



DECISION ON ADMISSIBILITY AND MERITS

Cases nos. CH/00/3802 and CH/00/3823

Šefik MEHIDIĆ and Islam HUSEJNOVIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, sitting in plenary session on 4 November 2004 with the following members present:

Mr. Jakob MÖLLER, President
Mr. Miodrag PAJIĆ, Vice-President
Mr. Želimir JUKA
Mr. Mehmed DEKOVIĆ
Mr. Andrew GROTRIAN

Mr. J. David YEAGER, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Meagan HRLE, Deputy Registrar

Having considered the aforementioned applications introduced to the Human Rights Chamber for Bosnia and Herzegovina 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;

Noting that the Human Rights Chamber for Bosnia and Herzegovina (“the Chamber”) ceased to exist on 31 December 2003 and that the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina (“the Commission”) has been mandated under the Agreement pursuant to Article XIV of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina entered into on 22 and 25 September 2003 (“the 2003 Agreement”) to decide on cases received by the Chamber through 31 December 2003;

Adopts the following decision pursuant to Article VIII(2) and Article XI of the Agreement, Articles 5 and 9 of the 2003 Agreement and Rules 50, 54, 56 and 57 of the Commission’s Rules of Procedure:

I. INTRODUCTION

1. The applicants complain that since 1994 the Municipality Zvornik has been using the abandoned and war-destroyed Bosniak village of Sultanovići as a dump. They have alleged that there has been no decision by a competent body authorizing such dumping, and that their property has neither been expropriated nor they have been compensated. Originally, the applicants requested the Chamber to suspend further dumping on the private property of the inhabitants of the village of Sultanovići and to order the removal of the garbage. After having submitted their application to the Chamber, the applicants initiated court proceedings against the Municipality of Zvornik for damage compensation. On 27 September 2002 the First Instance Court in Zvornik issued a judgment obliging the Municipality of Zvornik to pay compensation to the applicants. The Municipality of Zvornik appealed against the judgment, however, and the District Court in Bijeljina has not decided on the appeal for over 18 months. The applicants complain that the proceedings on appeal are unjustifiably delayed and that they are still not able to use their property.

2. The applications raise issues under Article 6(1) (right to a fair hearing) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights (“the Convention”) and Article 1 of Protocol No. 1 to the Convention (right to peaceful enjoyment of possessions).

II. PROCEEDINGS BEFORE THE CHAMBER AND COMMISSION

3. The applications were submitted on 26 May 2000.

4. On 6 May 2004, considering the similarity between the facts of the cases and the applicants’ complaints, the Commission decided to join the applications in accordance with Rule 32 of the Commission’s Rules of Procedure. On the same day, the Commission decided to transmit the applications to the respondent Party under Articles 6 and 8 of the Convention and Article 1 of Protocol No. 1 to the Convention.

5. On 11 May 2004 the Commission transmitted the applications to the respondent Party.

6. On 9 June 2004 and 14 June 2004 the respondent Party submitted its observations on admissibility and merits of the applications.

7. On 10 June 2004 and 15 June 2004, the Commission transmitted the respondent Party’s observations to the applicants.

8. On 25 June 2004 and 29 June 2004, the applicants submitted their written observations in reply. On 9 June 2004 and 30 June 2004, the Commission transmitted the applicants’ written observations to the respondent Party.

9. The Commission considered the applications on 6 May 2004, 7 September 2004, and 4 November 2004. On the latter date, it adopted the present decision.

III. FACTS

10. On 16 September 1994 the Ministry of Health, Labour and Social Protection – Sanitary Inspection of Republika Srpska issued a procedural decision approving cadaster lot no. 2161/1 as a sanitary garbage dump in the “Luke” valley of the Jošanica river (in the area of the village of Sultanovići). From the procedural decision it appears that the report choosing this location for a sanitary garbage dump for the city of Zvornik was prepared by the Faculty of Technology in Zvornik. The reasoning of the procedural decision states that the Public Utility Company “Rad” Zvornik from Zvornik, by its request of 28 August 1994, requested approval of the sanitary garbage dump in this location as a sanitary garbage dump for the city of Zvornik. It further states that an

on-site inspection determined that this location was suitable for a fully sanitary garbage dump. It also states, *inter alia*, that the dump would not endanger any residential area.

11. On 1 December 1994 the Ministry of Agriculture, Forestry and Water Management gave instructions relating to water management to the Public Utility Company "Rad" for the preparation of technical documentation necessary for the issuance of water management approval for creating the new sanitary garbage dump "Luke" in the valley of Jošanica river. In those instructions, among other things, it is stated that by on-site inspection it was determined that it is an area with no inhabited housing construction because the houses were completely demolished during the war and their occupants displaced. It further states that, on the highest point of the valley upstream, the village Sultanovići was located, and that it was completely abandoned. The instructions note that the location of the future city dump "Luke" was chosen in order to solve the garbage disposal problem for the cities of Zvornik and Mali Zvornik for the next 50 to 100 years.

12. The applicant Islam Husejnović submitted to the Chamber a decision of the Commission for Property Claims of Refugees and Displaced Persons ("CRPC") of 12 November 1998 confirming that on 1 April 1992 he was the bona fide possessor of the real estate marked as cadastral lot no. 2439/2 from the deed of title no. 2659 KO Zvornik-Zvornik. On 10 April 2000 the applicant Islam Husejnović filed a request for enforcement of this decision.

13. On 26 September 2000 the applicants submitted actions to the First Instance Court in Zvornik against the Municipality of Zvornik for redress and compensation of damages. The applicant Šefik Mehidić filed the action along with other heirs of his deceased father. The applicants have identified their plots by the CRPC decisions. From the action filed by Šefik Mehidić, it appears that the CRPC decision of 1 February 2000 established that on 1 April 1992 his deceased father (Abdulah Mehidić) was the bona fide possessor of the real estate marked as cadastral lot no. 2439/1, KO Zvornik-Zvornik.

14. On 27 September 2002 the First Instance Court in Zvornik issued a judgment ordering the Municipality of Zvornik to pay the applicant Islam Husejnović damage compensation of KM 63,477.90 and to pay Šefik Mehidić and others KM 76,988.00. These amounts include compensation for technical and biological re-cultivation of the land, damages from inability to use the land during three years of re-cultivation, damages to fruit trees, damages to the plaintiffs' facilities, compensation for transport and removal of garbage, compensation for removal of garbage and construction materials to enable access to the facility, and compensation for repair of the water supply and sewage installations and cleaning of the drainage canal. The Court also obliged the defendant to pay KM 1,507.50 to Islam Husejnović and KM 2,276.00 to Šefik Mehidić and others for their loss of income due to the inability to cultivate the land from 2000 until the payment of compensation for damages for the land re-cultivation.

15. The reasoning of the judgment states that the court joined the applicants' cases and conducted compound proceedings. It also appears from the reasoning that the probate proceedings for the estate of the deceased Abdulah Mehidić (the father of Šefik Mehidić) were conducted and completed by a final and binding decision of the First Instance Court in Zvornik. By the court's procedural decision of 12 June 2001, Šefik Mehidić, along with others, was pronounced the heir to the real estate registered in deed of title no. 2426. He is also entitled to cadastral lot at issue, no. 2439/1, which is included in the garbage dump.

16. The reasoning of the First Instance Court judgment further states that water management approval, urban plan approval, and a building permit were not obtained, which the Municipality of Zvornik did not dispute.

17. The reasoning of the judgment further states that the applicants entered into possession of the real estate in question in November 1999, when villagers of Sultanovići returned to the village. The applicants, along with other villagers, received donated construction materials for reconstruction of their houses. The court states that the applicants, because they had to remove the garbage, hired excavators. The Court further states that the applicants' houses had been destroyed and were partly preserved only on the ground floor, but filled with garbage.

18. The judgement further states that before the war the applicants had 3,000 raspberry seedlings planted on 1.5 dunum (1 dunum equals approximately 900 square meters) as sub-contractors of the "Agroprom" company in Zvornik. The court established that the applicants had grown vegetables on the remaining land.

19. The judgment also states that the court established, through the findings of an agricultural expert, that the land concerned is of good quality because the crops grow with minimum investment, and that the land is along the alluvial deposits of the Jošanica river. It states that, at the time of the expert's onsite investigation, the garbage had been removed from the land. The expert further stated that, according to technology relating to garbage disposal, it was an uncontrolled garbage dump created without the pressing of garbage or covering layers of garbage with soil. According to his statement, because it is located on porous alluvial soil, deeper layers of the land became contaminated and it was necessary to conduct a chemical and biological analysis to detect the presence of heavy metals. Land containing heavy metals is permanently excluded from the production of livestock feed or food for human consumption. The expert also stated that, due to the need for biological re-cultivation of the land, no crops could be expected for three years, and fruits can not be grown for ten years or more until the concentration of contaminants is reduced by the natural washing out process.

20. The judgment further states that, during the onsite investigation conducted on 19 April 2002 in the presence of the agricultural and construction engineering experts, the court established that the defendant started removing the garbage and that only superficial remnants of garbage were visible on the land.

21. Finally, the judgement states that the court found that the defendant was responsible for all damages that occurred due to its creation of the garbage dump on the applicants' land. Thus, it was responsible for returning the land to its original state, as it had been before the damage occurred. The defendant is further obliged to compensate the applicants for the damage and for lost profits within the meaning of Articles 154, 185, and 189 of the Law on Obligations.

22. On 10 December 2002 the Municipality of Zvornik, through the Public Prosecutor's Office of the Republika Srpska, deputy's office in Bijeljina, mailed an appeal against the First Instance judgement. The Second Instance court in Bijeljina has not issued yet a decision on the appeal.

23. On 19 January 2000 the applicants addressed the Executive Board of the Municipal Assembly Zvornik, requesting the removal of the dump. The applicants also addressed the Office of the Ombudsman for Human Rights for Bosnia and Herzegovina, OHR, UNHCR, IPTF, and SFOR.

24. In his letter of 25 March 2004, the applicant Islam Husejnović alleges that, although the applicants' houses were reconstructed, they cannot move in to them. He rents an apartment with his family in Tuzla, and the applicant Šefik Mehidić lives with his family in the collective centre Mihatovići in Tuzla. Mr. Husejnović complains that their case remains pending before the Second Instance Court in Bijeljina and that the proceedings have been delayed in order to make them lose their patience and to prevent them from repossessing their property. Further, he alleges that the appeal of the Municipality of Zvornik was filed out of time (see paragraph 40 below).

25. In his letter of 13 April 2004, the applicant Šefik MEHIDIĆ also complains that his case remains pending before the Second Instance Court in Bijeljina and that the proceedings have been delayed. Thus, he and his family have been prevented from repossessing their property. Further, he alleges that the appeal of the Municipality of Zvornik was filed out of time (see paragraph 40 below).

IV. RELEVANT DOMESTIC LEGISLATION

A. The Law on Basic Proprietary-Legal Relations (Official Gazette of SFRY ("OG SFRY"), no. 6/80 and Official Gazette of the Republika Srpska ("OG RS") no. 38/03).

26. Article 3 of the Law provides as follows:

"Everyone is obliged to refrain of breaching the property rights of other person."

27. Article 8 provides:

"The property right may be removed or limited only under the conditions determined by the law in accordance with the Constitution."

B. The Law on Expropriation ("OG RS", nos. 8/96-381, 9/96-438 and 15/96-660)

28. Article 1 provides:

"Immovable property may be expropriated if required for the purpose of construction of economic, residential, utility, health, educational and cultural facilities, structures of national defense and other structures of general interests."

C. The Law on Civil Procedure

29. The Law on Civil Procedure of the Republika Srpska, ("OG RS", no. 58/03 of 17 July 2003, entered into force on 1 August 2003. Amendments to this Law were published in "OG RS", no. 85/03 of 23 October 2003 and entered into force on 31 October 2003, ("the new Law"). Until the issuance of the new Law, the Law on Civil Procedure ("OG SFRY", nos. 4/77, 36/80, 69/82, 58/84, 74/87, 27/90 and 35/91, and "OG RS", nos. 17/93, 14/94 and 32/94), ("the old Law") was applied in the Republika Srpska.

30. Article 357 of the old Law provides:

"The appeal is filed with the court that has pronounced the first instance judgment in the sufficient number of copies for the court and the opposing party."

31. Article 358 of the old Law provides:

"The appeal that is untimely, incomplete (Article 351 paragraph 1) or inadmissible shall be dismissed by a procedural decision issued by the President of the Panel of the first instance court without conducting the hearing."

32. Article 359 of the old Law provides:

"A copy of the appeal that has been filed in time, that is complete and admissible, shall be served by the court of first instance to the opposing party, who may than, within eight days since receipt of the appeal, submit to the same court its reply to the appeal.

"The court of the first instance shall serve one copy of the reply to the appeal to the plaintiff.

"The reply to appeal that has not been submitted in time shall not be dismissed, instead, it shall be sent to the court of second instance which shall take it into consideration if that is still possible."

33. Article 360 of the old Law provides:

"Upon receiving the reply to the appeal or after the close of pleadings, the President of the Panel shall deliver the appeal and the reply to the appeal, if it has been submitted, along with all other records, to the court of second instance."

"If the applicant claims that the provisions of the code of civil proceedings have been

breached during the proceedings before the court of first instance, the President of the Panel of the court of first instance shall issue an explanation in respect to the allegations of the appeal, and if necessary, it shall conduct an investigation for the purpose of determining the veracity of such allegations.”

34. Article 361 of the old Law provides:

“When the documents related to the appeal are received at the court of second instance, the President of the Appellate Panel shall appoint a judge-rapporteur.

“The judge-rapporteur may, if need be, obtain from the court of first instance a report on violations of the rules of the proceedings and insist that an investigation is conducted in that respect.”

35. Article 217 of the new Law provides:

“The court of second instance shall decide on the appeal at the session of the Panel or on the basis of the hearing that has been held.

“The court of second instance shall schedule the hearing when it assesses that, for correct establishment of the facts before the court of second instance, it is necessary to determine new facts or examine new evidence or re-examine evidence that have already been presented as well as when it assesses that it is necessary to hold the hearing before the court of second instance because of the violations of the provisions of the civil proceedings.

“The court of second instance shall hold the Panel session, i.e. the hearing, within forty-five days since receipt of the files related to the appeal by the court of first instance.

“The court of second instance shall issue a decision within thirty days from the date of the Panel’s session, on which it has been decided on the appeal, i.e. if the hearing has taken place, within thirty days from the date of the conclusion of the hearing.”

36. Article 366 of the old Law provides:

“The court of second instance may, at the session of the Panel or on the basis of the hearing held, dismiss the appeal as untimely, incomplete or inadmissible, or reject the appeal as ill founded and uphold the judgment of the court of first instance or cancel that judgment and send the case to the court of first instance for retrial or cancel the judgment of the court of first instance and dismiss the appeal or alter the judgment of the court of first instance.

“The court of second instance may also cancel the judgment when the appellant requests its alteration, and it may alter the judgment when the appellant requests its cancellation.”

37. Article 456 of the new Law provides:

“If the first instance judgment has been issued before the entry into force of this Law, by which the proceedings before the court of first instance is completed, the further proceedings shall be conducted under the former regulations.

“Except for the provision of paragraph 1 of this Article, in the proceedings on legal remedies in the cases in which the first instance judgment has been issued before the entry into force of this Law, instead of the provisions of Articles from 362 to 364, and Articles from 369 to 373, and Articles from 394 to 397 of the Law on Civil Procedure (“OG SFRY”, nos. 4/77, 36/80, 69/82, 58/84, 74/87, 27/90 and 35/91, and “OG RS”, nos. 17/93, 14/94 and 32/94), the provisions of Articles from 217 to 220, and Articles from 227 to 229, and Articles from 249 to 251 of this Law shall be applied.

“If the first instance decision under paragraph 1 of this Law is cancelled upon the entry into force of this Law, the further proceedings shall be conducted under this Law.”

V. SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. As to the facts

38. In its observations the respondent Party states that the applicants' allegation that in 1994 the Municipality Zvornik started to use the land concerned as a city dump without a decision of the competent authorities is ill-founded. The respondent Party states that the Ministry of Health, Labour and Social Protection – Sanitary Inspection of Republika Srpska issued a procedural decision on 16 September 1994 giving sanitary approval for cadaster lot no. 2161/1 as a sanitary garbage dump on the location "Luke" valley of Jošanica river (in the area of the village of Sultanovići). The Ministry of Agriculture, Forestry and Water Management gave instructions on 1 December 1994 for the elaboration of technical documentation. In those instructions, among other things, it is stated that by on-site inspection it was determined that it is an area with no inhabited housing construction because the houses were completely demolished during the war and their occupants displaced, that on the highest point of the valley upstream the village Sultanovići was located, and that it was completely abandoned. It is further stated that the location of the future city dump "Luke" was chosen in order to solve the garbage dump problem for the cities of Zvornik and Mali Zvornik for the next 50 to 100 years.

39. The respondent Party further points out that the contents of the city dump were moved during the first half of 2002 by the company d.o.o. "Kočanj Prom" from Zvornik.

40. The respondent Party further asserts that the applicant Husejnović's allegations that the appeal against the judgment of the First Instance Court in Zvornik of 27 September 2002 was filed out of time and that the case has been pending before the Second Instance Court in Bijeljina in order to "prolong" the proceedings are incorrect. The president of the District Court in Bijeljina pointed out that the case related to the appeal of the Municipality of Zvornik was received on 3 January 2003 by the District Court in Bijeljina and that it was assigned to the deciding judge on 3 May 2004 for consideration. The president of the District Court in Bijeljina further asserts that the case has not yet been resolved because of personnel problems in the Court, which is why for objective reasons they are unable to solve the case quickly and to the parties' satisfaction. He states that the case will be resolved at the latest by the end of September 2004. The President of the Court further states that, because of the reform of the judicial system in Bosnia and Herzegovina, the election of six judges was halted, which affects the efficiency and the promptness of the court, especially in the area of the second-instance civil proceedings. After the election of judges by the High Judicial and Prosecutor's Council (which was completed on 30 January 2004) all judges were not elected in the Bijeljina court, which is why a public vacancy notice was published for the election of four permanent judges and two part-time judges. In the area of the second-instance civil proceedings, one permanent judge and one part-time judge are currently employed, when there should be eight judges (five permanent and three part-time). The election of these judges should have been completed by the end of May 2004. It is further stated that because of the lack of judges, from November 2001 until the present only two judges have worked in the area of the second-instance civil proceedings, and that the number of unsolved cases is constantly increasing, such that on 31 March 2004 the Second Instance Court had 2,130 unsolved cases. It is further stated that the appeal against the verdict of the First Instance Court was not filed out of time through the Public Prosecutor's Office of the Republika Srpska. The respondent Party also states that the allegation of the applicants that they cannot return to their houses because of the garbage dump is ill-founded because in the verdict of the First Instance Court of 29 July 2002 it is stated that after the inspection was performed "the access was made possible to this house, too" (in relation to Islam Husejnović).

2. As to the admissibility

41. The respondent Party alleges that the court proceedings were initiated in September 2000 and completed by the first instance judgment in September 2002, thus proving that there was an efficient legal remedy. Considering that the judgment is not final and binding, the respondent Party

proposes that the application be declared inadmissible as premature for non-compliance with the requirement under Article VIII(2)(a).

3. As to the merits

42. As to Article 6 of the Convention, the respondent Party states that it cannot be established from the applications whether the applicants complain of a violation of their “right to access to court” or their right to a fair hearing “within reasonable time”. The respondent Party states that in these cases it cannot be about a violation of the “right to access to court” but perhaps about a violation of the “reasonable time” requirement. The respondent Party states that the action was filed in September 2000 and that the court issued a verdict after two years. During the civil proceedings, as a preliminary question, the court had to resolve the issue of the plaintiff’s standing to sue, which is why in 2001 it conducted probate proceedings. Thus, in the respondent Party’s opinion, the proceedings met the “reasonable time” requirement. The respondent Party states that the applicants have no reason to fear that the second instance court would purposely “delay” the proceedings in the case so that they lose patience. Therefore the respondent Party proposes that the Commission reject the applications in relation to Article 6 of the Convention as ill-founded.

43. Regarding Article 8 of the Convention, the respondent Party states that the applicants did not specify whether the respondent Party does not recognize their right to home or whether it interferes with this right. The respondent Party states that it reinstated the applicants into possession of their pre-war homes on the basis of the CRPC decision, which means that it recognized their right to home completely. The respondent Party maintains out that the city dump was legally established at the time when the applicants were not living in their homes, and that it was removed as soon as they came back, so that it would not interfere with their right to home. It is further stated that the applicants never initiated civil proceedings for harmful emissions in accordance with the Law on Proprietary Legal Relations, but they only initiated proceedings for damage compensation. The respondent Party further maintains that the dump was established in 1994 in the public interest as a necessary measure so the requirement of paragraph 2 of Article 8 of the Convention was met. The respondent Party proposes that this part of the application also be rejected as ill-founded.

44. Regarding Article 1 of the Protocol No. 1 to the Convention, the respondent Party states that it is indisputable that in 1994 the city dump was established on the applicant’s property, and that the respondent Party did not have their addresses in order to pay them damage compensation. The aforementioned was done as a necessity “in the general interest” which means that the applicants were not deprived of their property, but only that its use was limited. Thus, at that time (in 1994) the requirement of the right to undisturbed enjoyment of property was fulfilled. The respondent Party states that because of the applicant’s return to their homes, it removed the city dump so that it would not in any way disturb the applicants’ peaceful enjoyment of their property, nor were their property right contested. Therefore the respondent Party proposes that the applications should also be rejected on these grounds.

B. The Applicants

45. The applicants state that the respondent Party’s allegations that Zvornik Municipality built the dump legally on their land are unacceptable and legally ill-founded. They state that the procedural decision of the Sanitary Inspection and Water Management Instructions by the Ministry of Agriculture and Forestry does not equal the establishment of the legality of the dump because the legality of the dump implies the establishment of rights over the real estate and then securing all the necessary approvals. They also state that the respondent Party neglects the provisions of Article 2 of the Law on Cessation of the Application of the Law on Abandoned Property. The applicants further point out that the dump on their real estate was established by simply determining the location for garbage disposal, and that soon a quantity of garbage was piled there, which buried their houses, auxiliary buildings and lots in their entirety, while nothing was done in advance to protect the environment. The liquid waste from the dump flowed directly into the river Jošavka, which bordered directly on the dump.

46. The applicants further state that the allegations of Municipal Administration of Zvornik that the location was returned to its original state are untrue. They point out that, regardless of the fact that they initiated court proceedings, the garbage disposal continued until, in the beginning of 2002, the competent SFOR service prohibited the depositing of garbage and threatened to confiscate the vehicles. In mid-2002 a rough removal of the garbage dump was made. However, the lots were not returned to their previous state because they are still covered with the remains of garbage 25 to 30 cm deep, and it is necessary to remove it and then start technical and biological re-cultivation of the land. The applicants state that they refuse to receive the conclusions on CRPC decision's enforcement permit by the Ministry for Refugees and Displaced Persons in Zvornik until such time when their property is returned to its original state or the damage incurred is compensated partially at least. Also, they state that they cannot accept the allegations of the Second Instance Court in Bijeljina that for objective reasons they still have not decided on the appeal filed against the judgment of the First Instance Court in Bijeljina of 27 September 2002. They point out that the reorganization of this court started in the beginning of 2004, and that the appeal was filed on 9 December 2002. The applicants state that they cannot accept any of the reasons put forward by the President of the Second Instance Court in Bijeljina to justify the fact that in their case there had been no decision for one year and eight months as of the time of submission of their observations in June 2004.

47. The applicants state that their application concerns the inaction of the second instance court for longer than 18 months as of June 2004. They complain that, despite the fact that they partially renovated their houses, the respondent Party's behaviour continues to prevent them from undisturbed use of their property. They point out that they do not live in their houses and state that they have been disturbed in the realisation of their rights to home and use of their property because the garbage dump has not been completely removed, the land has not been sanitized, and no analysis of the hygienic conditions of the land has been made. Moreover, they do not have the means to do these things themselves. They further complain that they must pay rent for apartments and that, as displaced persons, they are unemployed and they have no regular income, earning their living through occasional jobs. The applicant Islam Husejnović invites the Commission to make an on-site inspection to see that his buildings are uninhabited and that some 6,000 square metres of formerly fertile land planted with fruit trees is still buried under garbage and poisoned by the remains of the dump. He has also submitted photographs dated 15 June 2004. Both applicants further state that the respondent Party's allegations that the dump was removed and that they, as the owners, are able to access their property are untrue. They state that, in a technical sense, they are able to access their property in the same way they could at the time of intensive waste dumping. The applicants state that they only have conditional access to the property, and that they are presently prevented from living a normal life on their own property. According to them, the removal of a garbage dump requires a technical and biological re-cultivation of land, including all the necessary analyses of the land as determined by the judgment of the First Instance Court in Zvornik of 27 September 2002.

VI. OPINION OF THE COMMISSION

A. Admissibility

48. The Commission recalls that the applications were introduced to the Human Rights Chamber under the Agreement. As the Chamber had not decided on the applications by 31 December 2003, in accordance with Article 5 of the 2003 Agreement, the Commission is now competent to decide on the applications. In doing so, the Commission shall apply the admissibility requirements set forth in Article VIII(2) of the Agreement. Moreover, the Commission notes that the Rules of Procedure governing its proceedings do not differ, insofar as relevant for the applicants' case, from those of the Chamber, except for the composition of the Commission.

1. Exhaustion of effective legal remedies

49. In accordance with Article VIII(2) of the Agreement, "the [Commission] shall decide which applications to accept.... In so doing, the [Commission] shall take into account the following

criteria: (a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted....”

50. According to Article VIII(2)(a) of the Agreement, the Commission shall take into consideration whether effective remedies exist, and the applicant has demonstrated that they have been exhausted. In *Blenić* (case no. CH/96/17, decision on admissibility and merits of 5 November 1997, paragraphs 19-21, Decisions on admissibility and merits 1996-1997), the Chamber took into consideration this criterion on admissibility in light of the pertinent requirement for exhaustion of domestic remedies in the former Article 26 of the Convention (now Article 35(1) of the Convention). The European Court of Human Rights ("the European Court") found that the existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. In addition, the court held that in applying the rule it is necessary to take realistic account not only of the existence of formal remedies in the legal system of the party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants.

51. In its observations, the respondent Party alleges that the court proceedings were initiated in September 2000 and were completed in the first instance judgment in September 2002, thus proving that there was an efficient and effective legal remedy. Given that the judgment is not final and binding, the respondent Party proposes that the application be declared inadmissible.

52. The Commission notes, however, that the proceedings on appeal have been pending before the District Court in Bijeljina for almost two years. Therefore, having regard to the length of this appellate proceeding, the Commission cannot accept the respondent Party's proposal to declare the application inadmissible as premature. Accordingly, the Commission concludes that the requirement of admissibility set forth in Article VIII(2)(a) of the Agreement has been met.

2. Conclusion on admissibility

53. The Commission finds no other ground for declaring the application inadmissible, and therefore decides to declare the application admissible.

B. MERITS

54. Under Article XI of the Agreement, the Commission 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 recognized human rights and fundamental freedoms," including the rights and freedoms provided for in the Convention and the other international agreements listed in the Appendix to the Agreement.

1. Article 6 of the Convention

55. Article 6 paragraph 1 of the Convention reads:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

56. The applicants complain of the inaction of the second instance court, which has taken no action in their case for almost two years. The applicants state that the proceedings have been delayed deliberately so that they lose their patience, and that because of this they and their families have been prevented from returning to their property. They state that efficient organization of the judiciary is the obligation and responsibility of the respondent Party, the Republika Srpska.

57. The respondent Party states that, in the applicants' case, a legal action was filed in September 2000 before the First instance Court in Zvornik, and that the Court issued a verdict after two years. The respondent Party further states that, in its opinion, the proceedings met the "reasonable time" requirement. The respondent Party also states that the applicants have no

reason to fear that the second instance court would purposely “delay” the proceedings in their case so that they will “lose patience”. According to the respondent Party, information from the District Court in Bijeljina indicates that the respondent Party has undertaken all actions to remedy the situation. It further stated that, according to information from the District Court in Bijeljina, the case should have been resolved at the latest by the end of September 2004. The President of the District Court in Bijeljina has given a detailed explanation of personnel problems in relation to judicial reform, which is why, for objective reasons, he states, the respondent Party has been unable to solve the case quickly and to the parties’ satisfaction.

58. The Commission shall determine whether there has been a violation of Article 6(1) of the Convention as to the length of proceedings in the appeal filed by the Municipality of Zvornik, through the Public Prosecutor’s Office of the Republika Srpska in Bijeljina, before the District Court in Bijeljina against the judgment of the First Instance Court in Zvornik of 27 September 2002.

59. The reasonableness of the length of proceedings is to be assessed in the light of the circumstances of each individual case, having regard to the following criteria: the complexity of the case, the conduct of the applicant, and the conduct of the relevant authorities (see, e.g., case no. CH/97/54, *Mitrović*, Decision on admissibility of 10 June 1998, Decisions and Reports 1998).

60. The Commission notes that the appeal by the Municipality of Zvornik against the judgment of the First Instance Court in Zvornik of 27 September 2002 was filed on 10 December 2002 by registered mail. The applicants’ case was received on 3 January 2003 by the District Court in Bijeljina and allocated to the deciding judge on 3 May 2004. Accordingly, almost two years have passed from the date the appeal was mailed, and that the District Court in Bijeljina has not issued its decision to date.

61. The Commission notes that the respondent Party has candidly presented the problems regarding judicial reform faced by the District Court in Bijeljina, which it asserts have caused its failure to issue the decision on the appeal. The Commission finds, however, that the respondent Party should have organized judicial reform in a way that was not to the applicants’ detriment, and, further, that it should have provided them with a second instance decision within a “reasonable time limit”, which, the Commission concludes, would certainly be less than the time that has elapsed since the filing of the appeal.

62. According to the European Court’s case law, an excessive workload in general is not recognized as a justification for delay because Contracting States have a general duty to organize their legal systems in such a way that their courts can meet each of the requirements of Article 6 (European Court of Human Rights, judgment of 26 November 1992, *Francesco Lombardo versus Italy*, Series A no. 249-B, page 27). According to its long-standing case law, a temporary backlog of business does not implicate liability on the part of a Contracting State, provided that it takes, with the requisite promptness, remedial action to deal with an exceptional situation of this kind (Eur. Court HR, judgment of 13 July 1983, *Zimmermann and Steiner versus Switzerland*, Series A no. 66, pages 11-13). The measures taken are assessed with regard to their effectiveness (Eur. Court HR, Report of 12 December 1983, *Neubeck versus the Federal Republic of Germany*, D&R 41, 1985, page 13, 32-33). It must also be ascertained whether they have been taken in good time; measures taken late cannot make up for the fact that a reasonable time period has been exceeded (Eur. Court HR, Report of 12 March 1984, *Marijnissen versus the Netherlands*, D&R 41, 1985, pages 83, 90). When making this assessment, the court is prepared to take into consideration the political and social background in the country concerned (Eur. Court HR, judgment of 7 July 1989, *Union Alimentaria S.A. versus Spain*, Series A no. 157, page 15).

63. As to whether the applicants case is a complex one, the Commission notes that the European Court, when assessing the complexity of the case, has attached importance to several factors including the nature of the facts to be established (Eur. Court HR, judgment of 25 February 1993, *Dobbertin versus France*, Series A no. 256-D, page 117). The complexity may concern questions of fact as well legal issues (Eur. Court HR, judgment of 27 February 1992, *Lorenzi, Bernardini and Gritti. versus Italy*, Series A no. 231-G, page 75). The Commission finds that the nature of the facts in the applicants’ cases as well the legal issues relevant to resolving appellate

proceedings are not so complex to require almost two years.

64. The Commission also notes that, according to Article 217 of the Law on Civil Procedure of the Republika Srpska, which is applicable to the applicants' cases, the court of second instance shall hold its session within forty-five days of its receipt of the files related to the appeal, and it shall decide within thirty days of the date of the Panel's session in which the appeal has been considered. If a hearing has taken place, the court shall decide within thirty days of the date of the conclusion of the hearing. Since the District court has not decided on the appeal within the time limits determined by this Law, the respondent Party has violated the provisions of this Law.

65. As to the applicants' conduct, the Commission observes that, under the Law on Civil Procedure, they have no legal remedy available by which they could speed up the proceedings on the appeal, and they can only wait for the District Court in Bijeljina to issue its decision.

66. In these circumstances, the Commission can only conclude that the respondent Party failed to provide the applicants resolution of their case within a "reasonable time". Consequently, the Commission concludes that the respondent Party has violated the applicants' rights guaranteed by Article 6, paragraph 1 of the Convention.

2. Article 8 of the Convention

67. Article 8 of the Convention reads:

"Everyone has the right to respect for his private and family life, his home and his correspondence.

"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

68. The applicants complain that, despite the fact that they partially renovated their homes, they do not live in them because the garbage dump has not been completely removed, the land has not been sanitized, and no analysis of the hygienic condition of the land has been made. They do not have the means to carry out these activities themselves. They further complain that they must pay rent for apartments and that, as displaced persons, they are unemployed and have no regular income, earning their living through occasional jobs.

69. The respondent Party asserts that the applicants' allegation that they cannot return to their houses because of the garbage dump is ill-founded. The respondent Party refers to the verdict of the First Instance Court of 29 July 2002, stating that after the inspection was performed, access to the house of Islam Husejnović was made possible. The respondent Party further states that that it reinstated the applicants into possession of their pre-war homes on the basis of the CRPC decision, which means that it fully recognized their rights to their homes. The respondent Party maintains that the city dump was legally established during the time when the applicants were not living in their homes, and that it was removed as soon as they came back, so that it would not interfere with their rights to their homes. The respondent Party further maintains that the dump was established in 1994 as a necessary measure in the public interest.

70. The Commission shall first examine whether the property of the applicants represents their home within the meaning of Article 8(1) of the Convention.

71. The Commission notes that it is undisputed that the applicants lived in their houses and cultivated their land before the war and that, because of the war, they left their property temporary. Accordingly, the Commission finds that the property in question represents the home of the applicants within the meaning of Article 8(1) of the Convention.

72. The Commission shall next examine whether there has been an interference with the applicants' right to respect for their home.

73. The Commission observes that the District Court in Zvornik, in its judgment of 27 September 2002, stated that in November 1999 the applicants entered into possession of the real estate, but without any possibility of using it. By its judgement, the court obliged the Municipality of Zvornik to pay the applicants damage compensation for technical and biological re-cultivation of the land and for transport and removal of garbage.

74. Although that judgment is not final and binding, the Commission concludes that the court established in the proceedings that there were remains of garbage on the applicants' land and that the current situation is such that the land has been contaminated and requires technical and biological re-cultivation. Consequently, the Commission notes that the applicants' fear of living in their houses, which are located on the polluted land, and their fear of using the contaminated land for food production as they did before the war, is justified.

75. The European Court of Human Rights in Strasbourg has recognized, in the context of Article 8 of the Convention, the right of persons to be protected from severe environmental pollution which may affect their well-being and prevent them from enjoying their homes (*Guerra and Others v. Italy*, Eur. Court H.R. judgment of 19 February 1998, Series A no. 875; *Lopez Ostra v. Spain*, Eur. Court HR, judgment of 9 December 1994, Series A no. 303). Taking this case law of the European Court into account, the Commission considers that the applicants are entitled to protection under Article 8.

76. Although the dump has been removed except for remnants of garbage, the Commission finds that there is interference by the respondent Party with the applicants' right to respect for their home because the current situation is such that their land has been polluted by the dump and cannot be used for food production as it had been before the war.

77. In order to establish whether this interference has been justified and is therefore in compliance with the requirements set forth under Article 8, paragraph 2, the Commission must examine whether it has been "in accordance with the law", whether it has served a "legitimate aim", and whether it has been "necessary in a democratic society". If any of these requirements is not complied with, there will be a violation of Article 8 of the Convention.

78. The Commission notes that the First Instance Court in Zvornik, in the judgment of 27 September 2002, stated that neither water management approval, nor urban plan approval, nor a building permit were obtained. The respondent Municipality of Zvornik did not dispute this. In its observations, however, the respondent Party states that the dump was lawfully established, referring to the procedural decision of the Sanitary Inspection of Republika Srpska of 16 September 1994 and the letter of the Ministry of Agriculture, Forestry and Water Management of 1 December 1994 (see paragraph 38 above). It is undisputed that the dump was created on the applicants' land and that, according to the judgment of the First Instance Court in Zvornik, the resulting situation is such that their land is polluted. The Commission observes, however, that the respondent Party has not established that it conducted, before creating the dump, any legal proceedings in which the applicants were able to protect their interests. Having regard to the above, the Commission concludes that the respondent Party's interference has not been in accordance with the law.

79. The Commission therefore concludes that the Republika Srpska has violated the applicants' rights to respect for their home as guaranteed by article 8 of the Convention.

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

80. 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."

81. 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).

a. Existence of a "possession"

82. The European Court has stated repeatedly that "the concept of 'possessions' in Article 1 of Protocol No. 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions' for the purposes of this provision" (Eur. Court HR, *Iatridis v. Greece*, judgement of 25 March 1999, Reports of Judgements and Decisions 1999-II, page 96, paragraph 54).

83. The Commission notes that the relevant CRPC decisions in this case established that the applicant Islam Husejnović and the deceased father of Šefik Mehidić were the bona fide possessors of the real estate as follows: the applicant Islam Husejnović on cadastral lot no. 2439/2 and the deceased father of Šefik Mehidić on cadastral lot no. 2439/1 (see paragraphs 12, 13, and 15 above). The respondent Party has not disputed this, and, in its observations, it admits that the dispute involves the applicants' property (see paragraph 44 above). Having regard to the above, the Commission concludes that the applicants' real estate constitutes "property" within the meaning of Article 1 of Protocol No. 1 to the Convention.

b. Interference with the applicants' property

84. The applicants complain that the dump was not completely removed and that they, as the owners, have only incomplete access to their property. According to them, the removal of a garbage dump requires technical and biological re-cultivation of land, including all the necessary analyses of the land as determined by the judgment of the First Instance Court in Zvornik of 27 September 2002. The applicants maintain that they are deprived of the right to a normal life on their property.

85. The respondent Party states that it is undisputed that in 1994 the city dump was established on the applicants' property, and that it did not have their addresses in order to pay them fair compensation. It asserts that the dump was established as a necessity "in the general interest", which, according to the respondent Party, does not mean that the applicants were deprived of their property, but only that its use was limited. The respondent Party considers that in 1994 the requirement of the applicants' right to undisturbed enjoyment of their property was fulfilled. The respondent Party further states that, because the applicants returned to their homes, it removed the city dump so that it would not in any way disturb their peaceful enjoyment of their property.

86. The Commission notes that, according to the judgment of the First Instance Court in Zvornik of 27 September 2002, the situation is such that a major part of the dump has been removed except for some remnants of garbage. Further, according to that judgment, the applicants' land is polluted and they cannot use it for the food production as they did before the war. Therefore, although the First Instance Court judgment has not become final and binding

because the proceedings on appeal are still pending, the Commission considers that the applicants' fear of living on their property is justified, as is their fear of cultivation of the land before the necessary analyses of the mentioned land have been completed, which, according to them, they have no means to do themselves.

c. Principle of lawfulness

87. Regardless of which of the three rules set forth in Article 1 of Protocol No. 1 is applied in a given case (*i.e.*, interference with possessions, deprivation of possessions, or control of use of property), 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. The European Court has explained this "principle of lawfulness" as follows:

"The Court reiterates that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possession should be lawful: the second sentence of the first paragraph authorises a deprivation of possessions only 'subject to the conditions provided for by law' and the second paragraph recognises that the States have the right to control the use of property by enforcing 'laws'. Moreover, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention and entails a duty on the part of the State or other public authority to comply with judicial orders or decisions against it. It follows that the issue of whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary" (Eur. Court HR, *Iatridis v. Greece*, judgment of 25 March 1999, Reports of Judgments and Decisions 1999-II, page 97, paragraph 58)."

88. The respondent Party states that it is undisputed that in 1994 the city dump was established on the applicants' property, and that the respondent Party did not have their addresses in order to pay them fair compensation.

89. The Commission observes that the respondent Party did not conduct the proceedings required by law before creating the dump, on the basis of which it would have paid the applicants fair compensation. The Commission also notes that the respondent Party has not proved by any evidence that it tried to make contact with the applicants by ascertaining their addresses. Thus, the respondent Party has not protected the interests of the applicants, on whose property the dump had been built and because of which their land, according to the judgment of the First Instance Court in Zvornik, is polluted, resulting in the applicants' fear of returning to or living on their property.

90. 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 Commission to consider further the remaining requirements of that Article.

91. The Commission therefore concludes that the Republika Srpska has violated the applicants' right to peaceful enjoyment of their property as guaranteed by Article 1 of Protocol No. 1 to the European Convention.

VII. REMEDIES

92. Under Article XI(1)(b) of the Agreement, the Commission must next address the question of what steps shall be taken by the respondent Party to remedy the established breaches of the Agreement. In this connection the Chamber shall consider issuing orders to cease and desist, monetary relief (including pecuniary and non-pecuniary damages), as well as provisional measures.

93. The applicants complain that the District Court in Bijeljina unjustifiably delayed the proceedings on their appeal against the 27 September 2002 judgment of the First Instance Court

in Zvornik and that they are not able to use their property yet.

94. The Commission notes that it has found a violation of the applicants' human rights protected by Articles 6(1) and 8 of the Convention and Article 1 Protocol No. 1 to the Convention. The Commission considers it appropriate to order the respondent Party to take all necessary action to ensure that the applicants' case be completed by a final and binding judgment of the domestic courts as soon as practicable and at the latest within one month from the date of receipt of this decision.

95. Furthermore, the Commission considers it appropriate to award the applicants compensation as recognition for the injustices they have suffered from their inability to have their cases resolved within the reasonable time.

96. The Commission shall therefore order the respondent Party to pay to each of the applicants 2,500 KM, to be paid within one month of the date of receipt of this decision, as recognition for the harm suffered because of their inability to have their cases resolved within a reasonable time.

97. Additionally, the Commission awards simple interest at an annual rate of 10% from the due date for the payment ordered in the above paragraph on the full amount of the award or any unpaid portion thereof until the date of settlement in full.

98. The Commission shall also order the respondent Party to report to the Commission, or its successor institution, within six months of the date of receipt of this decision on the steps taken by it to comply with the above orders.

VIII. CONCLUSIONS

99. For the above reasons, the Commission decides,

1. unanimously, that the application is admissible in relation to Articles 6 and 8 of the European Convention on Human Rights and Article 1 of Protocol No. 1 to the Convention;

2. unanimously, that the Republika Srpska has violated the right of the applicants to a decision within "a reasonable time" as guaranteed by paragraph 1 of Article 6 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

3. unanimously, that the Republika Srpska has violated the right of the applicants to respect for their home as guaranteed by Article 8 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

4. unanimously, that the Republika Srpska has violated the right of the applicants to peaceful enjoyment of their possessions within the meaning of Article 1 of Protocol No. 1 to the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

5. unanimously, to order the Republika Srpska to take all necessary action to ensure, as soon as practicable but no later than one month from the date of receipt of this decision, that the applicants' case be completed by a final and binding judgment before the domestic courts ;

6. unanimously, to order the Republika Srpska to pay each of the applicants 2,500 KM (*two thousand five hundred Convertible Marks*), as recognition for the harm suffered because of their inability to have their cases resolved within a reasonable time, within one month from the date of receipt of this decision;

7. unanimously, to order the Republika Srpska to pay simple interest at an annual rate of 10% (ten per cent) on the sums specified above or any unpaid portion thereof from the due date for the

payment until the date of settlement in full; and

8. unanimously, to order the Republika Srpska to report to the Commission, or its successor institution, on the steps taken by it to comply with these orders at the latest within six months from the date of receipt of this decision.



(signed)
J. David YEAGER
Registrar of the Commission

(signed)
Jakob MÖLLER
President of the Commission