a car park and the Atik site in Janja as a flea market are supposed to be only of a temporary nature. The applicant may therefore recover the sites as soon as the respondent Party puts an end to their illegal utilisation. Accordingly, it cannot be said that the applicant has been definitively deprived of its possessions. The failure of the respondent Party to prevent the citizens of Bijeljina from illegally using the sites does not constitute a control of use either. However, the failure of the respondent Party to prevent the present inhabitants of Bijeljina from doing so, undoubtedly makes it impossible for the applicant to use the sites for the reconstruction of its mosques. It, therefore, constitutes an interference with the general principle of peaceful enjoyment of possessions under Article 1 of Protocol No. 1.

c. Discrimination

116. The Chamber has found above that the various acts and omissions resulting in a violation of the applicant's right to freedom of religion have been based on discriminatory grounds (see paragraphs 82-103 above). The same holds true with regard to the interferences with the right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the Convention. These interferences can, therefore, not be considered to be in accordance with the public interest.

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

3. Conclusion

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

VII. REMEDIES

119. 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.

120. In relation to the sites of the Atik, the Dašnice and the Krpić mosques in Bijeljina the applicant requests that the respondent Party be ordered to remove all facilities and constructions on the sites, to put the sites in order and erect enclosures around them until the reconstruction of the mosques takes place as well as to construct a new *Gasulhana* on the Atik site. Moreover, the applicant requests the Chamber to forbid the parking of vehicles on the Krpić site and on the site of the former Salihbegović mosque. Moreover, the applicant wants the respondent Party to revoke all changes to the urban planning concerning previously religious sites and to grant approval for the reconstruction of the Atik mosque, the Dašnice mosque, the Salihbegović Mosque, the Krpić Mosque and the Atik mosque in Janja. Finally, the applicant requests the Chamber to order the respondent Party to refrain from any further endangering of the Vakuf property within the area of Bijeljina. In its letter of 24 April 2000 the applicant, furthermore, requested 50,000 *Konvertibilnih Maraka* (KM) by way of compensation for the pecuniary and moral damage inflicted through the destruction of the *Gasulhana* and the construction on the site of the Atik mosque courtyard. During the public hearing of 4 July 2000 the applicant requested, moreover, KM 30,000 by way of compensation for the damage which arose by the illegal occupation of the sites in question.

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

122. Thus, the Chamber finds it appropriate to order the respondent Party to grant, within three months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the necessary permit for reconstruction of the Atik mosque at the location in Bijeljina at which it previously existed. In relation to the part of this site which is covered by the new bank building and which can therefore not be used for the reconstruction of the mosque and related structures and in relation to the destruction of the *Gasulhana* the Chamber finds it appropriate to order the respondent Party to pay to the applicant by way of compensation an amount of KM 15,000 within three months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure. Moreover, the Chamber orders the respondent Party to remove from this site, within one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the fence erected in connection with the construction of the bank as well as all moveable kiosks and tables and not to permit the use of the site for any purpose affecting or interfering with the rights of the Islamic Community.

123. In relation to the Dašnice site the Chamber finds it appropriate to order the respondent Party to remove, within six months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the part of the business facility which covers mosque land and to grant, within three months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the necessary permit for reconstruction of the Dašnice mosque at the location in Bijeljina at which it previously existed.

124. Regarding the Salihbegović site, the Chamber finds it appropriate to order the respondent Party to put an end to the use of this site as a car park, within one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, and not to permit the use of the site for any purpose affecting or interfering with the rights of the Islamic Community. Moreover, the Chamber finds it appropriate to order the respondent Party to grant, within three months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the necessary permit for reconstruction of the Salihbegović mosque at the location in Bijeljina at which it previously existed.

125. Relating to the Krpić site the Chamber finds it appropriate to order the respondent Party to remove from this site, within one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, all existing business facilities and not to permit the use of the site as a parking area or for any other purpose affecting or interfering with the rights of the Islamic Community. Moreover, the Chamber finds it appropriate to order the respondent Party to grant, within three months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the necessary permit for reconstruction of the Krpić mosque at the location in Bijeljina at which it previously existed.

126. Concerning the Atik site in Janja the Chamber finds it appropriate to order the respondent Party to remove the flea market from this site, within one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, and not to permit the use of the site for any purpose affecting or interfering with the rights of the Islamic Community. Moreover, the Chamber finds it appropriate to order the respondent Party to grant, within three months of the receipt of a request to that effect from the Islamic Community, the necessary permit for reconstruction of the mosque at the location at which it previously existed.

127. As to the request of the applicant regarding compensation in the amount of KM 30,000 the Chamber wishes to stress that it has no competence, *ratione temporis*, to award any compensation either for the destruction of the mosques in 1993 or for the illegal occupation of the sites or any other pecuniary or non-pecuniary damage which the applicant may have suffered before 14 December 1995. However, the Chamber notes that the illegal occupation of the sites of the former mosques which continued also after the entry into force of the Dayton Peace Agreement constitutes an insult to the applicant. The Chamber, therefore, finds it appropriate to order the respondent Party to pay to the applicant for the moral damages suffered after 14 December 1995 an amount of KM 10,000 within three months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure.

VIII. CONCLUSIONS

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

1. unanimously, to declare the application inadmissible in relation to the Janjica site;

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

3. by 6 votes to 1, that there has been a violation in Bijeljina of the right of the Islamic Community to freedom of religion as guaranteed by Article 9 of the European Convention on Human Rights considered in isolation, the respondent Party thereby being in violation of Article I of the General Framework Agreement;

4. by 6 votes to 1, that there has been a violation in Bijeljina of the right of the Islamic Community to the peaceful enjoyment of its possessions as guaranteed by Article 1 of Protocol No. 1 to the Convention considered in isolation, the respondent Party thereby being in violation of Article I of the Agreement;

5. by 6 votes to 1, that the Islamic Community has been discriminated against in Bijeljina in the enjoyment of its right to freedom of religion as guaranteed by Article 9 of the Convention, the respondent Party thereby being in violation of Article I of the Agreement;

6. by 6 votes to 1, that the Islamic Community has been discriminated against in Bijeljina 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;

7. by 6 votes to 1, to order the respondent Party to remove from the Atik site in Bijeljina, within one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the fence erected in connection with the construction of the bank and all moveable kiosks and tables and not to permit the use of the site for any purpose affecting or interfering with the rights of the Islamic Community;

8. by 6 votes to 1, to order the respondent Party to grant, within three months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the necessary permit for reconstruction of the Atik mosque at the location in Bijeljina at which it previously existed;

9. by 6 votes to 1, to order the respondent Party to remove from the Dašnice site, within six months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the part of the business facility which covers mosque land;

10. by 6 votes to 1, to order the respondent Party to grant, within three months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the necessary permit for reconstruction of the Dašnice mosque at the location in Bijeljina at which it previously existed;

11. by 6 votes to 1, to order the respondent Party to put an end to the use of the Salihbegović site as a car park, within one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, and not to permit the use of the site for any purpose affecting or interfering with the rights of the Islamic Community,

12. by 6 votes to 1, to order the respondent Party to grant, within three months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the necessary permit for reconstruction of the Salihbegović mosque at the location in Bijeljina at which it previously existed;

13. unanimously, to order the respondent Party to remove from the Krpić site, within one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, all existing business facilities, and not to permit the use of the site as a parking area or its use for any other purpose affecting or interfering with the rights of the Islamic Community;

14. by 6 votes to 1, to order the respondent Party to grant, within three months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the necessary permit for reconstruction of the Krpić mosque at the location in Bijeljina at which it previously existed;

15. unanimously, to order the respondent Party to remove the flea market from the Atik site in Janja, within one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, and not to permit the use of the site for any purpose affecting or interfering with the rights of the Islamic Community;

16. by 5 votes to 2, to order the respondent Party to grant, within three months of the receipt of a request to that effect from the Islamic Community, the necessary permit for reconstruction of the Atik mosque at the location in Janja at which it previously existed;

17. by 5 votes to 2,

a) to order the respondent Party to pay to the applicant, as monetary compensation for the moral damage suffered after 14 December 1995 in relation to all sites in question, KM 10,000 within three months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure; and

b) to pay to the applicant by way of compensation for the part of the Atik site in Bijeljina which is covered by the new bank building and which can therefore not be used for the reconstruction of the mosque and for the destruction of the *Gasulhana* an amount of KM 15,000 within three months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure;

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

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

(signed)
Peter KEMPEES
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel

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

ANNEX I

PARTLY DISSENTING OPINION OF MR. MEHMED DEKOVIĆ

In this case bearing the above-mentioned number, the respondent Party is ordered, in the conclusions under item 17(a), to pay to the applicant, by way of monetary compensation for the moral damage suffered after 14 December 1995 in relation to all sites where the sacral facilities were destroyed, KM 10,000 within three months from the date when this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure. In my opinion the said amount awarded as compensation is inadequate in regard to the material damage caused. In support of this I refer to the reasons presented in my dissenting opinion in case no. CH/98/1062.

I do not agree either with the part of the conclusions, item 16 of the Decision, in which the respondent Party is obliged to grant, within three months of the receipt of a request from the Islamic Community, the necessary permit for reconstruction of the Atik mosque. Taking into account the obstruction that has become known until now in similar cases I am of opinion that the Chamber's Decision and its order constitute a direct basis on which the reconstruction of the above-mentioned sacral facility may be allowed without any formal procedure. I have presented more detailed reasons for this in my dissenting opinion in case no. CH/98/1062.

(signed)

ANNEX II

DISSENTING OPINION OF MR. VITOMIR POPOVIĆ

I disagree with the Decision of the Human Rights Chamber for BiH with the above number for the following reasons:

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

In paragraph 72 of the Chamber's Decision it is stated:

"In the present case the applicant has only submitted a formal request to the Head of the Department of Housing Affairs in Bijeljina on 18 May 2000 applying for the reconstruction of the Atik mosque, the Dašnice mosque, the Krpić mosque and the Salihbegović mosque in Bijeljina. No other steps have been taken. In respect of the Atik mosque in Janja the applicant has never formally requested permission to rebuild it. The applicant allegedly submitted written requests to the respondent Party seeking for the protection of the Vakuf property and its repossession on 24 February 1997, on 21 November 1997 and on 20 April 1998 but none of these letters contained a formal request for building licenses. In a letter dated 13 September 1999 the applicant asked the respondent Party, *inter alia*, to protect its property from further devastation and to remove all facilities from the mosques sites. The applicant apparently had several informal talks with the respondent Party in order to get protection for the sites."

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

"The Chamber may declare at once that the application is inadmissible under the second paragraph of Article VIII of the Agreement or may decide to suspend consideration of, reject or strike out the application under paragraph 3 of Article VIII."

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

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

"The Parties shall secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and the other international agreements listed in the Appendix to this Annex."

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

a) The Law on Building Land (Official Gazette of SR BiH 34/86 and 1/90; Official Gazette of the Republika Srpska number 29/94 and 23/98);

b) The Law on Physical Planning of SR BiH (Official Gazette nos. 9/87, 23/88, 24/89, 10/90, 15/90, 14/91);
c) The Law on Physical Planning of the Republika Srpska (Official Gazette of RS nos. 19/96, 25/96, 25/97, 3/98 and 10/98);
d) in accordance with regulation plan of Bijeljina Municipality.

The Chamber came to a wrong conclusion when it held, as set out in paragraph 17c of the Conclusions, that the respondent Party was to pay to the applicant, by way of monetary compensation for moral damage suffered after 14 December 1995 in relation to all the sites in question, KM 10,000 within 3 months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, and
that, according to Conclusion number 17b, the respondent Party was ordered to pay to the applicant, by way of compensation for the part of the Atik site in Bijeljina which is occupied by the new bank building and which can, therefore, not be used for the reconstruction of the mosque and for the destruction of the *Gasulhana*, an amount of KM 15,000 within 3 months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure.

Actually, these parts of applicant's requests ought, according to Article VIII(2)(a) of the Agreement in conjunction with Rule 49 of the Chamber's Rules of Procedure, also to have been declared inadmissible by the Chamber for non-exhaustion of domestic remedies or suspended – the proceedings halted until such remedies before the relevant organs were exhausted – namely, the courts of the Republika Srpska as the respondent Party.

The request for compensation for moral damage and the compensation claim have never been submitted to the relevant organs of the respondent Party, and so this part of the request, according to Article VIII(2)(a), should also have been declared inadmissible for non-exhaustion of the domestic remedies or suspended – the proceedings halted until such remedies were exhausted.

Compensation for moral damage concerns non-pecuniary damage which cannot be suffered by, or awarded to, legal persons but only to natural persons within the meaning of the applicable legislation, i.e. the Law on Obligation Relations. The Islamic Community has the status of legal and not natural person and does not have any right to compensation for such damage. Such damage could possibly be awarded to believers whose personal, i.e. moral, rights have been violated. In addition, it is justified to question the award of such damages for the period from 14 December 1995, the date of entry into force of the Agreement, onwards, and a request for compensation of such damage was only set out in the applicant's letter of 24 April 2000, so compensation for damage was awarded for a period for which it was not requested.

Acting as described above the Chamber acted in violation of Article 1 of the Human Rights Agreement as Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina, which reads as follows:

"The Parties shall secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms..."

Moreover, the award of compensation made in sub-paragraph 17b of the Conclusions does not have any legal basis in "domestic jurisdiction" as referred to in Article 1 of the Human Rights Agreement. It is not known to what this damage actually relates. If this is considered to be pecuniary damage for the permanent occupation of the land and the destruction of the *Gasulhana*, then the amount of damage should be established by an appropriate building expert, that is, it should correspond to the amount of "real damage", and not be an award of a lump sum in respect of of damage as the Chamber made.

For the remainder of my separate opinion I completely maintain my separate dissenting opinion stated in case number CH/96/29 Islamic Community in BH v. the Republika Srpskaof 11 June 1999 (Banja Luka mosques case) and case number CH/98/1062 Islamic Community in BH v. the Republika Srpska of 9 November 2000 (Zvornik mosques case).

(signed)