DECISION ON ADMISSIBILITY

CASE No. CH/00/5796

Drago LUKENDA and Miroljub BEVANDA

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 5 July 2001 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)(c) of the Agreement and Rules 49(2) and 52 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The case concerns the attempts of the applicants to construct a mini hydro-electric power plant near the village of Duge at a site protected as an asset of natural heritage. This construction was approved by the Prozor-Rama Municipality[1] in the Hercegovačko-Neretvanski Canton in the Federation of Bosnia and Herzegovina. Among numerous other necessary approvals, the applicants, investors in the power plant project, obtained from the Municipality a certificate on conditions of regional development issued on 13 May 1996 and a building permit issued on 14 May 1996. In March 2001, the Ministry of Physical Planning and the Environment of the Federation of Bosnia and Herzegovina annulled both of these approvals, and in April 2001, the applicants filed administrative dispute complaints, which are still pending, challenging the validity of such annulments before the Supreme Court of the Federation of Bosnia and Herzegovina.

2. This case derives from the same factual circumstances and is related to case no. CH/00/5480 *Aziz Dautbegović and 51 other villagers from the Village of Duge v. the Federation of Bosnia and Herzegovina ("Dautbegović")*, filed by the villagers of Duge to prevent construction of the power plant by the applicants in this case, Messrs. Lukenda and Bevanda. For additional background and factual information, the Chamber refers to its decision on admissibility and merits in *Dautbegović*, delivered on 6 July 2001.

3. The applicants claim violations of their right to property and right to freedom of movement. The essence of their complaints is that they were granted permission to construct the power plant before the 1992-95 war, and these permissions were renewed by the respondent Party after the war. Now, however, the applicants are unable to perform the construction and complete the power plant, and they allege that the competent authorities of the respondent Party have done nothing to assist them in realising their rights to construct the power plant, especially when the villagers from Duge blocked their access to the planned construction site of the power plant. The applicants seek a withdrawal of the Chamber's order for provisional measures first issued in *Dautbegović* on 4 September 2000, and subsequently extended, which required the respondent Party to take all necessary measures to ensure that the construction works on the planned hydro-electric power plant near the village of Duge be stopped.

II. PROCEEDINGS BEFORE THE CHAMBER

4. Mr. Drago Lukenda submitted his application to the Chamber on 26 September 2000 and it was registered on the same day. Mr. Miroljub Bevanda submitted a nearly identical application to the Chamber on 13 December 2000 in which he requested that his application be joined with the application of Mr. Lukenda. Since the subject matter of the two applications is identical, the Chamber decided to consider the cases under the same case number.

5. The applicants in the present case requested, as a provisional measure, that the Chamber withdraw its order for provisional measures first issued on 4 September 2000 in *Dautbegović*. This order prevented construction of the power plant, and the applicants sought to have it withdrawn so that they could continue construction of their power plant. On 13 October 2000, the Chamber rejected the applicants' request for provisional measures. On the same day, the Chamber decided to extend its original order for provisional measures in *Dautbegović* until 15 November 2000. Thereafter, on 13 November 2000 the Chamber again extended its order for provisional measures in *Dautbegović* until such time as it adopted its final decision in *Dautbegović* or withdraws the order.

[1] The name of this Municipality has changed several times in recent years. Relevant to the dates at issue in this case, in 1991 it was called the Prozor Municipality, in 1996-1997 the Rama Municipality, and at the present time the Prozor-Rama Municipality. Throughout this decision the respective names indicated in the procedural decisions and documents at issue are used, all concerning the same Municipality.

6. The written submissions in this case have been numerous. The Chamber transmitted the case to the respondent Party under Article 1 of Protocol No. 1 to the Convention on 14 November 2000. The respondent Party filed its written observations on the admissibility and merits of the case on 28 November 2000. Mr. Lukenda filed his written reply observations thereto, plus a claim for compensation, on 4 December 2000. The respondent Party filed additional written observations on the compensation claim on 4 January 2001. On 10 January 2001, the respondent Party submitted further written observations on the admissibility and merits of the case.

7. On 10 November and 9 December 2000, the Chamber considered this case and *Dautbegović* and decided to hold a joint public hearing on both cases on 11 January 2001. The Chamber solicited witness proposals from the parties in both cases, and then summoned the following persons to appear at the public hearing: Mr. Emir Avdić from the Public Enterprise "Elektroprivreda BiH", Professor Sulejman Redžlć from the Center for Ecology and Natural Resources, Director Ferhad Mulabegović from the Institute for the Protection of Cultural-Historic and Natural Heritage of Bosnia and Herzegovina, Minister Tahir Dulić from the Ministry of Civil Engineering, Physical Planning and Environmental Protection of the Hercegovačko-Neretvanski Canton, Deputy Minister Vesna Čović from the Ministry of Civil Engineering, Physical Planning and Environmental Protection of the Hercegovačko-Neretvanski Canton, and Mr. Jozo Vukoja, the Head of the Prozor-Rama Municipality. The Chamber also asked representatives of the parties in both cases to be present at the public hearing to provide factual information.

8. The joint public hearing was held in the hearing room of the Cantonal Court in Sarajevo on 11 January 2001. The applicants in *Dautbegović* were represented by their lawyers, Messrs. Dževad Pazalja and Enes Dautbegović; Messrs. Osman Dautbegović and Ibro Kaltak appeared on the *Dautbegović* applicants' behalf as well. The applicants in the present case were represented by the applicant, Mr. Drago Lukenda, and Mr. Miroljub Bevanda was also present. The respondent Party was represented by Ms. Seada Palavrić, Secretary of the Office for Cooperation with and Representation before the Human Rights Commission, Ms. Safija Kulovac, assistant to the Secretary, and Ms. Branka Fetahagić, counselor to the Secretary. All witnesses who were summoned were in attendance as well.

9. At the beginning of the public hearing, the Chamber heard opening comments from representatives for each of the parties: first for the *Dautbegović* applicants, second for the *Lukenda and Bevanda* applicants, and third for the respondent Party. During the opening presentation of the *Dautbegović* applicants, a videotape was shown depicting the village of Duge and its surroundings. In its presentation, the respondent Party, contrary to its earlier submissions in the case (except the submission of 10 January 2001), admitted that without the provisional measure ordered by the Chamber, the villagers of Duge would suffer irreparable damage, and that a "dormant danger" remained that there could be a violation of the human rights of the *Dautbegović* applicants if construction of the power plant occured. The respondent Party admitted that all approvals and licenses granted to the investors, Messrs. Lukenda and Bevanda, by the Prozor-Rama Municipality were issued contrary to the law because they did not and could not include the required consent of the Institute for Protection of Cultural-Historic and Natural Heritage of Bosnia and Herzegovina. According to the respondent Party, such consent was necessary because the site in question was declared protected as a natural heritage asset by the procedural decision of 26 March 1958 issued by the State Institute for Protection of Monuments of Culture and Natural Rarities pursuant to the 1947 Law on Protection of Monuments of Culture and Natural Rarities (see paragraphs 24, 44-46 below).

10. With respect to the present case, the respondent Party explained at the public hearing that the documentation is not and can never be in order for construction of the power plant because the Institute for Protection of Cultural-Historic and Natural Heritage cannot approve construction of a power plant on or near a protected natural heritage asset. In support of this, the respondent Party submitted two expert opinions prepared in 1999: one opines that "the approval for performance of works on construction of the small hydroelectric power plant on the Buk River in the village of Duge-Prozor cannot be given because the value of the protected natural phenomenon of the waterfall would

be distorted," and the other opines that "it is necessary to cease immediately all activities and works of construction on the small hydroelectric power plant in the village of Duge until approvals which correspond to the protected status of the area are obtained." The respondent Party further noted that the competent authorities may withdraw the building permit for the power plant for the benefit of the public.

11. On the other hand, the applicants relied upon two contrary expert opinions they submitted in support of their application. On 11 June 1999, the Civil Engineering Faculty at the Institute for Hydro-Technology in Sarajevo made a pre-feasibility study on the influence of a power plant on the environment near the village of Duge. This Study Estimating the Influence to the Environment of the Mini Hydro-Power Plant "Duge" concluded as follows: a) that a power plant will not negatively influence the environment; b) that the plan for the proposed power plant fully satisfies the criteria for an acceptable ecology and power operation system; and c) that the Institute, with respect to general water management and ecological influences, supports the proposal for construction of the power plant near the village of Duge. On 10 January 2000, the Ministry of Civil Engineering, Physical Planning and Environmental Protection of the Hercegovina-Neretva Canton assessed the Study by the Civil Engineering Faculty. According to the Ministry, the purpose of the Study was to "estimate the influence on the environment of the mini hydro-power plant 'Duge'". The main issues addressed in the Study included a description of the power plant and the specific and surrounding location, protection of waters, protection of air, protection of soils, protection from noise pollution, and precautionary measures in the event of an environmental accident. The Ministry noted in the assessment that the authors provided no data about urban, rural, or cultural-historic heritage. The Study was made in accordance with applicable laws of the "Croat Community of Herceg-Bosna" and the Federation of Bosnia and Herzegovina. The Ministry concluded that "the results of the Study show there is no emission into the environment and no significant negative influence to the environment with the planned and applied measures for protection".

12. At the end of the public hearing, the agent for the respondent Party requested that the Chamber grant it three months from the date of the hearing to ensure that local authorities declare null and void all approvals and licenses granted to the investors for construction of the power plant and reconsider all requests by the investors in accordance with applicable laws. The agent further requested that the Chamber maintain its order for provisional measures in *Dautbegović* during this three-month period.

13. In light of the concessions by the respondent Party at the public hearing, the Chamber released all summoned witnesses with the exception of one: Mr. Jozo Vukoja, the Head of the Prozor-Rama Municipality. The Chamber questioned and heard testimony from Mr. Vukoja, but Mr. Vukoja could offer the Chamber little relevant information because he did not take office until May 2000, after the events complained of. The Chamber next questioned Mr. Drago Lukenda, the agent for the respondent Party, and Mr. Enes Dautbegović. Finally, the parties were given an opportunity to make closing remarks: first Messrs. Dževad Pazalja and Enes Dautbegović for the *Dautbegović* applicants, second Mr. Drago Lukenda for the *Lukenda and Bevanda* applicants, and third Ms. Seada Palavrić for the respondent Party.

14. In light of the information made known at the public hearing, on 18 January 2001, the Chamber transmitted the application to the respondent Party under Article 6 and Article 1 of Protocol No. 1 to the Convention, "based on apparent irregularities in the issuance of the approvals and licenses to Messrs. Lukenda and Bevanda for construction of the power plant in the village of Duge." The Chamber also sought additional information concerning the 1958 decision to protect the site at issue as a natural heritage asset, the specific location of the boundaries of the protected site, and with regard to any prosecutions before the Petty Offence Court lodged against the villagers of Duge for blocking the access routes to the applicants' planned construction site for the power plant.

15. On 19 February 2001, the respondent Party submitted additional written observations on the merits of the *Lukenda and Bevanda* application. This submission also contained the information requested by the Chamber described in paragraph 14 above.

16. On 19 February and 6 March 2001, Mr. Lukenda submitted additional written observations in support of the application. The submission of 6 March 2001 includes a claim by Mr. Bevanda for compensation.

17. On 2 April 2001, Mr. Lukenda wrote to the Chamber requesting that the Chamber issue an order for provisional measures to cancel certain procedural decisions issued in March 2001 which annulled the approvals and licenses for the power plant (see paragraph 32 below). The Chamber registered this new request for provisional measures under a new case number CH/01/7556, and a decision on admissibility was adopted in that new case on 5 July 2001, in which the Chamber declares the new case inadmissible for failure to exhaust domestic remedies.

18. On 4 April 2001, the respondent Party submitted additional written observations on Mr. Bevanda's claim for compensation, which claim is substantially identical to Mr. Lukenda's prior claim for compensation. The respondent Party referred back to its written observations of 4 January 2001 on Mr. Lukenda's claim for compensation.

19. On 4 May 2001, Mr. Lukenda requested once again that the Chamber withdraw its order for provisional measures in *Dautbegović* which suspended construction of the hydro-electric power plant near the village of Duge. On 9 May 2001 the Chamber rejected this renewed request to withdraw its order for provisional measures in *Dautbegović*.

20. On 19 June 2001, in response to a request by the Chamber, Mr. Lukenda submitted supplemental documents to the Chamber concerning administrative dispute proceedings that he initiated before the Supreme Court of the Federation of Bosnia and Herzegovina (see paragraph 33 below).

21. The Chamber deliberated on the admissibility of this case on 9 May, 8 June, and 5 July 2001, and adopted this decision on the latter date.

III. ESTABLISHMENT OF THE FACTS

22. The facts presented are not materially disputed between the parties except as specifically indicated below.

23. The applicants are the investors in a project to construct a mini hydro-electric power plant near the village of Duge in the Prozor-Rama Municipality in the Hercegovačko-Neretvanski Canton in the Federation of Bosnia and Herzegovina. The village is located near the Krupić Spring on the banks of the Buk River which flows into the Duščica Stream, forming two waterfalls along the way. The village is named for the rainbows that often appear in the sky above the waterfalls ("*duge*" means rainbows). The area is renowned throughout Herzegovina for its exceptional natural beauty.

24. On 26 March 1958, the State Institute for Protection of Monuments of Culture and Natural Rarities issued, pursuant to Articles 1 and 19 of the Law on Protection of Monuments of Cultural and Natural Rarities dated 30 April 1947 (see paragraphs 44-46 below), a procedural decision effective 24 June 1959, which placed the site, referred to as "the Krupić Spring and waterfalls near the village of Duge, Prozor Municipality, Mostar District, state property," "under the protection of the State as a natural rarity and significant object for tourism". This procedural decision prohibits all actions which could cause any change to the protected natural rarity, including construction and any damaging action, without approval from the State Institute for Protection of Monuments of Culture and Natural Rarities. It further prohibits any construction or actions causing any change to the appearance of the land in the immediate surroundings of the site without approval from the State Institute for Protection of Monuments of Culture and Natural Rarities. The decision describes the area at issue as including the Krupić Well, which is north of the village of Duge. The water flows out from under Krmska Glava Hill, which is covered with trees and shrubs. One kilometer from the Well, the water flows into the

Ljubunička River, over two waterfalls, one surrounded by vegetation the other surrounded by bare stones. Thereafter, the water enters the Vojna Canyon where the Prozor Stream passes.[2] The decision concludes, "the whole area represents an extraordinary rarity of significant interest that should remain in its present condition."

25. According to the procedural decision of 26 March 1958, the State Institute for Protection of Monuments of Culture and Natural Rarities delivered its decision to a variety of government authorities in Mostar and Prozor, including the District Court Land Registry in Prozor and the Forest Management Administrations in Mostar and Prozor. The Chamber has within its files a delivery notice dated 16 April 1958 confirming such delivery to the People's Committee of the Municipality of Prozor. Moreover, the procedural decision was included in the List of Protected Natural Monuments of Bosnia and Herzegovina published in the Almanac of the Institute for Protection of Nature of Bosnia and Herzegovina[3] of 1962. According to the respondent Party, this Almanac was transmitted to all Municipalities in the former Socialist Republic of Bosnia and Herzegovina in 1989.

26. In 1989 the applicants in the present case began to collect the necessary approvals and permissions for construction of a small hydro-electric power plant on the Duščica Stream near the village of Duge. On 31 July 1991 the Municipality allocated socially-owned property to the applicants for construction of the power plant. According to the terms of the procedural decision granting the allocation, the applicants would lose their right to use the land if, within one year, they did not submit a claim for issuance of the building permit or if, within three years of the issuance of such permit, they did not complete the majority of the construction works. The applicants claim that they undertook activities in February 1992 to obtain building permission for construction of the power plant, but these activities were interrupted due to the 1992-95 war in Bosnia and Herzegovina.

27. In 1996 the applicants submitted a request for building permission. On 13 May 1996 the Department of Physical Planning, Constructions and Housing-Utility Affairs of the Rama Municipality issued the applicants a certificate on conditions of regional development pursuant to Article 64(1) of the Decree on Physical Planning and Regional Development on the Territory of the "Croat Community of Herceg-Bosna" during the war and immediate threat of war (see paragraphs 64-72 below). This certificate stated that a "mini power plant of derivational type may be constructed with water intake from the Duščica Stream" in accordance with certain conditions set forth in the certificate. The "conditions for protection of the environment" set forth in the certificate must ensure "that the facility shall not in any way endanger the environment by its construction or existence" and "that the facility shall secure basic conditions for life and work of the people who will use this facility". On 14 May 1996 the Department of Physical Planning, Constructions and Housing-Utility Affairs of the Rama Municipality issued the applicants, pursuant to Articles 26 and 33 of the Decree on Constructions in the Territory of the "Croat Community of Herceg-Bosna" during immediate threat of war or state or war (see paragraphs 73-78 below), a procedural decision for a building permit for the power plant on the Duščica Stream near the village of Duge. The terms of this permit provide that all construction works must be performed in accordance with the requirements of the certificate on conditions of regional development and that the permit will expire if construction is not commenced within one year after issuance. On 20 June 1997, the Department of Constructions of the Rama Municipality extended the validity of the building permit until 14 May 1998 pursuant to Article 35 of the Decree on Constructions in the Territory of the "Croat Community of Herceg-Bosna" during immediate threat of war or state or war (see paragraph 77 below). On 22 April 1998 the applicants reported to the

[2] The names of the rivers and hills near the village of Duge were later changed. On current maps, the village of Duge is located on the banks of the Buk River, which flows south from the village, forming two waterfalls, and then joins the Duščica Stream, as described in paragraph 23 above.

[3] In 1961 the Law on Protection of Nature (OG PRBiH no. 45/61, dated 17 November 1961) replaced the 1947 Law on Protection of Monuments of Culture and Natural Rarities. Pursuant to Article 5 of this Law, the service of protection of nature was performed by the Institute for Protection of Nature of Bosnia and Herzegovina (see footnote 4 below).

Municipality the commencement of construction of the power plant, but only preliminary marking and excavation has taken place to date.

28. In connection with the issuance of the certificate on conditions of regional development and the building permit, the applicants were required to obtain numerous other approvals and permissions, including water management approval issued on 25 December 1989, electro-energetic approval issued on 27 February 1996, and a letter confirming permission for construction dated 11 May 1999. Each of these public documents, in addition to others not mentioned herein, were issued by or at the request of the appropriate Ministry of the Hercegovačko-Neretvanski Canton or Department of the Prozor-Rama Municipality. One important public document was not issued or requested by the Canton, however: there is no approval at any stage in the process concerning protection of natural heritage assets issued by the Institute for Protection of Cultural-Historic and Natural Heritage or any other competent authority on this subject matter (see paragraphs 49, 55 below).

29. In mid-1999, after the applicants received final permission to continue construction of the power plant, villagers from Duge began to apply significant pressure to attempt to prevent the construction from occurring. In addition to writing and petitioning both the Municipal authorities and the authorities of the Federation of Bosnia and Herzegovina, the villagers also physically attempted to prevent construction by blocking access to the site. In response to a complaint filed by the applicants, on 31 July 2000, the Municipal Court in Rama issued an order for provisional measures requiring the villagers to desist from disturbing in any way the applicants' property and from preventing any works on the property. In August and September 2000, the applicants sought enforcement of this order for provisional measures because the villagers were still preventing the construction of the power plant. On 5 and 12 September 2000, the Municipal Court requested the assistance of the Prozor-Rama Police Administration with that enforcement.

30. Meanwhile, the villagers from Duge sought protection of their human rights from the Chamber. They filed *Dautbegović* on 31 July 2000, which included a request for provisional measures to prevent construction of the power plant. As explained above, on 4 September 2000, the Chamber ordered the respondent Party, as provisional measures, to take all necessary measures to ensure that construction on the planned hydro-electric power plant near the village of Duge cease, and this order for provisional measures, the validity of which has been extended several times, remains in force. On 18 September 2000, the Municipality ordered the applicants in the present case to suspend construction on the power plant pursuant to the Chamber's order for provisional measures.

31. On 22 January 2001, following the public hearing in this and the *Dautbegović* cases, the respondent Party notified in writing the Ministry of Physical Planning and the Environment of the Federation of Bosnia and Herzegovina in Sarajevo and the Minstry of Physical Planning and Protection of the Environment of the Hercegovačko-Neretvanski Canton in Mostar of violations of the law requiring the annulment of the procedural decisions issued in favour of the investors by the Department of Physical Planning, Constructions and Housing-Utility Affairs of the Rama Municipality on 14 May 1996 and 20 June 1997. These procedural decisions authorise necessary phases of construction of the power plant near Duge. Among the violations of law pointed out by the respondent Party, it highlighted in particular the failure of the competent authoritites to request and obtain the necessary approval of the Institute for Protection of Cultural-Historic and Natural Heritage prior to authorising any approval or license for construction on the site in question, which is protected as a natural heritage asset.

32. In response to the respondent Party's notification of violations of the law, the Ministry of Physical Planning and the Environment of the Federation of Bosnia and Herzegovina issued three procedural decisions annulling previous procedural decisions which authorised construction of the power plant near Duge. On 16 March 2001, the Ministry annulled the decision of 13 May 1996, the certificate on conditions of regional develoment. On 19 March 2001, the Ministry annulled the decision of 14 May 1996, the building permit. On 21 March 2001, the Ministry annulled the decision of 20 June 1997, the extension of the building permit. The Ministry reasoned in its decision of 16

March 2001 that the Department of Physical Planning, Constructions and Housing-Utility Affairs of the Rama Municipality, which issued the annulled procedural decision, had failed to take into account that the Krupić Spring and waterfalls near Duge were protected as natural heritage assets of the state. The Ministry further explained that approval from the Institute for Protection of Cultural-Historic and Natural Heritage was mandatory prior to issuance of the annulled procedural decision. From there it followed that the subsequent decisions must also be annulled.

33. On 13 April 2001, the applicants initiated administrative dispute proceedings by submitting three complaints to the Supreme Court of the Federation of Bosnia and Herzegovina. These complaints challenge the validity of the three procedural decisions issued by the Ministry of Physical Planning and the Environment of the Federation of Bosnia and Herzegovina in March 2001 which annulled the previous approvals and permits for construction of the power plant near Duge. In their complaints, the applicants argue that the annulment decisions were issued by a governmental body lacking competence because it was not the applicable second instance body to review the underlying procedural decisions. The investors further argue that the land on which they were granted the right to build their power plant is not subject to any protection by the state as a natural rarity because it is a different plot of land than the one protected under the 1958 decision by the State Institute for Protection of Monuments of Culture and Natural Rarities. These complaints are still pending before the Supreme Court of the Federation of Bosnia and Herzegovina.

IV. RELEVANT DOMESTIC LAW

34. The relevant parts of domestic law important to this decision are described below.

A. Constitutions and Other Laws governing Transitional Arrangements in the Federation of Bosnia and Herzegovina

1. Constitution of Bosnia and Herzegovina

35. The Constitution of Bosnia and Herzegovina entered into force "upon signature of the General Framework Agreement", which occurred on 14 December 1995. In Article III, it sets forth the relations and responsibilities between Bosnia and Herzegovina and the Entities, including the Federation of Bosnia and Herzegovina. After specifying certain responsibilities concerning primarily international and financial matters, Article III, Section 3(a) states: "All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities."

36. Annex II to the Constitution of Bosnia and Herzegovina provides for transitional arrangements, including the continuation of laws. In Article 2 of Annex II, it provides as follows:

> "All laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution 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."

2. Constitution of the Federation of Bosnia and Herzegovina

37. The Constitution of the Federation of Bosnia and Herzegovina entered into force on 30 March 1994 at midnight. It provides, in Article 1, as amended on 5 June 1996, for the establishment of the Federation of Bosnia and Herzegovina:

> "(1) Bosniacs and Croats as constituent peoples, along with Others, and citizens of Bosnia and Herzegovina from the territories of the Federation of Bosnia and Herzegovina, in the exercise of their sovereign rights, transform the internal structure of

> the Federation territories, … so the Federation of Bosnia and Herzegovina is now composed of federal units with equal rights and responsibilities.
>
> "(2) The Federation of Bosnia and Herzegovina is one of two entities composing the state of Bosnia and Herzegovina, and has all power, competence and responsibilities which are not within, according to the Constitution of Bosnia and Herzegovina, the exclusive competence of the institutions of Bosnia and Herzegovina."

38. The Constitution of the Federation of Bosnia and Herzegovina describes the division of responsibilities between the Federation Government and the Cantons in Chapter III. According to Chapter III, Article 2, "both the Federation Government and the Cantons are to have responsibilities for the following: … (c) environmental policy; … and (i) use of natural resources".

39. Chapter IX of the Constitution of the Federation of Bosnia and Herzegovina provides for transitional arrangements, including the continuation of laws. Article 5(1) of Chapter IX provides as follows:

> "All laws, regulations, and judicial rules of procedure in effect within the Federation on the day on which this Constitution enters into force shall remain in effect to the extent not inconsistent with this Constitution, until otherwise determined by the competent governmental body."

3. Agreement on Implementation of the Federation of Bosnia and Herzegovina

40. The Agreement on Implementation of the Federation of Bosnia and Herzegovina was concluded at Dayton and signed on 10 November 1995 by representatives of the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republic of Croatia. This Agreement, which was a side agreement to the General Framework Agreement for Peace in Bosnia and Herzegovina which entered into force on 14 December 1995, clarified, among other things, the competencies of the State of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina. Chapter II, Section 5 states that the Federation of Bosnia and Herzegovina is responsible for "justice", "education, science and culture", and "city planning, resources and environment".

4. Decision on Cessation of Application of the Decision on Declaration of Immediate Threat of War on the Territory of the Federation of Bosnia and Herzegovina

41. On 19 December 1996, the Parliament of the Federation of Bosnia and Herzegovina issued the Decision on Cessation of Application of the Decision on Declaration of Immediate Threat of War on the Territory of the Federation of Bosnia and Herzegovina, which entered into forced on 23 December 1996 (Official Gazette of the Federation of Bosnia and Herzegovina— hereinafter "OG FBiH"–no. 25/96). Part II of this Decision states as follows:

> "Federal Ministries and other bodies and institutions of authority in the Federation of Bosnia and Herzegovina, Cantons, Municipalities and Cities, as well as Companies and other legal persons on the territory of the Federation of Bosnia and Herzegovina shall undertake all necessary actions and organise work in accordance with valid peace-time regulations that are applied on the territory of the Federation of Bosnia and Herzegovina in accordance with the Constitution of the Federation of Bosnia and Herzegovina."

5. Law on Recognition of Public Documents within the Territory of the Federation of Bosnia and Herzegovina

42. The Law on Recognition of Public Documents within the Territory of the Federation of Bosnia and Herzegovina (OG FBiH no. 4/98) entered into force on 26 February 1998. This law regulates and recognises "all kinds of public documents in legal transactions within the territory of the Federation of Bosnia and Herzegovina issued by administrative, judicial and other bodies and institutions, as well as legal persons exercising powers within the territory of the Federation in the period of 6 April 1992 through 14 October 1997" (Article 1). Article 4 further defines "public documents" in terms of this Law to include "all kinds of public documents, diplomas, certificates on graduation, certificates, attestations, excerpts from public books and other excerpts issued on the basis of official records, as well as court decisions and procedural decisions from the court register, and then verifications of signatures and transcripts of those and other public documents, issued and verified in accordance with the laws applied within the territory of the Federation until the day of entry into force of this law".

43. "Public documents issued by bodies and legal persons referred to in Article 1 of this law are recognised as public documents issued by competent bodies and have the same legal effect throughout the territory of the Federation" (Article 2).

B. Laws Applicable in the Federation of Bosnia and Herzegovina

1. Law on Protection of Monuments of Culture and Natural Rarities

44. The Law on Protection of Monuments of Culture and Natural Rarities of the former People's Republic of Bosnia and Herzegovina (Official Gazette of the People's Republic of Bosnia and Herzegovina— hereinafter "OG PRBiH"– no. 19, dated 30 April 1947) provides for the protection of cultural and historic monuments and natural rarities.[4] Article 1 of this Law provides as follows: "All immovable and movable cultural–historic, art and ethnographic monuments, as well as natural rarities of zoological, botanical, geological–palaeontological, mineralogical–petrographical and geographical character or of particular beauty, regardless of whose property they were and in whose possession, are under the protection of the state. Scientific and aesthetic values of these objects are a public asset."

45. In order to protect such monuments of culture and natural rarities, the former People's Republic of Bosnia and Herzegovina founded, on the basis of the Law, the State Institute for Protection of Monuments of Culture and Natural Rarities, with its seat in Sarajevo (Articles 16, 18). Article 19 of the Law provides that: "the State Institute in Sarajevo shall decide which objects shall

[4] The 1947 Law on Protection of Monuments of Culture and Natural Rarities (OG PRBiH no. 19) ceased being applicable on 25 November 1961, when the new Law on Protection of Nature was published and came into force (OG PRBiH 45/61, dated 17 November 1961). The Law on Protection of Nature was amended in November 1964 (OG SRBiH no. 41/64). The consolidated text of this Law was published on 5 February 1965 (OG SRBiH no. 4/65). Pursuant to Article 5 of this Law, the service of protection of nature was performed by the Institute for Protection of Nature of Bosnia and Herzegovina. Article 75 stipulates that within one year from the day this Law comes into force, the documents by which the objects of nature were placed under protection as natural rarities under the regulations which were applicable until this Law entered into force shall be amended with a view to harmonising them with the provisions of this Law.

The 1961 Law on Protection of Nature ceased being applicable on 14 February 1978, when the Law on Protection and Use of Cultural-Historic and Natural Heritage entered into force (OG SRBiH no. 3/78, dated 6 February 1978). Pursuant to Article 92 of this Law, the monuments of culture and objects of nature placed under protection pursuant to regulations which were applicable before this Law came into force shall be considered protected under the provisions of this Law. Article 94 provides that the Institute for Protection of Nature of Bosnia and Herzegovina continues to function pursuant to the provisions of this Law under the name the Institute for Protection of Monuments of Culture, Natural Sites and Rarities of Bosnia and Herzegovina. The 1978 Law ceased being applicable on 24 July 1985, when the 1985 Law on Protection and Use of Cultural-Historic and Natural Heritage came into force (see paragraphs 47-50 below).

be considered protected in terms of Article 1 of this Law, as well as the boundaries of the directly protected immovable asset and its surroundings which are subject to the limitations referred to in this Law." The State Institute for Protection of Monuments of Culture and Natural Rarities shall issue a procedural decision on protection, which it shall transmit to the owners and/or possessors of the objects or to their legal representatives and to the competent court land registry in order to have it registered in the land books (Article 19). Moreover, the State Institute for Protection of Monuments of Culture and Natural Rarities shall be responsible for maintaining a central public register of all objects referred to in Article 1 of this Law, which shall serve as the basis for other institutes to keep their public records of protected objects in their areas (Article 20). Article 21 of the Law expressly provides that after registering a procedural decision in the records of the State Institute for Protection of Monuments of Culture and Natural Rarities in Sarajevo, no one may claim not to know that a certain object is under the protection of the state in terms of Article 1 of the Law.

46. Pursuant to Article 2 of the Law, objects protected under Article 1 may not be dug up, excavated, altered, renovated, built into, added onto, adapted, pulled down, smashed, cut, destroyed or exterminated without a licence from the competent organ. Pursuant to Article 4 of the Law, it is prohibited, without a licence from the competent organ responsible for protection, to engage in any construction or shape changing of the terrain within the boundaries of the directly protected immovable asset and its surroundings which are subject to the limitations of this Law. Any person who violated Articles 2 or 4 of the Law could, at the time, be assessed a penalty up to 25,000 dinars, and in more serious cases, sentenced to forced labour without imprisonment for a period of up to one year (Article 25).

2. Law on Protection and Use of Cultural-Historic and Natural Heritage

47. The Law on Protection and Use of Cultural-Historic and Natural Heritage (Official Gazette of the Socialist Republic of Bosnia and Herzegovina—hereinafter "OG SRBiH"–nos. 20/85, 12/87, Official Gazette of the Republic of Bosnia and Herzegovina—hereinafter "OG RBiH"—nos. 3/93, 13/94) entered into force on 24 July 1985. It governs protection of cultural, historical, and natural heritage in Bosnia and Herzegovina. Article 1(2) defines protected natural heritage assets as follows: "the natural heritage, in terms of this law, are considered to be those parts of nature, which are of particular scientific, educational, cultural, historic, ecological and recreational significance" (hereinafter referred to as "natural heritage assets"). Article 3(1) further provides that natural heritage assets include "natural sites and rarities," which are in turn defined in Article 25(3) as "natural monuments, memorial natural assets, shaped nature monuments and individual endangered botanical and zoological species."

48. Article 110 states that "assets of cultural-historic and natural heritage, placed under protection pursuant to the regulations which were in force until the entry into force of this law, shall be considered protected until they become categorised in accordance with the provisions of this law." Article 5 provides that natural heritage assets, "as assets of public interest, enjoy special protection and are used under the conditions and in the manner prescribed by the law." Article 13 provides that natural heritage assets may not be used in any way that will result in harm to it. Moreover, according to Article 48(2), "on natural sites and rarities, all actions and activities, which may disturb spontaneous natural development or deteriorate the basic natural properties for which they were declared protected, are prohibited."

49. Pursuant to Article 51(1), construction on property of natural heritage assets requires the consent of the competent institution: "Works on immovable protected assets and immovable assets of cultural-historic and natural heritage which enjoy the aforementioned protection, as well as in their close surroundings, which could directly or indirectly change their appearance, property, authenticity or originality, may be performed only after previously obtaining an approval of the competent institute". Pursuant to Article 113 of the Law, such institute "continues to work pursuant to the provisions of this law under the name: the Institute for Protection of Cultural-Historic and Natural Heritage of Bosnia and Herzegovina."

50. Furthermore, Article 302 of the Criminal Law of the Federation of Bosnia and Herzegovina (OG FBiH no. 43/98) defines as a crime, with a possible penalty of imprisonment, the "damaging or destroying of a protected natural heritage asset."

3. Law on Physical Planning

51. The Law on Physical Planning (OG SRBiH nos. 9/87, 23/88, 24/89, 10/90, 14/90, 15/90, 14/91, OG RBiH nos. 7/92, 16/92, 13/94, 25/94, 33/94, 20/95) regulates urban plan matters, constructions, and protection and improvement of the human environment, both natural and developed (Article 1). The Law sets forth the conditions and procedures for obtaining urban plan approval and construction approval. If not otherwise provided in this Law, the Law on General Administrative Procedure is applied to the administrative proceedings for issuance of both urban plan approval and construction approval (Articles 135(1) and 154(1)). In order to construct a building, a person must first obtain a procedural decision granting urban plan approval and then a procedural decision granting construction approval, which is based on the urban plan approval (Articles 143(1)-(2), 144, 170(1)). The urban plan approval establishes that the planned building is in accordance with the conditions prescribed by the Law on Physical Planning (Article 122(1)-(2)).

52. Article 131(1) provides that the investor in a construction project shall initiate proceedings for obtaining urban plan approval with the competent municipal authority for urban affairs. Neighbours of the investor towards whom the investor has obligations may also be parties to the proceedings on urban plan approval (Article 124(1)). Article 124 sets forth the requirements of the content of the urban plan approval, including details about the building, an extract of the building plan, a description of the boundaries of the land, conditions for construction, conditions for technical urban issues, protection of the environment, and any special conditions such as for protected areas. Article 138(1) further provides that urban plan approval on protected areas of natural, historical, and cultural heritage may only be issued in accordance with the consent of the competent protection service (*i.e.*, the Institute for Protection of Cultural-Historic and Natural Heritage), unless the plan for the area already contains conditions for protection. If an urban plan approval is issued contrary to this Law, it is null and void (Article 123(5)).

53. Under Articles 148(1) and 150(1), the investor shall also initiate proceedings to obtain construction approval with the competent municipal authority for building works. Articles 143(1)-(2), 144, and 170(1) provide that construction approval is issued on the basis of urban plan approval, technical documentation, evidence of ownership or the right to use the land, technical building conditions, conditions for the construction site, and other special conditions. In the procedure for issuing construction approval, the municipal authority shall check whether the technical documentation is in accordance with the urban plan approval, the law, and conditions for building. A construction approval issued contrary to this Law is null and void (Article 143(3)).

C. Laws Applied on the Territory of the former "Croat Community[5] of Herceg-Bosna"

54. The Chamber notes that with respect to the present case, the local authorities in fact applied and took into consideration on the Territory of the former "Croat Community of Herceg-Bosna", where the village of Duge is located, the following laws. By citing these laws, the Chamber does not intend to imply any recognition of the existence of the "Croat Community of Herceg-Bosna" or the "Croat Republic of Herceg-Bosna". The Chamber also does not intend to take any position, nor does it need to take any position to reach its conclusions, on the relationship between or preferential validity or applicability of these laws as compared to the laws applicable in the Federation of Bosnia and Herzegovina, cited in paragraphs 44-53 above.

[5] At certain times relevant to this decision the territorial name was the "Croat Community of Herceg-Bosna" and at other times the territorial name was the "Croat Republic of Herceg-Bosna". Throughout this decision, the Chamber attempts to use the respective territorial name indicated in the laws at issue and considers both names, interchangeably, to refer to the same territory.

1. Decree on the Application of the Law on Protection and Use of Cultural-Historic and Natural Heritage

55. The Decree on the Application of the Law on Protection and Use of Cultural-Historic and Natural Heritage (Official Gazette of the "Croat Republic of Herceg-Bosna" — hereinafter "OG 'CRHB'" — no. 10/94) came into force on 24 March 1994. This Decree states, in Article 1, that the Law on Protection and Use of Cultural-Historic and Natural Heritage (OG SRBiH nos. 20/85, 12/87) (see paragraphs 47-50 above) "is applied within the territory of the Croat Republic of Herceg-Bosna ..., with the exception of the provisions which are contrary to this Decree".

56. Article 3 of the Decree divides "assets of cultural-historic and natural heritage, according to their significance, into three categories", as follows: "assets of extraordinary significance for history and culture", "assets of great significance for history and culture", and "other significant assets". Article 2 of the Decree provides that such "assets of cultural-historic and natural heritage may not be used in a manner which would harm the cultural heritage, social-economic and cultural development of the [Croat] Republic [of Herceg-Bosna]".

57. "The protection and determination of conditions for the use of cultural-historic and natural heritage are dealt with by: the Institute of the [Croat Republic of Herceg-Bosna] and branch institutes" and "national parks, museums, galleries, archives and libraries" (Article 5). Supervision over the lawfulness of such protection and determination of conditions for use is "performed by the Ministry of Education, Science, Culture and Sports" (Article 6). The Institute of the Croat Republic of Herceg-Bosna shall be administered by a Steering Board and Director, appointed according to a Decision on Establishment of the Institute of the Croat Republic of Herceg-Bosna (Article 8).

58. Article 10 of the Decree amended Articles 105 through 109 of the Law on Protection and Use of Cultural-Historic and Natural Heritage. These five articles set forth specific pecuniary penalties for infringements of the Law. For example, amended Article 105 provides that the Institute of the Croat Republic of Herceg-Bosna shall be assessed a penalty between 1000 and 5000 DEM if it "does not take measures for protection of an asset of cultural-historic and natural heritage which enjoys previous protection". Amended Article 108 provides that a legal person shall be assessed a penalty between 200 and 2500 DEM if it "acts contrary to Article 48 of the Law" (regarding acts which may disturb or deteriorate the natural properties for which an asset of cultural-historic and natural heritage was declared protected) or "performs works on immovable protected assets and immovable assets of cultural-historic and natural heritage which enjoys previous protection, without the approval of the Institute of the [Croat Republic of Herceg-Bosna]".

59. Article 11 of the Decree specifies that Articles 13 through 17, 23, 86, 87, 98 through 102, 104, and 112 through 115 of the Law on Protection and Use of Cultural-Historic and Natural Heritage (see paragraphs 47-50 above) "shall not be applied".

2. Decree on Protection of Nature

60. The Decree on Protection of Nature (OG "CRHB" no. 31/94, amended no. 2/95), which entered into force on 5 October 1994, "secures the protection of particularly valuable natural areas and natural assets of historic, cultural, aesthetic and recreational significance" (Article 1). Such protection of nature is enforced by identifying parts of nature subject to special protection, securing rational utilisation of nature without spoiling the natural equilibrium, "preventing development of disturbances in the nature as a consequence of technological development and other activities," and issuing and implementing plans for the protection of identified parts of nature (Article 2).

61. "Protected parts of nature" under the Decree include "protected landscapes" and "natural monuments" (Article 3). A protected landscape is defined as "a natural or cultivated area of great aesthetic, cultural or historic value or a landscape characteristic for a particular area" (Article 8). In such areas, "certain activities which could disturb the features for which the area has been declared protected are not allowed" (Article 8). Similarly, a natural monument is defined as "an individual

unchanged part or group of parts of the living or non living nature, which has scientific, aesthetic, cultural or historic value." Among the examples listed in the Decree is nature of "hydrological character", including waterfalls and water currents (Article 9). "Activities which endanger the features and values" of a "natural monument" or "its close vicinity" are not allowed (Article 9).

62. According to Article 12 of the Decree, the House of Representatives of "Herceg-Bosna" declares protected parts of nature upon a previously obtained opinion of the Ministry of Physical Planning, Constructions and Protection of the Environment. The document declaring parts of nature protected pursuant to Article 12 shall be published in the Official Gazette of the respective Canton in "Herceg-Bosna" (Article 13). The Decree also provides for the means to remove protected status for parts of nature: "If those features which lead to some part of nature being declared protected disappear, the competent bodies referred to in Article 12 of this Decree shall issue a document on cessation of that protection, in the manner and through such procedure as stipulated for declaring that protection" (Article 15).

63. Article 31 of the Decree clarifies that "actions which may cause changes and damage on the protected part of nature are not allowed. On the other hand, "on the protected part of nature, such actions and activities which will not cause any damage or change the features for which it has been declared protected are allowed"; however, such actions and activities "are allowed only after obtaining conditions for the protection of nature" from the Ministry of Physical Planning, Constructions and Protection of the Environment (Article 31). Such "conditions for protection of nature are established in the procedure for issuance of conditions for regional development" (Article 31). "A building permit may be issued and performance of other work allowed" in cases which will not cause any damage or change to the protected part of nature "only if the Ministry issues the required and appropriate documents made in accordance with the conditions for the protection of nature" (Article 31).

3. Decree on Physical Planning and Regional Development

64. The Decree on Physical Planning and Regional Development within the territory of the "Croat Community of Herceg-Bosna" during the time of war or immediate threat of war (Official Gazette of the "Croat Community of Herceg-Bosna" — hereinafter "OG 'CCHB'" — nos. 13/93, 19/94) entered into force on 12 July 1993. This Decree states in Article 1(1) that "physical planning and regional development are based on the right and duty of employees and citizens to dispose of space for human living and work and to preserve natural and man-made assets of the human environment, prevent and eliminate harmful consequences that endanger those assets, as well as ensure that social and economic development result in healthy, safe, and humane life and work for current and future generations." Moreover, "human environment assets are protected, improved and developed through physical planning" (Article 2(3)).

65. Article 6 of the Decree provides that "all users of space are obliged to utilise the space in a manner which will ensure that conditions for preservation and improvement of the environment are met and harmful consequences which might endanger those assets are prevented."

66. The Decree presupposes that each Municipality has a long term physical plan which provides for organisational and regional planning, as well as protection and improvement of the human environment (see Articles 8-10, 14). In the physical plan "particularly valuable areas and endangered parts of the human environment" are determined and measures for protection established, "with a view to protecting and improving the human environment in a certain area" (Article 42(1)).

67. Article 43 provides for special protection of particularly valuable areas as follows:

> "(1) Particularly valuable areas are under special protection in order to preserve their natural appearance or their historic and cultural identity and to ensure that they are used and improved for the needs of current and future generations.
> "(2) Particularly valuable areas are determined through physical planning or by a

special decree or some other regulation based on a decree.

"(3) Particularly valuable areas are:

- Protected structures and parts of nature,
- Monument complexes, historic settings and urban or rural units and cultural monuments,
- The sea, waters, and their shores/banks
- Agricultural land,
- Ore deposits and forests,
- Other areas determined through physical planning by the Croat Council of Defense."

68. In Article 46 the Decree sets forth measures for the protection of the environment. Such protective measures are determined through physical planning with a view to "protecting the natural environment," including "protecting the air from being polluted, protecting the waters and seas from being polluted, and using the waters in a rational manner" (Article 46(1)).

69. When land is developed in order to "make it suitable for construction or reconstruction of residential, economic/production and other facilities/buildings," the development involves certain "preparation of the land for construction". Such preparation involves "resolving legal property relations with owners and/or occupants of real property assets" and preparing necessary documents for "performing work on a cultural monument" and taking "measures for the protection of specially protected natural objects and cultural monuments which might be endangered by work on preparation of the land" (Articles 67-68).

70. "Regional development conditions determine the conditions for construction of facilities or buildings and conditions for land development, and if necessary, also the conditions for the manner of utilising facilities or buildings and land, which must be complied with when constructing or developing land" (Article 53(1)). Regional development conditions include technical conditions and the urban plan (Article 53(2)). The urban plan and technical conditions, in turn, determine the technical and physical aspects of a construction, including "conditions for protection and shaping of the environment" (Article 54). Special construction conditions which are not contained in the physical plan to provide for, among other things, "protection of cultural monuments" and "protection of nature" are "determined by a body competent for the determination of conditions for regional development together with all bodies and organisations which determine those special conditions on the basis of special decrees and other issued regulations" (Article 55(1)).

71. For facilities or buildings which, if constructed or used, may cause the deterioration of the "human environment or adversely effect the development of other activities or human health," "the regional development conditions are determined pursuant to specific conditions for the protection of the environment" after the investor in the project obtains and submits a scientific study by a special expert commission on how the planned construction will influence "the existing state of the human environment" (Article 59).

72. The competent municipal body determines the conditions for regional development (Article 62). Upon the request for a party, the competent municipal body for regional development issues a certificate on conditions of regional development (Article 64(1)). In issuing such certificate, the competent municipal body must prepare the documentation which supports the regional development conditions set forth in Article 53 (Article 65(3)). Such documentation and approval obtained in the procedure for issuing the certificate on conditions of regional development shall be considered as obtained also for the procedure for issuing the building permit (Article 65(4)). If the proposed "construction is not allowed pursuant to the provisions of this Decree" or the purpose of the construction "would be contrary to the purpose determined by the physical plan," the request for a certificate on conditions of regional development "shall be refused by a procedural decision issued by a competent municipal body for regional development" (Article 64(2)).

4. Decree on Constructions

73. The Decree on Constructions within the territory of the "Croat Community of Herceg-Bosna" during the time of immediate threat of war or the state of war (OG "CCHB" nos. 13/93) came into force on 12 July 1993. The Decree regulates essential issues in designing, constructing, and maintaining constructions, including technical aspects of constructions (Article 1). It sets forth particular requirements for the general design of construction projects and the required conditions, plans, and other documents necessary to make up the general design (Article 21).

74. Under Article 7, construction projects are required to be designed and constructed in accordance with health standards so as to prevent danger to citizens and the environment from poisonous gases, air pollution, water pollution, and ineffective waste disposal.

75. Under the Decree, it is possible for a construction to be built only upon the basis of a building permit (Article 25(1)). A building permit is issued by a competent municipal body for constructions in the area where the construction is to be built, unless some other body is specified by a special decree (Article 26(1)). In order to obtain a building permit, the investor in a construction project must submit a request to the competent municipal body for constructions and such request must include a description of the construction, the general design of the construction, evidence of ownership of the land where the construction is to be built, and "approvals, certificates or opinions of competent bodies or companies related to the general design, when it is specified by a special decree" (Article 28). The competent municipal body is obliged to advise the investor about any necessary conditions to the general design and construction plan or any relevant documents to substantiate that the general design and construction plan are harmonised with established requirements that the investor must obtain (Article 31(1)). The general design and construction plan must then be harmonised accordingly before the investor applies for the building permit (Article 31(2)).

76. The competent municipal body shall issue a building permit within 30 days from the date of the request, provided all conditions prescribed by this Decree are met (Article 33(1)). The building permit shall establish that the general design and construction plan has been made in accordance with the conditions and requirements of the law and the location (Article 33(2)).

77. A building permit ceases to be valid if the construction work does not commence within one year of the date the permit becomes valid. However, in certain circumstances and upon the request of an investor, the validity of the building permit may be extended for one additional year (Article 35).

78. According to Article 53 of the Decree, competent inspectors have the right and obligation to order the removal or suspension of construction "if, during the course of construction, they establish defects which cannot be corrected and which put in danger the stability of the construction or the stability of surrounding constructions or in some other way pose a threat to people's lives or the environment." However, if the construction constitutes cultural property or is located in a protected area, "the procedural decision on its removal cannot be enforced without the approval of the competent body for the protection of cultural property of the Croat Community of Herceg-Bosna" (Article 53(3)).

V. COMPLAINTS

79. The applicants, investors in the power plant, claim violations of their right to property and right to freedom of movement. The essence of their complaints is that they were granted permissions to construct the power plant before the 1992-95 war, and these permissions were renewed by the Federation of Bosnia and Herzegovina after the war. Now, however, they are unable to perform the construction and complete the power plant, and the competent authorities have done nothing to assist them in realising their rights to construct the power plant. The applicants seek a withdrawal of the Chamber's provisional order issued *Dautbegović* which prohibits continuation of construction of the power plant. The applicants also seek compensation for the alleged violations of their human

rights in the total amount of 750.000 KM.

VI. SUBMISSIONS OF THE PARTIES

A. The Respondent Party

80. In its written observations, the respondent Party challenged the admissibility of the application. Firstly, the respondent Party argued that the application is inadmissible *ratione personae* because the applicants directed their complaints primarily against the order for provisional measures issued by the Chamber, and the respondent Party bears no responsibility for this order. Secondly, to the extent the application was directed against actions occurring before 14 December 1995, it is inadmissible *ratione temporis*.

81. Moreover, the respondent Party contended that on the merits the application is ill-founded. Citing the Law on Protection and Use of Cultural-Historic and Natural Heritage, the respondent Party argued primarily that the competent Municipal authorities acted contrary to the law when they allocated the land to the applicants and when they issued the approvals and licenses for construction of the power plant without the requisite approval from the Institute for Protection of Cultural-Historic and Natural Heritage.

B. The Applicants

82. With respect to admissibility, the applicants refuted the respondent Party's objections made in its written observations. They argued that their complaints are directed against the respondent Party because competent authorities of the respondent Party allocated the land and issued the approvals for construction of the power plant in accordance with valid laws. They contended that the respondent Party can not now terminate the applicants' rights without any legal basis or relief.

83. They further questioned the validity of the 1958 decision declaring the site in question protected as natural heritage and contended that the Institute for Protection of Cultural-Historic and Natural Protection is not the competent authority to issue an opinion on the effect of the power plant on the environment. The applicants also stated that construction of the power plant would not endanger the economic survival of the villagers nor damage their water supply, in part because the applicants have offered to provide the villagers with a new modern irrigation system.

VII. OPINION OF THE CHAMBER

84. The Chamber must decide whether to accept the application, 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. The Chamber shall "dismiss any application which it considers incompatible with this Agreement [or] manifestly ill-founded" (Article VIII(2)(c)).

A. Competence *ratione temporis*

85. The Chamber will first address the question whether it is competent, *ratione temporis*, to consider the application, bearing in mind that some of the factual matters underlying the dispute between the parties occurred before the entry into force of the Agreement on 14 December 1995. In accordance with generally accepted principles of law, the Agreement cannot be applied retroactively; therefore, the Chamber must confine its examination of the case to whether the applicants' rights have been violated since that date. However, the Chamber may consider events prior to 14

December 1995 as part of an ongoing violation of rights after that date (case no. CH/96/29, *The Islamic Community in Bosnia and Herzegovina v. the Republika Srpska*, decision on admissibility and merits delivered on 11 June 1999, paragraph 132, Decisions January-July 1999).

86. The respondent Party argued that the applicants direct their application in part against actions occurring before 14 December 1995. The Chamber notes, however, that the significant disputed events concern the issuance of approvals and permits for use of land near Duge for construction of the power plant. The building permit was issued in May 1996 and later extended in June 1997. Moreover, it was not until September 2000 and thereafter that the applicants were specifically prevented from constructing their power plant, and it is these preventative actions which are the primary subject of the applicants' complaints against the respondent Party. Thus, the official actions at issue occurred after the Agreement entered into force. That the actions occurring after 14 December 1995 may relate to or flow from actions occurring prior to 14 December 1995 does not exclude them from the competence of the Chamber *ratione temporis*.

B. Competence *ratione personae*

87. The respondent Party also objects to the admissibility of the application on the ground that it is inadmissible *ratione personae* because the applicants directed their complaints primarily against the order for provisional measures issued by the Chamber in *Dautbegović*, which order prevented them from construction of the power plant. In order to be admissible, the application must be directed against an action for which the respondent Party bears responsibility.

88. In *Slavo Ovuk v. the Republika Srpska* (Case no. CH/98/1184, Decision on Admissibility, Decisions January-July 1999 at page 423, paragraph 10), the Chamber explained that an application directed against the Chamber itself is not admissible. Moreover, the Contracting Parties to the Agreement, including the respondent Party in this case, cannot be held responsible for the substance of decisions issued by the Chamber. Accordingly, to the extent the application is directed against decisions of the Chamber, it must be declared inadmissible *ratione personae*.

89. In this case, the applicants contended that their complaints are directed against the respondent Party because it is the competent authorities of the respondent Party that allocated the land and issued the approvals for construction of the power plant in accordance with valid laws. The applicants further argued that it is the competent authorities of the respondent Party that are now preventing them from constructing the power plant and that are attempting to terminate their rights to construct the power plant. To the extent the application is indeed directed against actions for which the respondent Party bears responsibility, it is not inadmissible *ratione personae*.

C. Whether the application is manifestly ill-founded

90. The respondent Party contended that the application is manifestly ill-founded. Citing the Law on Protection and Use of Cultural-Historic and Natural Heritage (see paragraphs 47-50 above), the respondent Party argued that the competent Municipal authorities acted contrary to the law when they allocated the land to the applicants and when they issued the approvals and licenses for construction of the power plant without the requisite approval from the Institute for Protection of Cultural-Historic and Natural Heritage.

91. The applicants insisted that the approvals and licenses issued to them for construction of the power plant were in accordance with the respective laws. They questioned the validity of the 1958 decision declaring the site in question protected as natural heritage and contended that the Institute for Protection of Cultural-Historic and Natural Heritage is not the competent authority to issue an opinion on the effect of the power plant on the environment.

92. In order for the applicants to have well-founded legal claims, they must have properly gained permission to construct their power plant near the village of Duge. In other words, the legality of the approvals and licenses for the construction project determine to a large extent whether the applicants

have any actionable claims under the Agreement. In this case, the primary approvals at issue are the certificate on conditions for regional development and the building permit to construct the power plant on a site protected as a natural heritage asset.

93. The Chamber notes, as a preliminary matter, that in 1996-97, the time the essential approvals and licenses were issued for construction of the power plant, two sets of laws concerning the protection of nature and physical planning were being applied on the territory of the Federation of Bosnia and Herzegovina — one set passed by the authorities of the former Republic of Bosnia and Herzegovina and the other set passed by the authorities of the former "Croat Community of Herceg-Bosna" (see paragraphs 44-78 above). Pursuant to the Constitution of the Federation of Bosnia and Herzegovina, all laws in effect in the Federation on the day the Constitution entered into force, 30 March 1994, "shall remain in effect to the extent not inconsistent with this Constitution, until otherwise determined by the competent governmental body" (see paragraph 39 above). The Constitution of Bosnia and Herzegovina, which entered into force on 14 December 1995, contains a similar clause carrying forward previously enacted laws on the territory (see paragraph 36 above). Accordingly, laws enacted in the former Republic of Bosnia and Herzegovina and the "Croat Community of Herceg-Bosna" carried forward in effect in the Federation until such time as the competent bodies of the Federation pass new laws superseding the prior ones. On the subject matters important to this case, protection of nature and physical planning, the competent bodies of the Federation have not yet passed new laws.

94. In the present case, the Chamber makes no comment on or determination of the hierarchy between or preferential applicability of the former laws of the Republic of Bosnia and Herzegovina or the "Croat Community of Herceg-Bosna". Rather, the Chamber considers each set of laws individually in analyzing whether the approvals and licenses for construction of the power plant were issued to the investors "in accordance with the law".

1. Pursuant to Laws Applicable in the Federation of Bosnia and Herzegovina

95. In 1958 the State Institute for Protection of Monuments of Culture and Natural Rarities issued a procedural decision placing the Krupić Spring and waterfalls near the village of Duge under the protection of the State as "a natural rarity" (see paragraph 24 above). This decision was issued in accordance with Articles 1 and 19 of the Law on Protection of Monuments of Cultural and Natural Rarities (see paragraphs 44-45 above). It was delivered to the People's Committee of the Municipality Prozor on 16 April 1958 and published in the Almanac of the Institute for Protection of Nature of Bosnia and Herzegovina of 1962 (see paragraph 25 above).

96. In accordance with specific provisions in the Law on Protection of Monuments of Culture and Natural Rarities, and the laws of the Republic of Bosnia and Herzegovina which succeeded this Law, both the protection of the Krupić Spring and waterfalls as natural heritage assets and the authority of the Institute for Protection of Monuments of Culture and Natural Rarities (the precise name of which was changed several times in the applicable laws) have carried forward to the present date (see paragraphs 44-50 and footnote 4 above). In 1985, the Law on Protection and Use of Cultural-Historic and Natural Heritage came into force in the Socialist Republic of Bosnia and Herzegovina; it has been amended several times thereafter and remains applicable in the Federation of Bosnia and Herzegovina. At Article 110, this Law states that assets of cultural-historic and natural heritage previously placed under protection pursuant to regulations in force until the entry into force of this Law, "shall be considered protected until they become categorised in accordance with the provisions of this law." Moreover, Article 113 of this Law confirms that the Protection Institute created under the previous Law on Protection of Monuments of Cultural and Natural Rarities "continues its work pursuant to provisions of this law".

97. The applicants challenge the validity of the decision of 1958, pointing out that it was prepared with two different type faces. Upon closer inspection, however, it appears that the decision was issued on a form, which explains the different type faces. Barring proof to the contrary, the Chamber assumes the legality of administrative acts. The Chamber therefore finds no material irregularities in

the form of the decision and concludes that it was issued in accordance with the applicable law.

98. Under the applicable provisions of both the Law on Protection and Use of Cultural-Historic and Natural Heritage and the Law on Physical Planning (see paragraphs 47-53 above), any construction on property of natural heritage assets requires the consent of the Institute for Protection of Cultural-Historic and Natural Heritage (Article 51(1) of the Law on Protection and Use of Cultural-Historic and Natural Heritage). Moreover, urban plan approval for construction on sites of natural heritage assets may only be issued with the consent of the Institute for Protection of Cultural-Historic and Natural Heritage (Article 138(1) of the Law on Physical Planning). There is no dispute in this case that the urban plan approval and related construction approval (that is, the certificate on conditions of regional development issued on 13 May 1996 and the building permit issued on 14 May 1996) issued to the investors did not contain the requisite consent of the Institute for Protection of Cultural-Historic and Natural Heritage. In fact, there is no dispute that the Institute for Protection of Cultural-Historic and Natural Heritage was not consulted at all in any of the procedures leading up to issuance of the urban plan approval or building permit. Under Article 124 of the Law on Physical Planning, if an urban plan approval is issued contrary to the Law, it is null and void. Without a legally valid urban plan approval, a person cannot construct a building (Articles 143(1)-(2), 144, 170(1) of the Law on Physical Planning).

99. Thus, the Chamber finds that the competent authorities did not follow the applicable requirements of the Law on Protection and Use of Cultural-Historic and Natural Heritage and the Law on Physical Planning because they failed to obtain the requisite consent from the Institute for Protection of Cultural-Historic and Natural Heritage prior to issuing the building permit for construction on a site protected as an asset of natural heritage. Accordingly, the Chamber finds that the approvals issued to the applicants for construction of the power plant near the village of Duge were not issued in accordance with the laws applicable in the Federation of Bosnia and Herzegovina. That being so, the applicants have no legally valid basis under the laws applicable in the Federation of Bosnia and Herzegovina upon which to complain that their human rights protected under the Agreement have been violated because they cannot legally construct their power plant.

2. Pursuant to Laws Applied on the Territory of the former "Croat Community of Herceg-Bosna"

100. On 24 March 1994, the "Croat Republic of Herceg-Bosna" enacted the Decree on the Application of the Law on Protection and Use of Cultural-Historic and Natural Heritage (see paragraphs 55-59 above). This Decree adopted, in substantial part, the Law on Protection and Use of Cultural-Historic and Natural Heritage, which entered into force in the Socialist Republic of Bosnia and Herzegovina in 1985. Article 1 of this Decree specifically provides that the Law on Protection and Use of Cultural-Historic and Natural Heritage "is applied within the territory of the Croat Republic of Herceg-Bosna..., with the exception of provisions which are contrary to this Decree". Significantly, the Decree did not alter Article 110 (which provides that assets of natural heritage protected under previous regulations remain protected until categorised in accordance with this law); Article 48(2) (which prohibits all actions and activities which may disturb the natural properties of protected assets of natural heritage); or Article 51(1) (which permits construction on property of natural heritage assets only after obtaining approval from the competent institute for protection). The Decree did alter Article 113 (which continued the work of the previous institute for protection under a new name), but Article 5 of the Decree establishes the Institute of the "Croat Republic of Herceg-Bosna" to perform such protection work. Under Article 6 of the Decree, the Ministry of Education, Science, Culture and Sports supervises the lawfulness of protection and the determination of conditions for use of protected assets.

101. Thus, with respect to the Decree on Application of the Law on Protection and Use of Cultural-Historic and Natural Heritage, the Chamber finds that the approval for construction of the power plant near the village of Duge was not issued in accordance with the laws applied on the former territory of the "Croat Republic of Herceg-Bosna" for the same reasons discussed in paragraphs 95-96, 98-99 above: namely, the competent authorities granted permission for construction of the power plant

without obtaining prior consent from the applicable Institute of the "Croat Republic of Herceg-Bosna", as required by Article 51(1) of the Decree.

102. The Chamber notes that on 5 October 1994, the Decree on Protection of Nature entered into force (see paragraphs 60-63 above). However, the Constitution of the Federation of Bosnia and Herzegovina was adopted on 30 March 1994. Pursuant to Chapter IX, Article 5(1) of the Constitution of the Federation, only laws "in effect within the Federation on the day on which the Constitution enters into force shall remain in effect to the extent not inconsistent with this Constitution, until otherwise determined by the competent governmental body" (see paragraph 39 above). None the less, even under this later Decree, the lawfulness of which may be questionable in light of the Constitution of the Federation of Bosnia and Herzegovina, the Chamber reaches the same conclusion that approval for construction of the power plant was not issued in accordance with the law, as explained below.

103. The Decree on Protection of Nature is substantively different from the Decree on Application of the Law on Protection and Use of Cultural-Historic and Natural Heritage (see paragraphs 55-63 above) and establishes a new scheme for the protection of natural heritage assets. Under Article 1, the Decree "secures the protection of particularly valuable natural assets". Article 31 of the Decree clarifies that "actions which may cause changes and damage on the protected part of nature are not allowed". On the other hand, "on the protected part of nature, such actions and activities which will not cause any damage or change the features for which it has been declared protected are allowed"; however, such actions and activities "are allowed only after obtaining conditions for the protection of nature" from the Ministry of Physical Planning, Constructions and Protection of the Environment (Article 31). Such "conditions for protection of nature are established in the procedure for issuance of conditions for regional development" (Article 31). "A building permit may be issued and performance of other work allowed" in cases which will not cause any damage or change to the protected part of nature "only if the Ministry issues the required and appropriate documents made in accordance with the conditions for the protection of nature" (Article 31).

104. In this case, the applicants were issued a certificate on conditions of regional development and a building permit for construction of the power plant by the Department of Physical Planning, Constructions and Housing-Utility Affairs of the Rama Municipality. The certificate for conditions of regional development contains "conditions for protection of the environment" as follows: "that the facility shall not in any way endanger the environment by its construction or existence" and "that the facility shall secure basic conditions for life and work of the people who will use this facility". The Chamber notes that such conditions do not provide any specific, substantive protection for the environment as contemplated by the Decree on Protection of Nature and the Decree on Physical Planning and Regional Development (see paragraphs 60-72 above). Moreover, while such "conditions" are technically present in the certificate on conditions of regional development issued to the applicants, there are no "required and appropriate documents made in accordance with the conditions for the protection of nature" issued by the Ministry of Physical Planning, Constructions, and Protection of the Environment, as required by Article 31 of the Decree on Protection of Nature.

105. Thus, while the applicants obtained the necessary certificate to construct on or in the vicinity of property protected as natural heritage assets from the competent first instance body (the Department of Physical Planning, Constructions and Housing-Utility Affairs), as required by Articles 62 and 64 of the Decree on Physical Planning and Regional Development, they did not obtain the necessary conditions for the protection of nature from the competent second instance body (the Ministry of Physical Planning, Constructions, and Protection of the Environment), as required by Article 31 of the Decree on Protection of Nature. That being so, the building permit issued to them by the Department of Physical Planning, Constructions and Housing-Utility Affairs pursuant to Article 33 of the Decree on Constructions for construction of the power plant was not issued in accordance with the law applied on the territory of the former "Croat Community of Herceg-Bosna". The Department should have refused the request for the building permit because there were no conditions for protection of nature and no appropriate documents certifying the conditions for protection of nature issued by the Ministry.

106. The Chamber finds that the competent authorities did not follow the applicable requirements of the laws applied on the territory of the former "Croat Community of Herceg-Bosna" because they failed to obtain the requisite consent from the designated body charged with the protection of nature prior to issuing the building permit for construction on a site protected as an asset of natural heritage. Accordingly, the Chamber finds that the approvals issued to the applicants for construction of the power plant near the village of Duge were not issued in accordance with the laws applied on the territory of the former "Croat Community of Herceg-Bosna". That being so, the applicants also have no legally valid basis under the laws applied on the territory of the former "Croat Community of Herceg-Bosna" upon which to complain that their human rights protected under the Agreement have been violated because they cannot legally construct their power plant.

3. Conclusion on whether the application is manifestly ill-founded

107. In summary, whether applying the laws of the former Republic of Bosnia and Herzegovina or the laws of the former "Croat Community of Herceg-Bosna", the approvals and permits issued to the applicants for construction of the power plant near the village of Duge on a site protected as an asset of natural heritage were not issued in accordance with the law. Under both sets of laws, the competent authorities failed to obtain necessary approval for the protection of nature from the governmental body responsible for such protection service. The applicants cannot, therefore, legally construct their power plant near the village of Duge. It follows that the application is manifestly ill-founded.

108. In reaching this conclusion the Chamber makes no decision or comment on which, if any, of the various laws is the legally preferred applicable law in the Federation of Bosnia and Herzegovina.

109. The Chamber notes that this decision in no way impairs the applicants' ability to seek redress before the domestic courts for any damage caused to them by relying on the approvals and licenses issued to them by the domestic authorities.

VIII. CONCLUSION

110. For these reasons, the Chamber, by 5 votes to 2,

DECLARES THE APPLICATION INADMISSIBLE.

(signed)
Peter KEMPEES
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel