DECISION ON ADMISSIBILITY AND MERITS
(delivered on 22 December 2003)

Case no. CH/01/7701

Islamic Community in Bosnia and Herzegovina (Mrkonjić Grad)

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 4 December 2003 with the following members present:

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

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Antonia DE MEO, 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 Articles VIII(2) and XI of the Agreement and Rules 52, 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The application concerns the site of the former Kizlaragina mosque in Mrkonjić Grad, Republika Srpska. The mosque was destroyed during the 1992-95 armed conflict in Bosnia and Herzegovina. In 1995 the site was declared to be undeveloped city construction land and partially allocated to a private contractor for the construction of business premises, which have since then been built. These business premises occupy a part of the plot, which used to be a graveyard belonging to the mosque complex. The remainder of the site, including the part of the plot where the mosque was standing, is currently used as a car parking area and refuse dump. None of the decisions issued by the Republika Srpska authorities in this matter has been notified to the applicant. The Islamic Community in Bosnia and Herzegovina (the "applicant" or the "Islamic Community") seeks permission to rebuild the destroyed mosque as well as destruction of the business premises.

2. The case raises issues under Articles 6(1) and 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention") and Article 1 of Protocol No. 1 to the Convention and discrimination in the enjoyment of these rights.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced to the Chamber on 16 July 2001 and registered on 18 July 2001. The applicant is represented by Mr. Esad Hrvačić, legal representative of the Islamic Community in Bosnia and Herzegovina.

4. In its application to the Chamber, the applicant requested that the Chamber order the respondent Party, as a provisional measure, to prevent the implementation of the procedural decisions of 7 April 1995 and 30 November 2000 and to order the respondent Party to return the seized real property to the Islamic Community. On 10 October 2001 the Chamber decided to order the respondent Party, as a provisional measure, to prevent the implementation of the procedural decisions of 7 April 1995 and 30 November 2000. On the same day, the Chamber transmitted the case under Article 9 of the Convention, Article 1 of Protocol No. 1 to the Convention and discrimination in the enjoyment of the above rights to the respondent Party for its observations on admissibility and merits in accordance with Rule 49(3)(b) of the Chamber's Rules of Procedure.

5. On 28 November 2001 the respondent Party submitted its written observations and these were transmitted to the applicant on 29 November 2001. On 14 January 2002 the applicant submitted its reply to the written observations of the respondent Party.

6. On 25 March 2002 the Chamber requested the Organization for Security and Co-operation in Europe (the "OSCE") to inspect the disputed site. On 26 and 27 March 2002 the OSCE submitted its reply to the Chamber.

7. On 11 April 2002 the Chamber wrote to the respondent Party requesting additional information with regards to the present factual situation, when the procedural decisions of 7 April 1995 and 30 November 2000 were delivered to the applicant, and what time limits applied for submitting an appeal against the procedural decisions of 7 April 1995 and 30 November 2000. On 23 May 2002 the Chamber wrote to the applicant requesting additional information on the same points and on 20 June 2002 the applicant submitted its reply. On 17 July 2002 the respondent Party submitted its additional written observations and these were transmitted to the applicant on 26 July 2002. On 22 August 2002 the applicant submitted its reply to the additional written observations of the respondent Party.

8. On 26 November 2002 the Chamber wrote to the parties requesting further information and copies of land registry documentation on plot no. k.č 26/82 for the period before and after the 1992-1995 armed conflict. The Chamber received the requested information from the respondent Party on 5 December 2002 and from the applicant on 30 December 2002.

9. On 6 March 2003 the Chamber decided to transmit the case under Article 6(1) of the Convention to the respondent Party for its observations on admissibility and merits in accordance with Rule 49(3)(b) of the Chamber's Rules of Procedure. The Chamber also requested information as to when the construction works on plot no. 26/82-2 commenced.

10. On 16 April 2003 the Chamber informed the parties that it would conduct an on-site inspection in Mrkonjić Grad on 12 May 2003.

11. On 12 May 2003 the Chamber conducted an on-site inspection in Mrkonjić Grad. The on-site inspection was attended by the Vice-President of the First Panel, Mr. Miodrag Pajić, judge of the First Panel, Mr. Andrew Grotrian, the Registry of the Chamber, the legal representative of the Islamic Community, Mr. Esad Hrvačić, representative of the Islamic Community regional office in Banja Luka, Mr. Edhem Čamdžić, Vice-President of the Medžliš of the Islamic Community in Mrkonjić Grad, Mr. Ahmo Zonić, the Legal Representative of the Government of the Republika Srpska, Mr. Milan Dupor, the Head of the Municipality of Mrkonjić Grad, Mr. Slobodan Savanović, President of the Municipal Assembly, Mr. Đurad Podrašanin, Head of the Municipal Administration for Property and Geodetic and Legal Affairs, Mr. Dragan Ilić, and Secretary of the Municipality of Mrkonjić Grad, Mr. Slobodan Rajković.

12. On 20 May 2003 the Chamber received additional submissions from the applicant on various issues that arose during the on-site inspection.

13. On 21 May 2003 the Chamber wrote to the applicant enclosing additional documents received from the respondent Party.

14. On 30 July 2003 the Chamber wrote to the parties requesting them to submit written observations on the possibility of reaching a friendly settlement. On 6 August 2003 the applicant responded to the Chamber's proposal stating that a friendly settlement would not be appropriate in the present case. On 8 August 2003 the respondent Party replied to the Chamber's proposal indicating that it would accept the terms proposed by the Chamber for reaching a friendly settlement.

15. The First Panel deliberated on the admissibility and merits of the applications on 10 October 2001, 11 April 2002, 11 October 2002, 6 March 2003, 4 April 2003, 3 June 2003, 5 September 2003, 10 October, 4 November and 1 December 2003. On 1 December 2003 the First Panel relinquished jurisdiction over the application in favour of the Plenary Chamber in accordance with Rule 29(2) of the Chamber's Rules of Procedure.

16. The Plenary Chamber deliberated on the admissibility and merits of the case on 4 December 2003 and adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

17. The settlement of Mrkonjić Grad was built on its present location during the latter half of the 16th Century, when the Kizlar-agha Djukanović, from the adjacent village of Kotlina, from the Serb family of Djukanović, founded his Vakuf (endowment) there. Ottoman soldiers had killed his father at that very place, whereupon, according to tradition, he was taken away to Constantinople to be converted to the Islamic faith and brought up as a janissary like all the other male Serb tribute-children that were recruited periodically into the Ottoman corps of janissaries. On the settlement of Mrkonjić Grad it is alleged that he built what later became known as the Kizlaragina Mosque complex during 1590. The Mosque was located in the upper section of the complex, while the lower section, previously covered with grass, contained a number of tombstones and bordering ulica Sime Šolaje, it previously contained two harem-cemeteries; the Mosque harem-cemetery and the Delić family cemetery. To one side of the site, a number of small abandoned buildings are located that were used by the Islamic Community for various purposes, including the preparation of bodies for funerals.

18. The Kizlaragina Mosque was previously entered into the registry of protected heritage on the territory of Yugoslavia. On 28 November 2002, based on Article 36 of the Book of Regulations of the Commission to Preserve National Monuments (established by Annex 8 to the General Framework Agreement for Peace in Bosnia and Herzegovina), the Commission entered the Kizlaragina Mosque was entered into the registry of "Cultural Monuments as National Heritage" (published in the Official Gazette of the Federation of Bosnia and Herzegovina no.59/02) as a monument of national heritage.

19. The land, on which the Kizlaragina Mosque complex is located, was previously owned by the Islamic Community. On 3 December 1975, the plot no. k.č. 26/82, measuring approximately 1500m^2, became socially owned land pursuant to the Decision on Determination of Building Land Which Shall Become Socially Owned Property of the Municipality of Mrkonjić Grad. The Islamic Community maintained a priority right to use the land on which the Kizlaragina Mosque complex stood.

20. During 1988, an urban regulatory plan was drawn up in which the areas of development were detailed. This urban regulatory plan only provided for the existing buildings along one side of the plot, but not for any construction on the site.

21. During November 1992 the Mosque was destroyed by a large quantity of explosives. The minaret to the Mosque withstood the first detonation, but was then destroyed with a second larger quantity of explosives.[1] It is believed that at some stage thereafter, possibly also during November 1992, a third explosion completely levelled the site on which the Mosque once was stood.

22. During 1995, the exact date is not known to the Chamber, the state owned construction company G.P. "Gradnja" filed a request with the Municipality of Mrkonjić Grad for the allocation of undeveloped building land, namely plot no. k.č 26/82, for the construction of business premises.

23. On 23 March 1995, the Secretariat of Administrative Affairs in Mrkonjić Grad issued a procedural decision on urban approval in favour of allocating the undeveloped city building land to the construction company.

24. On 7 April 1995, acting upon the request of the construction company and after urban consent was obtained from the Secretariat of Administrative Affairs in Mrkonjić Grad, the Municipal Assembly of Mrkonjić Grad issued a procedural decision by which plot no. k.č 26/82 was parcelled into two smaller plots; namely plot nos. 26/82-1 and 26/82-2. Plot no. 26/82-1 is the upper part of the site, where the mosque used to stand, while plot no. 26/82-2, measuring 720m^2, is the lower part, which was used as a graveyard. Plot no. 26/82-2, was seized from the applicant in favour of the Municipality Mrkonjić Grad and allocated to the construction company. The procedural decision was issued on the basis that the real property in question was undeveloped city building land. The procedural decision stated that the previous owner or user of the real property, i.e., the Islamic Community, in accordance with the Law on Administrative Disputes (see paragraphs 74 to 75 below), was entitled to initiate an administrative dispute (Article 22 of the Law) within 30 days of receipt of the procedural decision (Article 23(1) of the Law). However, if the previous owner or user of the real property did not receive the procedural decision, an administrative dispute could be filed within 60 days from the date in which the successful party in the administrative proceedings received the procedural decision (Article 23(2) of the Law).

25. The procedural decision of 7 April 1995 also stated that an appropriate level of compensation was to be allocated to the applicant, the amount of which would be determined at a later stage. Thereafter, the Municipal Administration for Surveying, Property and Legal Affairs was instructed to make the appropriate changes regarding the right of use in the land registry.

26. During the administrative proceedings, the applicant was not informed that a request had been made by the construction company, or that seizure or allocation proceedings had been initiated.

[1] Source: State Commission for Gathering Facts on War Crimes in the Republic of Bosnia and Herzegovina, Sarajevo, August 1993, Bulletin no. 5: *Destruction of Sacred Complexes* (III), paragraph 581

The Municipal Assembly alleges that it had no knowledge of the registered address of the applicant or its legal representative, therefore it was unable deliver the procedural decision. Accordingly, the Municipality Mrkonjić Grad issued a written notice of the decision and attached it on the notice board of the administrative organ conducting the proceedings. The applicant was entitled to initiate an administrative dispute within 8 days of the procedural decision being placed on the notice board.

27. On 28 May 1995 the Municipal Secretariat of Administrative Affairs in Mrkonjić Grad issued a procedural decision by which the construction company was issued with a permit for the construction of business premises. The procedural decision stated that once it became valid, the construction company was permitted forthwith to commence construction works. However, should the construction works not commence within one year, the procedural decision would cease to be valid. An appeal against this procedural decision could be filed to the Ministry of Physical Planning and Environmental Protection within 15 days of receipt of the procedural decision. However, this procedural decision was not delivered to the applicant. The procedural decision thereby entered into force on 12 June 1995.

28. It has remained unclear from the submissions of the parties at what stage the business premises were in fact constructed. However, on examination of the evidence before it, the Chamber concludes that construction was completed at some stage during the period of 1998-2001. The business premises cover a part of the seized land and consist of a two-story building containing a number of small commercial premises.

29. On 14 November 2000, the Islamic Community Regional Office in Banja Luka filed a request with the Department for Physical Planning, Housing and Communal Affairs of the Municipality of Mrkonjić Grad for the removal of temporary facilities, refuse and a newly constructed parking site at the place in question. On 6 December 2000 the applicant was informed that a Municipal Inspector had visited the site and established that there was a small quantity of refuse on the site of the former Mosque and a solution was sought for the removal of refuse containers that had been placed on the site. At the same time, the Municipal Inspector warned the applicant that the Islamic Community was responsible for the upkeep of the site and was obliged to erect an enclosure preventing cars from parking. However, the Municipal Inspector also established that according to building and traffic standards it could not be stated that a parking site had been built, only that a few cars were visibly stationary on the site. In this respect, the Municipal Inspector concluded that the applicant's real property had not been usurped. During this period, there was no mention to the applicant of the procedural decisions of 7 April 1995 and 28 May 1995.

30. On 30 November 2000 the Republic Administration for Geodetic, Property and Legal Affairs of the Republika Srpska, Department for Mrkonjić Grad, issued a procedural decision authorising the registration of plot no. k.č. 26/82-2 in favour of the Municipality of Mrkonjić Grad for the purpose of allocating it to the construction company. The procedural decision states that since there were no obstacles preventing registration of the land, registration in favour of the construction company was permitted in accordance with Article 146 of the Law on Survey and Cadaster of Real Estates. An appeal could be filed against the procedural decision to the Republic Administration for Geodetic, Property and Legal Affairs of the Republika Srpska, Banja Luka, within 15 days from the date of receipt. However, instead of notifying the applicant of this decision, a Bosniak member of the Committee of the Municipal Assembly of Mrkonjić Grad, Z.Š., was given the procedural decision on 8 December 2000, purportedly as a representative of the Islamic Community. The Municipal Assembly claims to have been deceived by Z.Š. acting as a representative of the Islamic Community, but the applicant disputes ever having made contact with Z.Š. It appears that no further attempt was made to deliver the procedural decision to the applicant. The Municipal organs claim that they did not have the registered address of the legal representative of the Islamic Community or the address for the Main Office for Administration of Vakuf Property of the Islamic Community in Bosnia and Herzegovina.

31. The applicant claims that during March 2001 it learned that the plot of land previously designated as plot no. k.č. 26/82 had been parceled into two smaller plots; namely plot nos. 26/82-1 and 26/82-2.

32. On 16 March 2001 the applicant addressed the Office of the High Representative (the "OHR") in Banja Luka stating that the seizure was in breach of the High Representative's Decision on Re-allocation of Socially Owned Land of 27 April 2000. The applicant requested the OHR to intervene rendering null and void the procedural decision of 7 March 1995 and ordering that the previous state of possession be reinstated.

33. On 1 February 2002 the applicant submitted a request for permission to reconstruct the Kizlaragina Mosque to the Ministry of City Planning, Housing-Communal Activities, Building and Ecology of the Republika Srpska (the "Ministry of City Planning"). On 26 March and 14 May 2002 the Ministry of City Planning wrote to the applicant requesting it to submit additional documentation. The applicant informed the Ministry that the documentation was in the draft stage and it was therefore unable to submit all formal documentation. On 28 October 2002 the Ministry of City Planning rejected the applicant's request for failing to submit all requested documentation. In the decision of the Ministry of City Planning rejecting the applicant's request, it was stated that it could initiate an administrative dispute before the Supreme Court of the Republika Srpska (the "Supreme Court") within 30 days of receipt. The applicant did not initiate an administrative dispute.

34. At some stage in the proceedings, the Municipality of Mrkonjić Grad valued the level of compensation for the seizure of plot no. k.ć. 26/82-2 at 20,000 Convertible Marks (*Konvertibilnih Maraka*, "KM"). The applicant has never received any payment for the seizure and deems the amount offered by the authorities to be insufficient for the land seized.

IV. RELEVANT DOMESTIC LAW

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

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

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

B. Religious Communities

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

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

39. For the purpose of construction and adaptation of religious objects (buildings) the religious

communities are obliged to provide the necessary documentation as well as to obtain permission by the competent administrative authority (Article 28).

40. Article 28 of the Constitution of the Republika Srpska provides:

> "(1) Freedom of religion shall be guaranteed.
>
> "(2) Religious communities shall be equal before the law and shall be free to perform religious affairs and services. They may open religious schools and perform religious education in all schools at all levels of education; they may engage in economic and other activities, receive gifts, establish legacies and manage them, in conformity with law.
>
> "(3) The Serbian Orthodox Church shall be the church of the Serb people and other people of Orthodox religion.
>
> "(4) The State shall materially support the Orthodox church and it shall co-operate with it in all fields and, in particular, in preserving, cherishing and developing cultural, traditional and other spiritual values."

41. The Constitutional Court of Bosnia and Herzegovina established in its judgment no. U/98 IV of 19 August 2000, published in the Official Gazette BiH no. 36/00, that Article 28 paragraph 4 of the Republika Srpska Constitution was incompatible with the BiH Constitution. This provision ceased to be in force on 31 December 2000 when the partial Decision was published in the BiH Official Gazette.

C. The Law on Environmental Planning of the Socialist Republic of Bosnia and Herzegovina (Official Gazette of Socialist Republic of Bosnia and Herzegovina, Nos. 9/87, 23/88, 24/89, 10/90, 14/90, 15/90, 14/91)

42. Under Article 11 of the Law on Environmental Planning 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.

43. 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).

44. 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).

45. 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.

46. 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)).

47. 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)).

D. The Republika Srpska Law on Physical Planning (Official Gazette of Republika Srpska, Nos. 19/96, 25/96, 25/97, 3/98 and 10/98)

48. The Law on Physical Planning of the Republika Srpska entered into force on 25 September 1996. It replaced the previously mentioned law of Socialist Republic of Bosnia and Herzegovina.

49. According to Article 32, the organisation, 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.

50. 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)).

51. 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").

52. 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.

53. 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.

54. 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.

55. 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).

56. 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).

E. The Law on Construction Land (Official Gazette of Socialist Republic of Bosnia and Herzegovina, Nos. 34/86 and 1/90; Official Gazette of Republika Srpska, Nos. 29/94 and 23/98)

57. The Law on Construction Land provides that no right of ownership can exist over construction land in a city or town (Article 4). Construction 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).

58. 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)).

59. Article 25 of the Law provides for the procedure to be adopted in taking over undeveloped city construction land. It states:

> "(1) The Municipal Assembly shall issue a procedural decision on taking over of undeveloped city building land from the possession in order to realise its permanent use, that is to prepare it for construction.
>
> "(2) The procedural decision referred to in the preceding paragraph may also be issued when the Municipal Assembly establishes that social interest for construction of temporary socially owned building exists.
>
> "(3) The previous owner, that is the holder of the temporary right to use the land shall be heard in the proceedings of taking over the land.
>
> "(4) An appeal cannot be filed against the procedural decision on taking over the land but an administrative dispute may be filed against it."

60. The permanent right to use the land may be transferred, alienated, inherited or mortgaged only together with the building. In case of seizure of the building, the procedural decision on seizure 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).

61. Subject to the above-mentioned possibility of seizure, 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).

62. 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).

F. Decisions of the High Representative on State-Owned Real Property

1. Decision of 26 May 1999

63. On 26 May 1999, the High Representative issued a Decision suspending the power of local authorities in the Federation and the Republika Srpska to dispose of state owned land in cases where the land was used on 6 April 1992 for residential, religious, cultural, private agricultural or private business activities.

64. The Decision of 26 May 1999 states, in pertinent part, as follows:

> "Notwithstanding the provision of any other law, state property (including former socially-owned property, but excluding socially-owned apartments) may not be disposed of (including allotment, transfer, sale, giving for use or rent) by the authorities of the Entities or Bosnia and Herzegovina if it was used on April 6, 1992 for cultural or religious services, or if it was used by natural persons for residential purposes, business activities, or agriculture.
>
> "Any decision referred to in the previous paragraph made by the authorities of the Entities after April 6, 1992 which affects the rights of refugees and displaced persons shall be null and void, unless a third party has undertaken lawful construction work."

65. The Decision of 26 May 1999 entered into force immediately and remained in force until 31 December 1999. On 31 December 1999, the High Representative extended the validity of the Decision of 26 May 1999 until 30 June 2000.

2. Decision of 27 April 2000

66. On 27 April 2000, the High Representative issued a Decision on state-owned real property (Official Gazette of Bosnia and Herzegovina — hereinafter "OG BiH" — no. 13/00; Official Gazette of the Federation of Bosnia and Herzegovina — hereinafter "OG FBiH" — no. 17/00; Official Gazette of the Republika Srpska — hereinafter "OG RS" — no. 12/00). The Decision of 27 April 2000 revoked and superseded the Decision of the High Representative of 26 May 1999 and the Decision of 31 December 1999, which extended the Decision of 26 May 1999.

67. The Decision of 27 April 2000 states, in pertinent part, as follows:

> "Notwithstanding the provision of any other law, state-owned real property, including former socially-owned property, but excluding socially owned apartments, may not be disposed of, allotted, transferred, sold, or given for use or rent, by the authorities of either Entity or Bosnia and Herzegovina.
>
> "Any decision referred to in the previous paragraph made by the authorities of the Entities after 6 April 1992 which affects the rights of refugees and displaced persons shall be null and void, unless a third party has undertaken lawful construction work. ...
>
> "Any decision, agreement or transaction in violation of this Decision is null and void. The Office of the High Representative may, upon a clear showing by the competent authorities of an Entity or Bosnia and Herzegovina that a proposed transfer of state-owned real property is non-discriminatory and in the best interest of the public, grant a written exemption to this Decision. The burden of clearly showing that a proposed transfer of state-owned real property is non-discriminatory and in the best interests of the public rests with the competent authority requesting a written exemption to this Decision."

68. The Decision of 27 April 2000 entered into force immediately and remained in force until 31 December 2000. On 20 December 2000, the High Representative extended the validity of the Decision of 27 April 2000 until 30 March 2001 (OG BiH no. 34/00; OG FBiH no. 56/00; OG RS no. 44/00). On 30 March 2001, the High Representative again extended the validity of the Decision of 27 April 2000 until 31 July 2002 (OG BiH no. 11/01; OG FBiH no. 15/01; OG RS no. 17/01).

69. On 31 July 2002, the High Representative issued another Decision further extending the Decision of 27 April 2000 until 31 March 2003 (OG BiH no. 24/02 of 29 August 2002; OG RS no. 49/02 of 13 August 2002). The Decision of 31 July 2002 adds the following statement:

> "Further, by means of the adoption of harmonised legislation regulating the transfer and disposal of state-owned real property, including socially-owned property, by a date as early as possible prior to 31 March 2003, the authorities of Bosnia and Herzegovina and its entities are to assume full responsibility for ensuring the re-allocation of state-owned real property, including formerly socially-owned property, in a non-discriminatory manner and in the best interests of the citizens of Bosnia and Herzegovina."

G. Law on Construction Land of the Republika Srpska of 15 May 2003 (Official Gazette of the Republika Srpska no. 41/03), which entered into force on 16 May 2003

70. On 15 May 2003 the High Representative imposed a Decision Enacting the Law on Construction Land of the Republika Srpska. The new Law on Construction Land thereby enacted has entered into force on 16 May 2003. The following provisions of the Law are of particular relevance to the present case:

> Article 1
>
> "This Law regulates: the conditions and manner of acquiring rights to land in towns, cities and similar settlements and other areas intended for residential and other complex construction; to the time of the cessation of those rights, the manner of use and management, and compensation for the use of that land."
>
> Article 39
>
> "Upon entry into force of this law, the owner of a building, or particular parts of a building, obtains an ownership right on the land beneath the building and on the area of land that is contemplated in the regulation plan or parcelling plan for use as the regular service area of the building, except in cases subject to revision under Articles 87- 92 of the Interim Provisions of this Law.
>
> "If the regulation plan or parcelling plan does not specify the area of land to be used for the regular use of the building, this area shall be determined in a decision of a body of administration competent

for property legal issues upon obtaining the opinion of the body of administration competent for urbanism issues."

Article 87 *(Revision)*

"The validity of construction land allocated between 6 April 1992 and the entry into force of this law, upon which natural persons held a right of use before 6 April 1992 for residential, agricultural or business purposes (hereinafter: revision), shall be determined solely in accordance with this Law.

"Allocations of construction land after 6 April 1992 made pursuant to valid exemptions issued by the Office of the High Representative pursuant to the High Representative's Land Decision banning transfers of socially owned land *(hereinafter referred to as "waivers")* shall not be subject to revision, but may be challenged before a court of competent jurisdiction.

"Natural persons, or their legal heirs, who held a right of use to construction land and who used that land on or before 6 April 1992 for residential, agricultural or business purposes, and whose right of use was cancelled without their consent between 6 April 1992 and the date of entry into force of this law, may submit a request for revision before the organ competent for property legal issues within 2 years from the date of entry into force of this law (hereinafter: claimants).

"A claim under the previous paragraph may also be brought by a member of the family household of the person mentioned in the previous paragraph, or their legal representative.

"The transformation of the permanent right of use, which was acquired between 6 April 1992 and the entry into force of this law, shall not be transformed into private ownership pursuant to Article 39 of this Law until the expiration of the deadline for which claims for revision may be filed under paragraph 3 of this Article."

H. The Law on General Administrative Procedure (Official Gazette of the Socialist Federal Republic of Yugoslavia no. 47/86)

71. Articles 8 and 55 provides for the hearing of parties to administrative proceedings:

Article 8

"(1) Before making a decision, a party has to be given opportunity to express his/her opinion on all facts and circumstances that have importance for making the decision.

"(2) A decision may be made without obtaining an opinion by the party only in cases when it is allowed by the law."

Article 55

"(1) If a process-wise incapable party does not have a legal representative or if an action is to be taken against a person whose place of residence is unknown and who does not have a proxy, the authority conducting the procedure will appoint a temporary representative for such a party, if so required by the urgency of the case, and the procedure must be conducted. The authority conducting the procedure will immediately inform the custody authority accordingly, and if a temporary representative is appointed for a person whose place of residence is unknown, it will display its conclusion upon a notice-board or in some other usual manner.

"(4) An appointed person is obliged to accept the representation, and he/she may reject the representation only for the reasons stipulated by special regulations. A temporary representative shall take part only in the procedure for which he/she has been appointed and until a legal representative or the party himself/herself or his/her proxy appears."

72. Articles 81, 84-86, 94 and 98 provide the means by which delivery of decisions may be effected:

Article 81

"(1) As a rule, delivery of written acts (invitations, decisions, conclusions and other official documents) shall be carried out by handing out court depositions to a person who is to receive it.

"(2) Delivery of written acts shall be carried out via a post office or by an official person of an organ. A person who is to receive a written act may be invited to receive the written act only exceptionally, if required by nature of importance of the written act, if a special regulation foresees such a delivery.

"(3) A manner of delivery shall be determined by the organ who is delivering the written act, in accordance with the provisions of this Law on delivery of written acts."

Article 84

"(1) If a person who is to receive the written act does not happen to be in his/her apartment, the delivery shall be carried out by delivering the written act to an adult member of his/her household and if they do not happen to be in the apartment the written act can be handed out to a neighbour if he/she agrees.

"(2) If the delivery carried out to the office of a person who is to receive the written act and the person does not happen to be in the office, the delivery can be carried out to a person who is employed in the same office, if he/she agrees to receive it. The delivery to a lawyer may be also carried out by the delivery to a person employed in the lawyer's office.

"(3) Delivery referred to in paragraphs 1 and 2 of this Article may not be carried out to a person who participates in the procedure but has opposite interest."

Article 85

"(1) If it is established that the person who is to receive the written act is absent and that the person referred to in Article 84 of this Law cannot hand out the written act in due time, the written act shall be returned to the organ which issued it with a remark related to the location of the absent person.

"(2) If, in spite of an inquiry, the place of residence of the person who is to receive the written act remains unknown, the organ which issued the written act shall appoint an interim representative of that person in the sense of Article 54 of this Law and the written act shall be given to him/her."

Article 86

"(1) If the delivery cannot be carried out even in the manner prescribed in Article 84 of this Law, and it was not confirmed that the recipient is absent, the messenger shall hand out the written act to the responsible municipal organ in the area which is the recipient's place of residence, or in the post office which is in the area of the recipient's place of residence, if the delivery is being carried out through the post office. At the door of the recipient the messenger shall nail a written statement mentioning the location of the court deposition. The messenger shall state the reason for delivery in such a manner on both the written statement and the written act as well as the date on which he nailed the statement on the door and shall put his signature.

"(2) The delivery shall be considered as carried out when the statement is nailed to the door. A damage or a destruction of this statement carried out after the statement had been nailed to the door shall have no influence on the validity of the delivery.

"(3) The organ which ordered the delivery shall be informed on a delivery carried out in a manner prescribed in Paragraph 1 of this Article."

Article 87

"(1) The delivery in person must be carried out when such a delivery is determined by this Law or another regulations, when a deadline which can not be extended starts to run from the day of delivery,

or when ordered by the organ which requested the delivery. It is considered that the delivery in person to a lawyer has been carried out when a written act is delivered to a person employed in the lawyers office.

"(2) When a person who is to receive a written act does not happen to be in the apartment i.e. office or a person employed in the lawyer's office does not happen to be in the office, the messenger should be informed where and when the person can be found and he/she will leave a written notification with any of the persons referred to in Article 84 of this Law requesting the person to be in the apartment i.e. workplace on a certain date and time, in order to receive the written act. If even after the notification the messenger does not find the person who is to receive the written act, he/she shall act in the manner determined by Article 86 of this Law, and then it shall be considered that the delivery has been carried out.

"(3) When a written act is delivered to a legal representative, an authorised agent or a an agent authorised to receive a written act (Article 89) it shall be considered as the delivery to a party itself."

Article 88

"(1) Delivery to a legal representative or an authorised agent, if the party has it, shall be carried out in a manner prescribed by Articles 80 to 86 of this Law.

Article 89.

"(1) A party may authorise a certain person to receive all deliveries in his/her behalf. When the party send a written notification on the authorisation to the organ which runs the procedure, that organ is obliged to deliver all written acts to this authorised agent (agent authorised to receive written acts).

"(2) The agent authorised to receive written acts is obliged to send any document to the party, without delay.

"(3) If direct delivery to the party, authorised agent or a legal representative would significantly delay the procedure, an official person leading the procedure may order a party to appoint, within certain deadline, an agent authorised to receive written act for certain case, who will be located at the seat of the organ. If the party does not act in accordance to this order, the organ may act in accordance to Article 54 of this Law.

"(4) When a written act is delivered to an agent authorised to receive written act it shall be considered that the written act has been delivered to the receiving party."

Article 94

"If the written act needs to be delivered to a person or to several persons either unknown to the organ or which cannot be determined as recipients, the delivery of written acts shall be carried out through a public announcement on a bulletin board of the organ which issued the written act. Delivery of written act shall be considered done after 15 days of the day on which the announcement was displayed at the bulletin board, if the organ which issued the written act does not prescribe a longer deadline. Apart to displaying it on the bulletin board, the organ may publish the announcement in the newspapers i.e. other media or in another usual manner."

73. Articles 249-252 concerning renewal of proceedings provide:

Article 249

"Proceedings finished by decision or conclusion against which there are no legal remedies in the administrative proceedings (final in the administrative sense) shall be renewed :

"...

"(9) if a person, who was supposed to participate in the capacity of a party, was not given a possibility to participate in the proceedings;

"(10) if a party was not represented by a legal representative, and according to the law he/she was supposed to represent the party;

"…"

Article 250

"(1) Renewal of the administrative proceedings may be requested by the party, and the body which made decision by which the proceedings was finished, may initiate renewal of the proceedings ex officio;

"…"

Article 252

"(1) A party may request renewal of the proceedings within a month and:

(5) in the case from Article 249, Items 9, 10 and 11 - from the date when the decision was delivered to the party.

"(2) If the deadline determined in Paragraph 1 of this Article would begin before the decision became final in the administrative proceedings, that deadline shall be counted from the date on which the decision has become final, i.e. from the date of delivery of the final decision of the competent body.

"(3) After expiration of the deadline of five years from the date of delivery of the final decision to the party, renewal may not be requested nor it may be initiated ex officio.

"(4) Exceptionally, after the deadline of five years, renewal may be requested, i.e. initiated only for the reasons mentioned in Article 249 Items 2, 3 and 5 of this Law."

I. The Law on Administrative Disputes (Official Gazette of the Republika Srpska no. 12/94)

74. Article 22 provides:

"An administrative dispute is initiated by a complaint."

75. Article 23 provides:

"A complaint is filed within 30 days from the day of delivery of the administrative act to the party that files the complaint.

"The deadline from the Paragraph 1 of this Article is also valid for the body authorised for filing of complaint, if the administrative act was delivered to the body. If the act was not delivered, the body can file a complaint within 60 days from the day of delivery of the administrative act to the party in whose favour the act was brought."

V. COMPLAINTS

76. The applicant complains that real property, over which it maintained a lawful priority right of use, was arbitrarily, and without its prior consent or knowledge, seized by the Municipality of Mrkonjić Grad and allocated to the construction company without payment of any compensation. It further complains that it was prevented from participating in the proceedings that determined the seizure and allocation in violation of its right of access to court as guaranteed under Article 6(1) of the Convention. The real property, that was allocated to the construction company, was previously the site of a number of Muslim graves and two harem-cemeteries. A shopping precinct[2] has now been constructed on this religious property without exhuming those buried beneath.

[2] The applicant refers to the construction as a "shopping precinct", while the Chamber has referred to this as "business premises" throughout the decision.

77. The applicant also complains that the authorities have prevented it from gaining permission to reconstruct the Kizlaragina Mosque by the utilisation of the site as a parking facility for the business premises and a refuse dump and by rejecting its requests for reconstruction. The applicant complains that the acts of the authorities of the Municipality of Mrkonjić Grad amount to an interference with its peaceful enjoyment of religious property, as guaranteed under Article 9 of the Convention and Article 1 of Protocol No. 1 to the Convention, on purely discriminatory grounds in breach of Article II(2)(b) of the Agreement.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. Facts

78. The respondent Party disputes the factual assessment as presented by the applicant.

79. The respondent Party points out that the procedural decision of 7 April 1995 issued by the Municipal Assembly of Mrkonjić Grade parcelled plot no. k.č 26/82 into two smaller plots, one of which was allocated to the construction company from Mrkonjić Grad for the construction of business premises. This smaller plot, over which the Islamic Community held a priority right of use, was seized by the procedural decision of 7 April 1995, in accordance with the urban regulatory plan of 1988, with the right to compensation.

80. As to the alleged non-delivery of the procedural decision, the respondent Party states that the delivery of the procedural decision was carried out in accordance with Articles 87-97 of the Law on General Administrative Procedure which provides that when such an application is sought and the change of address of the interested party is unknown, it suffices to leave a written submission on the notice board of the administrative body conducting the proceedings. In this respect the applicant was entitled to initiate an administrative dispute within 8 days from the date on which the notice was placed on the notice board. The address of the Islamic Community or its legal representative was not known at that time and, concerning the procedural decision of 30 November 2000, delivery was effected through Z.Š., a representative of the Bosniak people at the Municipal Assembly of Mrkonjić Grad.

81. As regards the issue as to whether the Islamic Community was informed of the decision on seizure or allocation or whether consent was sought, the respondent Party argues that it is not necessary to seek the consent of the former user or possessor, only that urban and technical conditions are met.

82. As regards the allegation that business premises have been constructed on top of a Muslim graveyard, the respondent Party concedes that a number of old graves were previously located on that site. According the respondent Party, these were “disused” or “non-functional” graves and no burial had been carried out for at least 50 years. At some stage after the destruction of the Kizlaragina Mosque, the Islamic Community was allegedly requested to exhume the graves, but declined to do so as it intended to reconstruct the Kizlaragina Mosque.

83. As regards the urban regulatory plan, the respondent Party submits that the 1988 plan provided for city construction on the disputed site and provided the Chamber with a copy of the 1988 plan that covered part of the disputed plot of land and an additional drawing of an urban plan covering a wider area of the disputed plot of land.

2. Admissibility

84. The respondent Party firstly objects to the admissibility of the application *ratione temporis*. It argues that the applicant complains primarily of the procedural decision of 7 April 1995, by which real property was seized from the Islamic Community and allocated to the construction company in

accordance with the urban regulatory plan. Accordingly, these events occurred before the entry into force of the Agreement and any complaint relating to them is therefore inadmissible *ratione temporis*.

85. The respondent Party next argues that the application was introduced to the Chamber on 16 July 2001, more than six months from the date in which the applicant received a final decision. Accordingly, the application is inadmissible under the six months rule. However, the respondent Party does not submit which final decision it is referring to.

86. Finally, the respondent Party states that the applicant, by its own admission, became aware that the procedural decisions of 7 April 1995 an 30 November 2000 had been issued, but failed to make use of any domestic remedies available. Under Article 25 of the Law on Construction Land (see paragraph 59 above) the applicant could have initiated an administrative dispute and under Article 239(1) of the Law on General Administrative Procedure (see paragraphs 71 to 73 above) it could have requested the renewal of administrative proceedings. Accordingly, the application is inadmissible for non-exhaustion of domestic remedies.

3. Merits

87. In relation to Article 1 of Protocol No. 1 the respondent Party states that the seizure and allocation of city building land were issued in the public interest in accordance with the construction and physical planning urban regulatory plan in Mrkonjić Grad within the meaning of the provisions of the Law on Physical Planning. Accordingly, it was in accordance with law and pursued the legitimate aim of being in the general public interest.

88. Under the applicable legal provisions the Municipality of Mrkonjić Grad is obliged to pay compensation to the applicant for seizure or to allocate alternative property, within the meaning of Article 52(b)(2) of the Law on Amendments to the Law on Building Land. In this respect, the respondent Party points out that the applicant has failed to apply for compensation through the relevant domestic organs. Due to the applicant's failure to apply for compensation, the organs of the respondent Party have been unable to issue a final decision and without this, the complaints cannot be examined under Article 9 of the Convention or Article 1 of Protocol No. 1 to the Convention.

89. As regards the complaint under Article 6(1) of the Convention, the respondent Party repeats that the proceedings on seizure and allocation were conducted in accordance with law. Due to the situation in Bosnia and Herzegovina at the time, it was not possible to locate the registered office of the Islamic Community or its legal representative. Accordingly, the relevant authorities took appropriate steps, in accordance with the Law on General Administrative Procedure, to notify the applicant of the procedural decisions issued. As to whether the applicant's consent was required, the respondent Party repeats that it was not and that it was only necessary to establish that urban and technical requirements were met, which in the present case is indisputable.

90. The respondent Party concludes that the applicant filed its complaint 6 years after the land was seized and after construction was completed, business premises were built and sold to natural and legal persons and commercial activities commenced. The Municipality of Mrkonjić Grad suggests, in order to resolve the issue amicably, that the applicant should apply directly to the Municipality requesting compensation, following which the appropriate organ would conduct the proceedings and issue a final decision.

4. Remedies

91. As the applicant is directed to apply for compensation for seizure to the Municipality of Mrkonjić Grad, the request for compensation in the present proceedings would be irrelevant. However, should the Chamber issue a decision on the merits, the respondent Party considers the request for compensation to be excessive and not proportionate to the complaints

B. The Applicant

92. The applicant maintains its complaints as stated in its application to the Chamber.

93. The applicant claims to be the owner and possessor of real property located in the Municipality of Mrkonjić Grad, Republika Srpska, formerly registered in the land registry as Cadastral plot k.č. 26/82 and registered in the Title Deed of the Municipality of Mrkonjić Grad as no. 524.

94. As regards whether the issued urban regulatory plan provided for the construction of business premises, the applicant concurs with the respondent Party that, according to legal regulations, urban consent may only be issued for construction for which urban and technical conditions exist. In the course of the on-site inspection, the respondent Party presented an excerpt from the urban regulatory plan of Mrkonjić Grad made during the period from 1988 to 1990. However, on examination of the urban regulatory plan, no construction was envisaged on the disputed plot, but only on the site of buildings that existed on neighbouring plots. The applicant points out that the respondent Party stated that it is correct that there are no envisaged buildings in the regulatory plan, but allegedly the subsequent urban projects included the planned construction, although it failed to elaborate on when the plans were made and which buildings the subsequent projects referred to. Additionally, during the on-site inspection, the respondent Party stated that it would provide the Chamber with such plans, but it has failed to do so. As it is apparent that in this case the general urban plan does not provide for any construction, the organs of the respondent Party could not have issued the appropriate urban and construction permits. It follows that the building permits in the present case that the respondent Party refers to are invalid and without any legal basis.

95. As regards the respondent Party's statement that the real property, which is the subject of the dispute, is socially owned property and that the use of the real property was allocated to the Islamic Community, the applicant submits that the former communist system eliminated through its laws all private ownership in urban areas, and left the *bona fide* owner with the right of use. By doing this, the property of the *de facto* owner was not altered, as it retained ownership over the property and enjoyed all benefits which are performed by the owner; the only limitation being that the land could not be sold to a third party without the permission of the State. Accordingly, the statement by the respondent Party that the land is state owned is untrue, as the so called "right of use" is actually the product of the right of ownership and the same is protected by Article 1 of Protocol No. 1 to the Convention. This means that the Islamic Community was the sole owner before seizure.

96. Additionally, the applicant draws attention to the statement of the respondent Party that it parcelled the land into two plots in accordance with domestic law. However, parcelling or dividing real property into plots can only be performed in circumstances where there is a general interest in the change of use or change of purpose. The general interest would exist in circumstances where the urban regulatory plan predicted the construction of business premises. In this case, there is no general public interest, but only the interests of certain companies or individuals are served by the decision of the Assembly of the Municipality of Mrkonjić-Grad

97. Moreover, the Kizlaragina Mosque with its complex was determined a cultural monument since before the war. Given the aforementioned, it is apparent that this is no ordinary violation of human rights, but a very serious and intentional caused desecration of a national monument and prevention of its revitalisation. If the constructed business premises are not removed, it will be impossible to revitalise this cultural monument, i.e., even if the Mosque was to be rebuilt, it would no longer be a cultural monument, as the environment has been desecrated by the construction of business premises, and its unique position vis-à-vis the surrounding parts of the town disrupted by the presence of the business premises.

98. The applicant requests that the Chamber order the respondent Party to remove the unlawfully constructed business premises at its own expense, to return the seized land, to authorise and finance the reconstruction of the destroyed Kizlaragina Mosque, and to be granted pecuniary compensation in the amount of 20,000 KM. The applicant states that this amount is not intended to be considered as a remedy for permanent expropriation as it is seeking the return of the seized land,

but compensation for temporary seizure and damage to property. The applicant does not specify the level of compensation for non-pecuniary damage it is seeking and leaves the calculation of this to the Chamber in accordance with its previous jurisprudence.

VII. OPINION OF THE CHAMBER

A. Admissibility

99. Before considering the merits of the application the Chamber must first decide whether it is admissible, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. According to Article VIII(2)(a), the Chamber shall consider whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted and whether the application has been filed within six months from such date on which the final decision was taken. Article VIII(2)(c) states that the Chamber shall dismiss any application it considers incompatible with the Agreement, manifestly ill-founded or an abuse of the right to petition.

1. Compatibility *ratione temporis* with the Agreement

100. The Chamber will first address the question of whether it is competent, *ratione temporis*, to consider the application, bearing in mind that the applicant complains partly about a period prior to 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 (see case no. CH/96/1, *Matanović*, decision on admissibility of 13 September 1996, Decisions on Admissibility and Merits 1996-1997). Accordingly, the Chamber is not competent to find violations with regard to events that took place prior to 14 December 1995.

101. In the present case, the Chamber notes that part of the application concerns the destruction of the Kizlaragina Mosque. This complaint relates to a period prior to 14 December 1995, which is the date on which the Agreement entered into force. However, the Agreement only governs facts subsequent to its entry into force. It follows that the application in this respect is incompatible *ratione temporis* with the provisions of the Agreement, within the meaning of Article VIII(2)(c).

102. However, as regards the remainder of the application, the Chamber notes firstly that the seizure and allocation of land was initiated on 7 April 1995, but was not concluded until 30 November 2000, when the seized land was registered in the name of the state owned construction company. Secondly, the Chamber notes that the applicant was never notified of the proceedings on seizure and allocation or the subsequent proceedings concerning registration. Thirdly, the Chamber recalls that the allocation was subject to construction commencing within a set time period, and it is not disputed between the parties that construction commenced after the entering into force of the Agreement. Accordingly, the Chamber finds that with regard to the seizure of a part of the land from the applicant, its allocation to the construction company, the construction of business premises on a Muslim graveyard without previous exhumations being carried out, and the use of the upper part of the plot as a car parking area and refuse dump, as well as, finally, the denial of the permit to reconstruct the mosque, the application concerns facts that occurred or continued after the entering into force of the Agreement. Therefore, in all these respects, the Chamber will not declare the application inadmissible as being incompatible *ratione temporis* with the provisions of the Agreement, within the meaning of Article VIII(2)(c).

2. Non-exhaustion of domestic remedies

103. The respondent Party submits that the applicant has failed to exhaust available domestic remedies. In particular under Article 25 of the Law on Construction Land the applicant could have initiated an administrative dispute and under Article 249(1) of the Law on General Administrative Procedure it could have requested the renewal of administrative proceedings.

a. Renewal of proceedings

104. As to the remedy provided under Article 249 of the Law on General Administrative Procedure (see paragraphs 71 to 73 above), entitling the applicant to request renewal of the proceedings, the Chamber firstly notes that this is an extraordinary remedy. Moreover, under Article 252 of the Law, such renewal could have also been initiated *ex officio* by the organ conducting the proceedings, which it failed to do and under paragraph 1 of this Article, such a request shall be submitted within one month, if the decision has been delivered to the party, but in any case renewal may not be initiated after the passage of 5 years from the date in which it was delivered. According to the respondent Party, concerning the decision of 7 April 1995, delivery was effected by posting the decision on the notice board of the Municipal organ conducting the proceedings. In this respect, Article 94 of the same Law states that when a decision is posted on the notice board of the organ conducting the proceedings, delivery shall be considered executed after 15 days from the date of the note being posted. Accordingly, delivery was executed on 22 April 1995 and under Article 252 as mentioned above, the 5-year period expired on 22 April 2000, thus time barring the applicant from submitting a request for renewal of proceedings. According to the undisputed statement of the applicant, it did not learn of the procedural decision until March 2001, 11 months after the time limit for submitting a request had expired. As regards the procedural decision of 30 November 2000, the Chamber notes that the time limit for submitting renewal of proceedings has not yet expired. However, considering that this decision was based upon the decision of 7 April 1995 and the Chamber has already stated that the time limit for challenging that decision has passed, any challenge to the latter decision could not be considered an effective remedy as it would not alter the earlier decision on which the latter decision was based. Moreover, the Chamber recalls that the construction work on the seized plot was completed at some stage during 1998. Therefore, the effectiveness of requesting renewal of proceedings was thereby removed by this fact.

b. Administrative dispute

105. As to the remedy provided under the Article 25 of the Law on Construction Land and Articles 22-24 of the Law on Administrative Disputes (see paragraphs 74 to 75 above), the Chamber notes that the applicant was entitled to initiate an administrative dispute within 30 days of receipt of delivery of the decision. Accordingly, for the reasons mentioned in the preceding paragraph, the applicant was time barred from submitting a complaint to initiate an administrative dispute and due to the completion of construction work such a remedy can not be considered effective.

c. Request for reconstruction of the Kizlaragina Mosque

106. As regards the respondent Party's objection that the Islamic Community has failed to comply with the procedural requirements concerning its request for permission to reconstruct the Kizlaragina Mosque, the Chamber notes that the applicant's request was rejected on formal grounds as it failed to submit all requested documentation. The applicant was entitled to initiate an administrative dispute against the decision on rejection, but failed to do so. The applicant complains that the Islamic Community in Mrkonjić Grad does not possess the funds required to prepare all necessary plans for the Mosque's reconstruction. It requests that the authorities of the Republika Srpska be ordered to authorise the reconstruction and to bear all costs as its organs are responsible for its destruction. The Chamber notes that it has already declared the complaint concerning the actual destruction of the mosque inadmissible as incompatible with the Agreement *ratione temporis*. Accordingly, the Chamber can not now order the respondent Party, in this decision, to bear the financial burden of its reconstruction. The Chamber notes that there is nothing preventing the applicant from resubmitting a request. Provided all relevant documentation is submitted in the correct form, the organs of the respondent Party would thereafter be obliged to authorise the reconstruction of the Kizlaragina Mosque. Accordingly, the Chamber finds that by failing to submit all relevant documentation required for authorisation of reconstruction, the applicant has failed to exhaust effective domestic remedies in accordance with Article VIII(2)(a) of the Agreement. Therefore, the Chamber decides to declare this part of the application inadmissible.

d. Request to remove temporary facilities

107. The applicant complains that the Municipality of Mrkonjić Grad has permitted the land, on which the Mosque once stood, to be used as a car park and refuse dump. The Chamber notes that the applicant submitted a formal request to the Municipality on 6 November 2000 to clean the area in which the mosque once stood in order to facilitate the reconstruction. However, despite the assurances from the Municipality to put an end to the land being used as a refuse dump, nothing has been done. Furthermore, the applicant was informed by the Municipal Inspector of the Municipality of Mrkonjić Grad, that the applicant was obliged to prevent cars from parking on land in which it held a priority right of use. However, the Municipal Inspector also stated that the area on which cars were currently parked could not be considered a car parking facility within the meaning of building and traffic regulations. Accordingly, given the manifest failure of the authorities of the Republika Srpska to secure the applicant its rights, the Chamber finds that the applicant was justified in doubting the effectiveness of further formal requests to clean the area and remove temporary facilities. Moreover, the respondent Party has failed to establish what effective domestic remedies, in this respect, the applicant was required to exhaust.

e. Conclusion as to the requirement to exhaust domestic remedies

108. Accordingly, with the exception of the request for reconstruction of the Kizlaragina Mosque, which it has declared inadmissible for non-exhaustion, the Chamber holds that for the reasons as set out above, it will not declare the application inadmissible on the ground of failure to exhaust domestic remedies in accordance with Article VIII(2)(a) of the Agreement.

3. Six months rule

109. The respondent Party further submits that the application was introduced to the Chamber on 16 July 2001, more than six months from the date in which the applicant received a final decision.

110. In this regard, the Chamber notes that the respondent Party has not stated which final decision it refers to in declaring that six months have passed. The Chamber notes that the applicant did not become aware of the decisions on seizure and allocation until March 2001 and submitted its application to the Chamber four months later. The Chamber notes that under Article VIII(2)(a) an applicant is required to submit his application to the Chamber within six months of a final decision being issued, within six months from the date in which the alleged violation is alleged to have occurred, or within six months from the date in which the applicant learnt of the alleged violation, if it was previously ignorant of the decision being made (see, *e.g.,* Eur. Commission HR, *Bozano v. Italy*, application no. 9991/82, Decisions and Reports 39 (1984), p.147 at p. 155). Accordingly, as the application was lodged within six months from the date in which the applicant learnt of the alleged violation, the Chamber holds that the applicant has complied with the six month time limit within the meaning of Article VIII(2)(a) of the Agreement and will not declare the application inadmissible in this respect.

4. Conclusion as to admissibility

111. The Chamber finds that no other ground for declaring the application inadmissible has been established. Accordingly, the Chamber declares the application under Articles 6(1), concerning the right of access to court, Article 9 of the Convention, Article 1 of Protocol No. 1 to the Convention, as well as discrimination in the enjoyment of the above rights, admissible, with the exception of the complaints relating to the destruction of the Kizlagarina Mosque and the rejection of the permit to rebuild it.

B. Merits

112. Under Article XI of the Agreement the Chamber must next address the question of whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement. Under Article I of the Agreement the Parties are obliged to "secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms", including the rights and freedoms provided for in the Convention.

1. Article 6(1) of the Convention (right of access to court)

113. The applicant complains that it was not informed of the seizure and allocation proceedings and thereby unable to participate in the proceedings affecting its rights, in violation of its right of access to court as guaranteed under Article 6(1) of the Convention.

114. Article 6(1) of the Convention provides, insofar as is relevant, as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

a. Applicability of Article 6(1) of the Convention

115. The Chamber must first determine whether the complaint falls within the ambit of Article 6(1) of the Convention.

116. In the civil context, the Chamber recalls that Article 6 of the Convention applies to the determination of "civil rights and obligations". This covers civil proceedings whether between two private individuals or between a private individual and the State, the result of which is "decisive" for civil rights and obligations (see e.g., Eur. Court HR, *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no.13, paragraph 94). The European Court of Human Rights has held in the past that expropriation proceedings, planning proceedings and procedures which concern building permits fall within the protection of Article 6(1) of the Convention, irrespective of whether the right at issue concerns ownership or the use or enjoyment of property (see e.g., Eur. Court HR, *Sporrong and Lönnroth v. Sweden*, judgments of 23 September 1982, Series A no.52, paragraphs 79-83). Additionally, the Chamber, interpreting the jurisprudence of the European Court, has held that seizure and allocation proceedings in Bosnia and Herzegovina concerning socially owned property fall within the protection of Article 6(1) (see e.g., case no. CH/00/6134 *Štrbac*, decision of 2 September 2002, paragraphs 99-104, Decisions July – December 2002). Moreover, the fact that the Law on Construction Land (see paragraph 59 above) provides that a former right of use holder is entitled to be heard in proceedings and to appeal a decision before the ordinary courts and the Law on General Administrative Procedures (see paragraph 71 to 73 above) entitles the former right of use holder to put forward objections to a decision on seizure, reveals that the right, at least on arguable grounds, is recognised under domestic law.

117. In light of the above, the Chamber finds that the proceedings by which the seizure and allocation were examined involved a "determination" of the applicant's "rights" for the purposes of Article 6(1) which can be said, at least on arguable grounds, to be recognised under domestic law and that the result of the proceedings was directly decisive for the right in question.

b. Compliance with Article 6(1) of the Convention

118. The Chamber must next examine whether the applicant was provided with a practical, effective right of access to court for the determination of its property rights. The European Court has recognised that the effective access to court can be impaired if the individual is not given proper notice of administrative decisions affecting his/her civil rights and obligations. In *De Geouffre de la Pradelle v. France* (Eur. Court HR, judgment of 16 December 1992, Series A no. 253-B, paragraphs 34-35) the European Court found a violation of Article 6(1) where the applicant was unable to

challenge an administrative decision as he did not receive proper notice until the time period for challenge had elapsed.

119. On 23 March 1995, acting upon the initiative of the construction company, the Secretariat of Administrative Affairs in Mrkonjić Grad issued a procedural decision on urban approval in favour of allocating the undeveloped city building land for construction purposes. On 7 April 1995 the Municipal Assembly in Mrkonjić Grad issued a procedural decision by which the land in question was seized, parceled, and a plot thereof allocated to the state owned construction company. However, the applicant was not invited to attend any hearing, or to make any submissions, prior to the decision being reached. The respondent Party alleges that it was unable to locate the address of the Islamic Community or its legal representative, and therefore, in accordance with the Law on General Administrative Procedure, fixed a notice of the procedural decision at the location of the administrative organ conducting the proceedings. On 30 November 2000 the Administration for Surveying, Property and Legal Affairs of the Republika Srpska, Department for Mrkonjić Grad, issued a procedural decision authorising the registration of plot no. 26/82-2 in favour of the Municipality of Mrkonjić Grad for the purpose of allocating it to the construction company. This procedural decision was not delivered to the applicant, but instead given to a Bosniak member of the Committee of the Municipal Assembly of Mrkonjić Grad, Z.Š., as a purported representative of the Islamic Community. During March 2001 the applicant became aware that the plot of land previously designated as plot no. k.č. 26/82 had been parceled into two smaller plots and that one of the plots had been allocated to a third party for construction purposes. On 16 March 2001 the applicant addressed the Office of the High Representative (the "OHR") in Banja Luka stating that the seizure was in breach of the High Representative's Decision on Re-allocation of Socially Owned Land of 27 April 2000.

120. The Chamber notes that under Article 25(3) of the Law on Building Land (see paragraph 59 above), the previous holder of the temporary right of use "shall be heard in the proceedings of taking over the land". Additionally, under Article 8(1) of the Law on General Administrative Procedures of the Socialist Federal Republic of Yugoslavia, before taking an administrative decision "a party has to be given an opportunity to express his/her opinion on all facts and circumstances that have importance for making a decision". An exception to this rule is contained under Article 8(2) of the Law. However, such an exception is only permitted where the law so provides. In the present case, the Law on Building Land does not provide for such an exception to be applied. Moreover, under Article 55(1) of the Law, in circumstances when the location of the party is not known, the authority conducting the proceedings will appoint a temporary representative for the party in the proceedings. The Chamber notes that the applicant was neither informed of the proceedings nor a representative appointed to act on its behalf.

121. As regards the respondent Party's statement that it was unable to locate the whereabouts of the Islamic Community, the Chamber finds that it lacks credibility. Whilst it may not have been known during 1995 where the Islamic Community in Mrkonjić Grad was based, it is difficult to believe that the Municipality of Mrkonjić Grad were unable to make contact through the Islamic Community's central office in Sarajevo. Additionally, the respondent Party has failed to establish what steps were taken to locate a representative of the Islamic Community, only that it had no idea where it was located during this time. Moreover, the statement lacks sincerity as the Municipal Inspector of the Municipality of Mrkonjić Grad in fact liaised with a representative of the Islamic Community during November-December 2000 and failed to inform the applicant of the proceedings on seizure and allocation.

122. Additionally, putting aside the fact that the authorities failed to take reasonable and plausible steps to locate the Islamic Community, and thus failed to comply with the spirit of the law, they further failed to act in accordance with the letter of the law. Concerning the delivery of the procedural decisions, the respondent Party has stated that it acted in accordance with Articles 87-97 of the Law on General Administrative Procedure by displaying the procedural decision at the administrative organ conducting the proceedings and then by delivering the latter procedural decision to Z.Š., a purported representative of the Islamic Community. The Chamber notes that under the Law the general rule is that a decision shall be delivered to the appropriate party (Article 81(1)). However, under Article 85(1) if the whereabouts of the person who is to receive the decision is unknown, then the decision

shall be returned to the appropriate organ. Under Article 85(2), if after an inquiry, the location of the person is still unknown, the appropriate organ should appoint an interim representative to effect delivery. No such interim representative was appointed to the applicant.

123. In any event, the Chamber recognises that in certain circumstances it may be reasonable and necessary for the domestic authorities to conduct proceedings *in absentia* of a party. However, as the European Court has said in *Colozza v. Italy* (Eur. Court HR, judgment of 12 February 1985, Series A no. 89, page 15, paragraph 29) when the domestic law provides that proceedings may be conducted *in absentia* of an interested party, "that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge". In the present case, the applicant has been given no actual opportunity to participate in the proceedings that deprived it of its property rights. On the contrary, the evidence before the Chamber suggests that the organs of the respondent Party have, over a period of five years, purposefully and systematically, kept the applicant uninformed of decisions depriving it of a piece of land it has been using for centuries, thereby denying the applicant its right to a practical, effective access to court for the determination of its property rights.

c. Conclusion under Article 6(1) of the Convention

124. In light of the above, the Chamber considers that the respondent Party has violated the applicant's rights as guaranteed by paragraph 1 of Article 6 of the Convention.

2. Article 9 of the Convention

125. The applicant complains that the seizure of land previously used by the Islamic Community, the construction of business premises over non-exhumed graves, and on the other hand, the utilisation of the upper part of the site as a parking facility and a refuse dump, thus preventing the reconstruction of the destroyed Kizlaragina Mosque, amount to an interference with its right to freedom of religion.

126. That the land allocated for construction was previously used as a graveyard is not disputed by the respondent Party. Instead, it argues that the graves were "disused" or "non-functional". By this, the Chamber believes the respondent Party to mean that no one had been buried on the plot for at least 50 years.

127. Article 9 of the Convention provides 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."

128. As the Chamber has found in the past, a burial conducted in accordance with Muslim religious regulations and practice clearly falls within the ambit of Article 9 insofar as it relates to freedom of religion, including, in particular, freedom to manifest religion in "practice and observance" (case no. CH/98/892*, Mahmutović*, decision on admissibility and merits of 7 September 1999, paragraph 85, Decisions August—December 1999). In the Zvornik Mosques case, the Chamber found that the respondent Party's "tacit acceptance of the removal of the remaining parts of the graveyard from that site … clearly amount to an interference with - or a "limitation" of - the right of the Muslim believers in Zvornik freely to manifest their religion, as guaranteed by Article 9(1) taken in isolation" (see case no. CH/98/1062, *The Islamic Community in Bosnia and Herzegovina*, decision on admissibility and merits of 11 October 2000, paragraph 87, Decisions July—December 2000). Similarly, in the present case, the Chamber finds that the seizure and allocation of land and the construction of business premises on a Muslim graveyard, without the consent of the Islamic Community, constitute an interference with, or a limitation of, the right of Muslim believers in

Mrkonjić Grad to freely to manifest their religion as guaranteed by Article 9(1). The Chamber also finds that the toleration of the authorities for the use of the site of the Kizlaragina Mosque as a parking facility and a refuse dump constitutes an interference with the right of the Muslim believers in Mrkonjić Grad to freely to manifest their religion as guaranteed by Article 9(1).

129. 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). In the present case, the respondent Party argues that the seizure and allocation was based on the urban regulatory plan of 1988. During the on-site inspection in Mrkonjić Grad, however, on 12 May 2003, the Chamber noted that the construction of business premises on top of the Muslim cemetery was not provided for in the urban regulatory plan. The respondent Party provided the Chamber with an additional plan, which it argues provides the basis for the construction. However, the second plan was nothing more than an unofficial drawing and did not have the force of law as the 1988 urban regulatory plan. During the on-site inspection, the respondent Party also stated that it would provide the Chamber with the relevant documentation in its possession, but it has thus far failed to do so. The respondent Party has provided no additional legal basis on which the interference with the applicant's rights was grounded. Additionally, the Chamber notes that under Article 11 of the Law on Environmental Planning (see paragraphs 42 to 47 above) construction is prohibited in "reserved areas". Articles 36 and 45 of the Law provide that 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. The Chamber recalls that the Kizlaragina Mosque complex was registered as a cultural monument within the Socialist Federal Republic of Yugoslavia and entered into the registry of Cultural Monuments as National Heritage (see paragraph 18 above). Finally, the mere fact that the applicant's consent was not sought, or at the very least the applicant invited to participate in the proceedings, as established by the Chamber in consideration of the complaint under Article 6(1) of the Convention (see paragraphs 113 to 124), adds weight to the argument that the interference was conducted in an arbitrary manner and not "prescribed by law".

130. The Chamber further notes that the respondent Party is under a positive obligation to protect religious communities and cutural-historic monuments (see, *e.g.,*. case no. CH/96/29 *Islamic Community in Bosnia and Herzegovina*, decision on admissibility and merits of 11 May 1999, paragraph 161, Decisions January-June 1999). In this regard, the respondent Party has a duty to take reasonable and appropriate measures to secure the applicant's rights under Article 9 of the Convention and to strike a fair balance between the competing interests of the individual and the community as a whole. The respondent Party is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the respondent Party apparatus acts in such a way that the violation goes unpunished and a victim's full enjoyment of such rights is not restored as soon as possible, the respondent Party has failed to comply with its duty to ensure the free and full exercise of those rights to all persons within its jurisdiction. The same is true when the respondent Party allows private persons or groups to act freely with impunity to the detriment of the rights recognised by the Convention.

131. The Chamber recalls that the first requirement of Article 9(2) is that any interference by a public authority should be lawful. Since the respondent Party has failed to satisfy the principle of lawfulness contained within paragraph 2 of Article 9, it is not necessary for the Chamber to consider further the remaining requirements of this Article. Nevertheless, even if the principle of lawfulness had been adhered to and the respondent Party had established a legal basis for the interference, the Chamber notes that the interference with the applicant's rights cannot be considered necessary and as mentioned above, the respondent Party is under a positive obligation to protect religious communities and monuments for the purposes for which they are intended. The respondent Party has singularly failed in its duty to secure the rights of the applicant in this regard. Therefore, the Chamber finds that the interference amounts to a violation of Article 9 of the Convention.

3. Article 1 of Protocol No. 1 to the Convention

132. The applicant also complains that the seizure and allocation of land constitutes an interference with its right to peaceful enjoyment of its possession.

a. Article 1 of Protocol No. 1 to the Convention in isolation

133. Article 1 of Protocol No. 1 to the Convention provides 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."

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

134. It is not in dispute that up until the issuance of the procedural decisions on seizure and allocation, the Islamic Community held a permanent right of use over the entire plot no. k.č. 26/82. In April 1995, the plot was divided into two, and the lower part (now plot no. 26/82-2) allocated for construction to the construction company. As the Chamber has already found with regard to its competence *ratione temporis* (see paragraphs 100 to 102 above), the allocation was not completed before the entry into force of the Agreement. In the meantime, business premises have been built on plot no. 26/82-2. Legal title to use the upper part of the original plot no. 26/82, now plot no. 26/82-1, is still with the applicant. The plot is, however, used by the local population as a car park and garbage dump.

135. In the *Islamic Community (Biljeljina)* case (case no. CH/99/2656, decision of 5 December 2000, paragraphs 106-113, Decisions July – December 2000) the Chamber established that a priority right of use constitutes a possession within the meaning of Article 1 of Protocol No. 1 to the Convention.

Additionally, the Chamber stated:

> "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…

136. In the present case, the Chamber has already established that the Kizlaragina Mosque was destroyed during the 1992-1995 armed conflict. However, it also noted that several small buildings located to one side of the plot remained intact. Moreover, the gravestones of the cemeteries on plot no. 26/82-2, on which the building premises were built, whilst very old, were removed after December 1995, and not dilapidated or destroyed by *vis major*.

137. For the above reasons, the Chamber concludes that, as of 15 December 1995, the applicant enjoyed rights in both plot no. 26/82-1 and plot no. 26/82-2 that constitute possessions for the purposes of Article 1 of Protocol No. 1.

ii. Interference

138. The Chamber will separately examine whether there is an interference with the applicant's peaceful enjoyment of possessions for the two plots into which plot no. k.č. 26/82 has been divided. Firstly, in relation plot no. k.č. 26/82-1 the Chamber notes that the respondent Party did not effect either a formal or a *de facto* seizure. The use of the site as a parking facility and a refuse dump is

supposed to be only of a temporary nature. The applicant may therefore recover the site as soon as the respondent Party puts an end to its illegal use. Accordingly, it cannot be said that the applicant has been definitively deprived of its possessions, in this respect. Nonetheless, the failure of the respondent Party to prevent the citizens of Mrkonjić Grad from illegally using the site, and the failure to act of the competent Municipal Department notwithstanding the requests of the applicant, do constitute an interference with the applicant's peaceful enjoyment of possessions under the first sentence of the first paragraph of Article 1 of Protocol No. 1.

139. Secondly, the seizure of plot no. k.ć. 26/82-2 and its allocation to the construction company constitute a formal taking over or seizure of the applicant's property within the meaning of the second sentence of the first paragraph of Article 1 to Protocol No. 1.

iii. Principle of lawfulness

140. Article 1 of Protocol No. 1 comprises three distinct rules. The first rule, which is of a general nature, enshrines the principle of peaceful enjoyment of property. It is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to the condition that the deprivation must be in the public interest and subject to conditions provided for by law and by the general principles of international law. It appears in the second sentence of the same paragraph. The third rule recognises that States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws, as they deem necessary for that purpose. It is contained in the second paragraph (see, *e.g.*, case no. CH/96/29, *Islamic Community*, decision on admissibility and merits of 11 June 1999, paragraph 190, Decisions January-July 1999).

141. As the Chamber has repeatedly stated (see the above-mentioned *Štrbac* decision at paragraphs 90-95), regardless of which of the three rules set forth in Article 1 of Protocol No. 1 is applied in a given case, the challenged action by the respondent Party must have been lawful in order to comply with the requirements of Article 1 of Protocol No. 1.

142. The Chamber has already established with regard to the applicant's rights under Article 9 of the Convention, that the seizure of plot no. k.ć. 26/82-2 from the applicant and its allocation to the construction company were unlawful, *inter alia* because this was not in accordance with the 1988 urban regulatory plan. The Chamber has also noted, in finding a violation of the right of access to court under Article 6(1) of the Convention, that the manner in which those proceedings were conducted calls into question the legitimacy of the procedural decisions of 7 April 1995 and 30 November 2000 under the Law on Building Land and the Law on Administrative Procedures.

143. Moreover, on 26 May 1999, the High Representative issued a Decision which takes priority over the respective provisions of the Law on Building Land and therefore renders the procedural decisions of 23 March 1995 and 7 April 1995 null and void (see paragraphs 63 to 65 above). The Decision of 26 May 1999 was later revoked and superseded by the Decision of 27 April 2000, which remained in force until the enactment of the new Law on Construction Land, and contained substantially similar provisions (see paragraphs 70 above). The Chamber observes that the facts of this case fall squarely within the Decisions of the High Representative. Therefore, as of 26 May 1999, the procedural decisions of 23 March 1995 and 7 April 1995, which seized and allocated the applicants' real property to third parties, ceased to be valid and are null and void. As of that date, the respondent Party's insistence to act upon the decision of 7 April 1995, and particularly the issuance of the procedural decision of 30 November 2000, are not in compliance with the applicable law.

144. In addition, not only did the respondent Party fail to comply with the Decisions of the High Representative of 26 May 1999 and 27 April 2000, it further failed to comply with the Chamber's order for provisional measures of 10 October 2001, which prohibited the enforcement of the procedural decisions of 7 April 1995 and 30 November 2000. Despite the Chamber's order, construction works continued on the applicant's real property. It is not known precisely at what stage the construction works were completed. However, by failing to inform the Chamber at the time

of issuance of its order for provisional measures that the construction works had already commenced, or even been completed by then, the respondent Party acted in breach of the order either way. Moreover, with the exception of one letter sent by the Agent of the respondent Party to the Municipality of Mrkonjić Grad instructing it to abide by the Chamber's order, it appears from the case file before the Chamber that the respondent Party has taken no further action to prevent such construction works by the third parties even though it is fully aware of them. The Chamber considers that such blatant disregard for the Chamber's order for provisional measures constitutes an aggravated breach of the principle of lawfulness by the respondent Party.

145. Since the respondent Party has failed to satisfy the principle of lawfulness contained within Article 1 of Protocol No. 1, it is unnecessary for the Chamber to consider further the remaining requirements of this Article.

4. Discrimination in the enjoyment of the right to freedom of religion and to peaceful enjoyment of possessions

146. The Chamber has repeatedly held that the prohibition of discrimination, stipulated in Article I(14) of the Agreement, is a central objective of the General Framework Agreement to which the Chamber must attach particular importance. Article II(2)(b) of the Agreement affords the Chamber jurisdiction to consider alleged or apparent discrimination on a wide range of grounds in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to the Agreement, amongst others the International Covenant on Economic, Social and Cultural Rights (see *Zahirović,* case no. CH/97/67, decision on admissibility and merits, delivered on 8 July 1999, Decisions January-July 1999, paragraph 114 with further references).

147. In examining whether there has been discrimination contrary to the Agreement, the Chamber, applying the case-law of the European Court of Human Rights and of other international human rights monitoring bodies, has consistently found it necessary to determine whether the applicant was treated differently from others in the same or a relevantly similar situation (see, e.g., case no. CH/97/45, *Hermas*, decision on admissibility and merits delivered on 18 February 1998, paragraphs 87ff., Decisions and Reports 1998). The Chamber has held that any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. There is a particular onus on the respondent Party to justify differential treatment which is based on any of the grounds explicitly enumerated in Article I(14) of the Agreement, including religion or national origin (see case no. CH/97/67, *Zahirović*, decision on admissibility and merits delivered on 8 July 1999, paragraph 121, Decisions January-July 1999).

148. The applicant claims discrimination against it in the enjoyment of the rights to freedom of religion and peaceful enjoyment of possessions. It complains that there was no general public interest served by the seizure and allocation of religious real property, as it only served the interests of certain individuals. No further explanation of how the applicant and its members were treated differently from others is provided.

149. The respondent Party disputes that the applicant has been discriminated against and repeats that the seizure and allocation was conducted in accordance with law, specifically in accordance with the urban regulatory plan. The respondent party has not commented on the utilisation of the site as a parking facility for the business premises and a refuse dump.

150. The Chamber has already found that the respondent Party violated the right of the applicant and of its members in Mrkonjić Grad to freely manifest their religion. The Chamber recalls 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 recalls that by the partial decision of the Constitutional

Court no. U/98 IV of 19 August 2000 it was concluded that Article 28 paragraph 4 of the Republika Srpska Constitution, pertaining to the material support of the Serb Orthodox Church, was unconstitutional and it ceased to be in force on 31 December 2000 when the partial Decision was published in the Official Gazette of Bosnia and Herzegovina (see paragraphs 40 to 41 above). Nonetheless, until the year 2000, this provision remained in force. The Chamber is not called upon in the present case to determine whether the privileged treatment institutionally afforded to the Serb Orthodox Church in itself amounts to discriminatory treatment of the applicant in this case. However, the Chamber bears in mind that during the period in which the interference with the applicant's right to freedom of religion occurred, the Republika Srpska Constitution subjected the applicant's religious community to less favourable treatment than the Serb Orthodox Church.

151. The Chamber notes that, although the Parties have not drawn any comparison in their submissions to the Chamber between the treatment afforded by the Mrkonjić Grad authorities to the Serb Orthodox Church and that afforded to the Islamic Community, the evidence before the Chamber allows only one conclusion: the conduct of the respondent Party targets the applicant as a religious community because of its religion. The Kizlagarina mosque, a historic monument and the primary symbol of the applicant's presence in the town over centuries, was destroyed deliberately, and not as a result of any armed military action. Instead of protecting the site and of taking steps toward a reconstruction of the mosque, the respondent Party hastened to remove all remaining traces of the site's religious function. In preparing the lower part of the site for construction, gravestones were removed, but the graves not exhumed. The upper part of the site is left in a state of abandonment that is unique in the city centre of Mrkonjić Grad, as the Chamber has observed on the occasion of the on site inspection.

152. The Chamber is of the opinion, taking into account all of the above, that the conduct of the authorities of the respondent Party, in the present case, shows utter neglect of the religious feelings of the Muslim community that has been burying its dead at the cemetery of the mosque compound in Mrkonjić Grad over the last few centuries. In particular, the Chamber takes note of the fact that graves were not exhumed in accordance with the Muslim religion prior to the construction of business premises. During the on-sight inspection, a representative of the respondent Party argued that it invited representatives of the Islamic Community to exhume the bodies, but the Islamic Community declined to do so. However, the authorities of the respondent Party have also stated that they were unable to locate a representative of the Islamic Community during the same period in which they allegedly invited the Islamic Community to exhume the graves. The Chamber finds that these statements are contradictory and lack any credibility. The respondent Party has further offered no other evidence that the graves were exhumed in accordance with Muslim tradition or that the graves were exhumed at all. Accordingly, the Chamber can only conclude that the organs of the respondent Party took no steps at all to exhume the graves prior to permitting the construction of business premises on the same plot. As to the statement by a representative of the respondent Party during the on-site inspection that the graves were "disused", meaning that no-one had been buried there for over fifty years, the Chamber cannot find that this justifies the conduct of the authorities.

153. The Chamber further takes note of the fact that the applicant was excluded from the seizure and allocation proceedings in violation of domestic law and the right of access to court under Article 6(1) of the Convention. The Chamber has already held that, over a period of five years, the authorities of the respondent Party purposefully and systematically kept the applicant uninformed of decisions depriving it of a piece of land it has been using for centuries, thereby denying the applicant its right to a practical, effective access to court for the determination of its property rights. The Chamber finds this fact to aggravate the treatment the applicant has been subjected to and reinforces its complaint that such treatment amounts to discrimination.

154. In the context of the present case, the Chamber notes that the establishment of a reasonable relationship of proportionality cannot disregard the events that took place in Bosnia and Herzegovina in the recent past, between 1992 and 1995, and the Chamber cannot be oblivious to the background of ethnic cleansing that took place against the Muslim population. In signing the Dayton Peace Agreement and the Annexes thereto, in particular the Annex 7 Agreement on Refugees

and Displaced Persons, the Republika Srpska undertook to "ensure that all refugees and displaced persons are permitted to return in safety, without risk of harassment, intimidation, persecution or discrimination, particularly on account of their ethnic origin, religious belief, or political opinion." (Article I(2) of Annex7). The Chamber considers that this obligation to create conditions conducive to the return of persons expelled during the armed conflict because of their religion places a particular burden on the Parties to Annex 7, among them the Republika Srpska, to ensure that returnees will be met with full respect for their religious beliefs and practices, including full respect for the sites that are connected to the manifestation of religious beliefs, such as graveyards (see case no. CH/02/12016, *Čengić v. the Republika Srpska*, decision on admissibility and merits of 5 September 2003, paragraph 118).

155. The Chamber concludes that the respondent Party's authorities in Mrkonjić Grad have subjected the applicant to specifically poor treatment, not only if compared to the Serb Orthodox Church, but to the citizenry in general. This differential treatment, which the respondent Party has not attempted to justify, if not by denying it, has affected the applicant's right to freedom of religion and peaceful enjoyment of possessions. The Chamber considers the actions of the authorities of the respondent Party to amount to a clinical attempt to "cleanse" the Mrkonjić Grad area of all traces of Muslim presence in the area.

156. Accordingly, as there is no reasonable and objective justification for the differential treatment, the Chamber finds that the authorities of the respondent Party have both actively engaged in and passively tolerated discrimination against the Islamic Community and its members due to their religion. 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. It also interferes with the applicant's peaceful enjoyment of its possessions. It follows that the respondent Party has failed to meet its positive obligation under the Agreement to respect and secure the right to freedom of religion and the peaceful enjoyment of possessions without any discrimination. The Chamber finds discrimination in the enjoyment of the rights protected by Article 9 of the Convention and Article 1 of Protocol No. 1 thereto.

5. Conclusion on the merits

157. The Chamber therefore finds, in conclusion, that the respondent Party has violated the applicant's right of access to court as guaranteed under Article 6(1) of the Convention, the right to freedom of religion as guaranteed under Article 9 of the Convention, the right to peaceful enjoyment of possessions as guaranteed under Article 1 of Protocol No. 1 to the Convention, and has discriminated against the applicant in the enjoyment of the latter two rights.

VIII. REMEDIES

158. Under Article XI(1)(b) of the Agreement the Chamber must address the question of what steps shall be taken by the respondent Party to remedy the 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". The Chamber is not limited to the requests of the applicant.

159. In its application, the applicant requested the Chamber to order the respondent Party to prohibit the enforcement of the procedural decisions of 7 April 1995 and 30 November 2000 and to order the immediate return of the seized land to the Islamic Community and to permit the applicant to reconstruct the Kizlaragina Mosque. Additionally, the applicant requested compensation for pecuniary and non-pecuniary damage in the amount of 20,000 (*Konvertibilnih Maraka*, "KM") as a remedy for the temporary seizure and damage to property. The applicant stresses that this amount is not intended to remedy a permanent seizure or expropriation, as it is seeking the full return of the land. The applicant further seeks compensation for non-pecuniary damage in the amount of 20,000 KM and to order the respondent Party to conduct exhumation of the graves.

160. On 10 October 2001 the Chamber ordered the respondent Party, as a provisional measure, to prevent the implementation of the procedural decisions of 7 April 1995 and 30 November 2000. It is not known whether the construction of the business premises was concluded at this stage. However, by failing to fully implement the Chamber's order for provisional measures, or in the alternative, by failing to inform the Chamber that the construction of the business premises had already been commenced or concluded, the respondent Party failed to implement the order as directed by the Chamber.

161. During the proceedings before the Chamber, as noted in the preceding paragraph, it became apparent that the Chamber's order for provisional measures had been disregarded and the construction of business premises completed. In this regard, the applicant extended its request for remedies to include the demolition of the constructed business premises, as permission to construct was obtained unlawfully and without the prior consent or knowledge of the Islamic Community. The applicant emphasises that the historical ambience of the Kizlaragina Mosque complex was primarily due the fact that it overlooked Mrkonjić Grad and was visible throughout the town. The fact that business premises have now been constructed immediately in front of where it once stood destroys this historical ambience. Additionally, the applicant maintains that the business premises have been constructed on top of a Muslim cemetery and that the graves were not exhumed before construction began. During the on-site inspection of 12 May 2003 the applicant also requested that, due to the fact that the Republika Srpska was responsible for the destruction of the Kizlaragina Mosque, it should bear the financial burden of paying for its reconstruction.

1. Remedies with regard to the upper part of the mosque site (plot no. 26/82-1)

162. The Chamber notes that it 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. Considering that the destruction of the Kizlaragina Mosque occurred before this time, the Chamber can not now order the respondent Party to bear the financial burden of its reconstruction.

163. Additionally, the Chamber has also declared inadmissible for non-exhaustion of domestic remedies the complaint that the authorities failed to authorise the reconstruction of the Kizlaragina Mosque. The Chamber will therefore not order the respondent Party to grant the applicant a permit to reconstruct the mosque. Nonetheless, the Chamber orders the respondent Party to consider any future requests by the applicant for reconstruction of the Kizlaragina Mosque in good faith and to grant permission without unreasonable conditions.

164. Moreover, the Chamber will order the respondent Party to ensure that by 22 January 2004 all cars are removed from plot no. 26/82-1, all temporary facilities (if any remain) are removed, and the site is cleaned of all refuse.

165. Finally, taking into consideration the Chamber's decision not to order demolition of the business premises and restitution of plot no. 26/82-2, which is the subject of discussion in the following section, in order to provide full and effective protection of the use of the plot, the Chamber will order the respondent Party to ensure that, by 31 March 2004, the ownership of plot no. 26/82-1 shall be legally transferred to the Islamic Community and it shall be permitted to fence in the perimeter of the plot without any further obstruction or hindrance.

2. Remedies with regard to the seized part of the site (plot no. 26/82-2)

166. As regards the seized land, the Chamber recalls that the applicant argues that the Kizlagarina Mosque can only be restored to its full value as a religious and cultural monument if the premises unlawfully built on the lower part of the plot are removed, as its position overlooking the town was an essential element of the former ambience of the Kizlaragina Mosque complex. Moreover, the Chamber has found that the construction of business premises on the graveyard constitutes a violation of the applicant's right to freedom of religion. On the other hand, whilst the Chamber recognises the obvious change in the ambience, it notes that there is sufficient space in which to

reconstruct the Mosque and further notes that the ground on which the Mosque once stood is on a higher level than the ground on which the business premises have now been constructed. Additionally, the Chamber notes that the constructed business premises occupy only a part of plot no. 26/82-2.

167. The Chamber recalls that in its decision concerning the Zamlaz and Divić mosques in Zvornik, it found that it would not be appropriate under the circumstances to order demolition of buildings (a four storey residential building in the case of the Zamlaz mosque, a small Orthodox church on the site of the Divić mosque) constructed upon disputed real property previously owned or possessed by the applicant (case no. CH/98/1062, *Islamic Community in Bosnia and Herzegovina*, decision on admissibility and merits of 9 November 2000, paragraphs 120 and 122, and decision on review of 4 September 2001, Decisions July-December 2001, paragraphs 28 and 33). Instead, in that case, the Chamber ordered the respondent Party to provide a remedy to the Islamic Community for the violation of its human rights by allocating other suitable and centrally located building land in the town of Zvornik and by paying compensation for pecuniary and non-pecuniary damages (*id.* at paragraphs 29, 34, 37, and 38).

168. In the present case, the Chamber takes into consideration that there remain approximately 780m^2 of land on which to re-establish the Kizlaragina Mosque complex as a place of worship for the Muslim community in Mrkonjić Grad. The Chamber also takes into consideration that it is not in a position to evaluate whether the restoration of the Kizlagarina Mosque complex as a cultural landmark requires the business premises to be removed. The Chamber will therefore not order the respondent Party to remove the business premises. This does not exclude, of course, that the applicant may seek an order for the demolition of the unlawfully constructed business premises from the competent authorities.

169. For the same reasons, the Chamber does not find it necessary to order the respondent Party to allocate other suitable and centrally located building land in the town of Mrkonjić Grad.

170. The Chamber notes that by the procedural decision of 7 April 1995, the Municipal Assembly determined that compensation shall be paid to the Islamic Community for the real property seized from it. In the submissions of the respondent Party, the compensation for the seized real property was assessed by the Municipality of Mrkonjić Grad at 20,000 KM. The applicant has requested to be compensated for pecuniary damage in the same amount. However, the applicant states that this amount relates to the control of the property during the period from 1995 until the present and does not relate to a permanent dispossession. The Chamber will therefore order the respondent Party to take all necessary action to ensure that the amount of compensation for seizure is re-assessed based on present day evaluations, a new compensation offer made to the applicant and the applicant provided access to the remedies foreseen by the applicable law in case of dispute on the appropriate amount.

171. Considering, however, that an offer of 20,000 KM has already been made by the Municipality, the Chamber finds it appropriate to order the respondent Party to pay 20,000 KM on account of the pecuniary damage due to the applicant without further delay, and at the latest by 22 January 2004.

172. In addition to the compensation for the pecuniary damage arising from the unlawful seizure, the applicant must be provided with a remedy for the violation of its human rights protected by Articles 6(1) and 9 of the Convention, Article 1 of Protocol No. 1 to the Convention and for the discrimination suffered. In determining the proper remedy, the Chamber takes particular note of the aggravating facts that the Municipality of Mrkonjić Grad has failed to act in accordance with the Decisions of the High Representative of 26 May 1999 and 27 April 2000 and disregarded the Chamber's order for provisional measures of 10 October 2001.

173. In assessing the level of non-pecuniary compensation to award the applicant, the Chamber notes the difficulties inherent in the determination of an adequate monetary compensation for this kind of violation. In particular, the Chamber recalls that the business premises were constructed on the site of a Muslim cemetery without exhuming the graves and that a representative of the

respondent Party attempted to justify this by saying that they were "non-functional" graves and that no one had in fact been buried there for 50 years. The Chamber will also pay particular attention to the fact that the Islamic Community was excluded from the seizure and allocation proceedings on the ground that the authorities had no way of contacting them. This may have been the case, although not an entirely convincing argument, during the proceedings in 1995. However, the Chamber has also established that the applicant corresponded with the Department for Physical Planning, Housing and Communal Affairs of the Municipality of Mrkonjić Grad, an organ of the Municipality, during November and December 2000, and the fact that the Municipal organs still complain that they had no way of contacting the applicant or its legal representative is quite simply absurd.

174. The Chamber recalls that a special stigma must be attached to deliberate treatment of discrimination on grounds of religious or ethnic origin. The Chamber also points out that the facts of the present case reveal a particularly serious form of discrimination practised, or at the very least passively observed, by the authorities of the Republika Srpska against the Islamic Community and seems to be aimed at humiliating the applicant and thereby disrupting the process of return in the Municipality of Mrkonjić Grad, in violation of the Agreement. The Chamber notes that any amount of compensation that it awards the applicant for non-pecuniary damage will not fully remedy the applicant's complaints and return the previous *status quo*. Accordingly, taking all of the above into consideration, the Chamber deems it appropriate to award the applicant a substantial amount of compensation. The Chamber will order the respondent Party to pay to the applicants the lump sum amount of 50,000 KM as compensation for non-pecuniary damage suffered by it as a result of the violations of their human rights. The lump sum amount ordered in this paragraph shall be paid to the applicants by 22 February 2004 at the latest.

175. Additionally, the Chamber awards simple interest at an annual rate of 10% on the sum awarded to be paid to the applicant in paragraphs 171 and 174 above. Interest shall be paid as of one month from the date on which the sums awarded or any unpaid portion thereof until the date of settlement in full.

IX. CONCLUSIONS

176. For the above reasons, the Chamber decides,

1. unanimously, to declare the application inadmissible in relation to events that occurred prior to the entry into force of the Agreement on 14 December 1995;

2. by 12 votes to 1, to declare the application inadmissible in relation to the refusal of the permit to rebuild the Kizlagarina Mosque;

3. unanimously, to declare the remainder of the application admissible;

4. unanimously, that the applicant has been denied the right of effective access to court as guaranteed by Article 6, paragraph 1 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Agreement;

5. unanimously, that there has been a violation of the right of the applicant 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. unanimously, that there has been a violation 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, the respondent Party thereby being in violation of Article I of the Agreement;

7. unanimously, that the Islamic Community has been discriminated against in the enjoyment of its right to freedom of religion as guaranteed in Article 9 of the Convention and of 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;

8. by 10 votes to 3, to order the respondent Party to ensure that by 31 March 2004 ownership of plot no. 26/82-1 is transferred to the applicant and that the applicant is permitted to fence in the perimeter of the plot without any further obstruction or hindrance;

9. unanimously, to order the respondent Party to consider any future requests by the applicant for a permit for the reconstruction of the Kizlaragina Mosque on plot no. 26/82-1 in good faith and to grant permission without unreasonable conditions;

10. unanimously, to order the respondent Party to ensure, at the latest by 22 January 2004, that all cars, temporary facilities, and refuse, are removed from plot no. 26/82-1, that the site is fenced in and handed over to the applicant;

11. unanimously, to order the respondent Party to take all necessary action to ensure that the amount of compensation for seizure is re-assessed based on present day evaluations, and a new offer for pecuniary compensation for the seizure of plot no. 26/82-2 is made to the applicant. In no case shall the new offer amount to less than 20,000 KM;

12. unanimously, to order the respondent Party to make an advance payment on the pecuniary compensation to be established in accordance with conclusion no. 11 in the amount of 20,000 KM (twenty thousand Convertible Marks), at the latest by 22 January 2004;

13. by 10 votes to 3, to order the respondent Party to pay to the applicant, no later than 22 February 2004, the sum of 50,000 KM (fifty thousand Convertible Marks) by way of compensation for non-pecuniary damage;

14. unanimously, to dismiss the remainder of the applicant's requests for remedies;

15. unanimously, that simple interest at an annual rate of 10% (ten percent) will be payable on the sums awarded in conclusions 12 and 13 above from the expiry of the period set for such payment until the date of final settlement of all sums due to the applicant under this decision; and

16. unanimously, to order the Republika Srpska to report to the Human Rights Commission within the Constitutional Court by 22 February 2004 and again on 31 March 2004 on the steps taken by it to comply with the above orders.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber