



DECISION ON ADMISSIBILITY AND MERITS
(delivered on 10 October 2003)

Case no. CH/02/12016

Enes ČENGIĆ

against

**BOSNIA AND HERZEGOVINA
AND
THE REPUBLIKA SRPSKA**

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 5 September 2003 with the following members present:

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

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 and 66 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina of Bosniak origin. Prior to the outbreak of the armed conflict in Bosnia and Herzegovina, the applicant's family had resided for many centuries in Rataj, a village in the Municipality Foča-Srbinje in the Eastern Republika Srpska. The applicant complains that the Serb Orthodox Church and local residents in Rataj have repeatedly interfered with the peace of the Čengiđ family cemetery in Rataj. The applicant complains that the graves, in which members of his family have been buried, and their tombstones have been partially or completely destroyed. The surrounding fence and gate to the cemetery has been torn down repeatedly and during 2002 an Orthodox cross was engraved into a "Turbe" or "Mausoleum", a cylindrically shaped rock located in the centre of the cemetery.¹ Additionally, archaeological research aimed at proving that the graveyard is on the site of an ancient Serb Orthodox shrine has been carried out with the support of the Republika Srpska authorities. Finally, on 1 August 2002, the Serb Orthodox Church issued a public proclamation that was displayed at several locations in Rataj, informing the local residents that on 18 August 2002 a liturgy would take place on the grounds of the Čengiđ family cemetery. The applicant alleges that such an interference amounts to violations of his right to respect for private and family life, right to freedom of religion and that he has been discriminated against in the enjoyment of these rights because of his Muslim religion.

2. The application primarily raises issues of discrimination under Article II(2)(b) of the Agreement in the enjoyment of the right to respect for private and family life and the right to manifest one's religious beliefs in practice as guaranteed by Articles 8 and 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"), respectively.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced to the Chamber on 7 August 2002 and registered on 8 August 2002. The applicant is represented by Mr. Sead Hodžić, a lawyer practising in Sarajevo. In his application, the applicant requested that the Chamber order the respondent Parties, as a provisional measure, "to prevent the christening/consecration of the Muslim cemetery in Rataj, Municipality of Foča-Srbinje, organised by the Serb Orthodox Church and to remove the engraved cross on the stone located in the centre of the cemetery". On 16 August 2002, the Chamber ordered the Republika Srpska "to take all necessary steps to prevent the christening/consecration or any performance of any Orthodox ceremony of the Muslim cemetery in Rataj, Municipality of Foča-Srbinje". The Chamber rejected the request for provisional measures insofar as it was directed against Bosnia and Herzegovina and to the removal of the engraved cross.

4. On 4 September 2002 the Chamber decided to keep in force the order for provisional measures and at the same time decided to transmit the applicant's case to the Republika Srpska as respondent Party under Articles 8 and 9 of the Convention and discrimination in the enjoyment of such rights under Article II(2)(b) of the Agreement for its observations on admissibility and merits in accordance with Rule 49(3)(b) of the Chamber's Rules of Procedure.

5. The Chamber decided not to transmit the application to Bosnia and Herzegovina as a respondent Party, as it could not be seen that any responsibility attached to Bosnia and Herzegovina in respect of the matters complained of.

6. On 16 September 2002 the Chamber received the written observations of the Republika Srpska and these were transmitted to the applicant on the same day. On 10 October 2002 the Chamber received the applicant's response to the written observations of the Republika Srpska and on 14 October 2002 the Chamber received from the applicant a supplement to his reply of 10 October 2002. On 10 and 14 October 2002, respectively, the Chamber transmitted the applicant's reply to the written observations to the Republika Srpska for their possible comment.

¹ The Parties contest the religious origin of this rock and it remains unclear as to whether it formed part of an ancient Christian shrine or part of a Mosque possibly destroyed in the 19th Century. Accordingly, it will be referred to throughout the text as the "central stone".

7. On 11 November 2002 the Chamber wrote to the Republika Srpska requesting additional information concerning the engraved cross on the central stone of the Čengić family cemetery and information concerning the public proclamation issued by the Serb Orthodox Church on the proposed Christening/Consecration.
8. On 14 November 2002 the Chamber wrote to SFOR requesting information on its knowledge of the dispute concerning the engraved cross and public proclamation issued by the Serb Orthodox Church. On 12 December 2002 the Chamber received a response from SFOR denying any official knowledge of the present case.
9. On 26 November 2002 the Chamber received the requested additional information from the Republika Srpska. In addition, the Chamber received, annexed to the additional information, the written observations of the Orthodox Metropolitan of the Diocese of Dabrobosanski (the "Orthodox Metropolitan") and the Head of the Foča-Srbinje Municipality.
10. On 16 December 2002 the Chamber received further written observations from the Orthodox Metropolitan, on behalf of the Serb Orthodox Church, informing the Chamber that it had appointed Mr. Jelica Vuković, a lawyer practising in Sarajevo, as its legal representative in the present case before the Chamber. In its written observations the Orthodox Metropolitan requested to be permitted to participate in the proceedings before the Chamber as *amicus curiae*.
11. On 17 December 2002 the Chamber wrote to the Republika Srpska requesting whether it accepted the written observations of the Serb Orthodox Church, through its representative the Orthodox Metropolitan, as its own. On 24 December 2002 the Chamber received a reply from the Republika Srpska confirming that it accepted the written observations of the Orthodox Metropolitan as the position of the Republika Srpska.
12. On 23 December 2002 the Chamber received the applicant's reply to the written observations of the Republika Srpska dated 26 November 2002. This was transmitted to the Republika Srpska for its information and possible comment on the same day.
13. On 24 March 2003 the Chamber conducted an on-site inspection of the Čengić family cemetery. The on-site inspection was attended by the President of the Second Panel, the Registry of the Chamber, the applicant, the applicant's brother, Mr. Hajrudin Čengić, the applicant's legal representative, Mr. Sead Hodžić, the Legal Representative of the Government of the Republika Srpska, Mr. Milan Dupor, the Head of the Foča-Srbinje Municipality, Mr. Milan Rudinac, a Geodetic expert, Mr. Radovan Vojčić, the Orthodox Metropolitan Mr. Nikolaj, and a local priest of the Serb Orthodox Church in Miljevina, Mr. Goran Terzić.
14. On 26 March 2003, at the request of the Chamber, the Republika Srpska submitted to the Chamber its comments on the possibility of reaching a friendly settlement. The letter, sent under the authority of the Office of the Legal Representative of the Government of the Republika Srpska, was signed by the Orthodox Metropolitan, who formally requested a public apology from the applicant for offending the Serb Orthodox Church. He further requested that the ground on which the cemetery is located be entrusted to archeological experts from the Institute for the Protection of Monuments of the Republika Srpska and the Federation of Bosnia and Herzegovina (the "Institute"). This was transmitted to the applicant on the same day and the Chamber received the applicant's response on 15 April 2003. In his response, the applicant stated that he could not accept the proposal of the respondent Party, as he did not consider it a friendly settlement offer, and therefore, invited the Chamber to consider his application on the merits.
15. On 17 June 2003 the Chamber wrote to the applicant requesting further information concerning what steps he had taken to initiate criminal proceedings or to request protection by the domestic authorities. On the same day the Chamber wrote to the European Union Police Mission in Bosnia and Herzegovina (the "EUPM") requesting information as to whether the applicant had reported any complaints to the police in Miljevina or Foča-Srbinje. On 5 August 2003 the Chamber received a reply from the EUPM, which was forwarded to the Parties.

16. On 24 June 2003 the applicant made submissions in response to questions asked by the Chamber. On 7 August 2003 the Republika Srpska made further submissions in response to questions asked by the Chamber. The applicant replied to these submissions on 18 August 2003.

17. The Chamber deliberated on the admissibility and merits of the case on 4 September 2002, 7 November 2002, 6 December 2002, 10 January 2003, 6 March 2003, 4 April 2003 and 10 May 2003, 3 June and 5 September 2003. On the latter date the Chamber adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

A. History of the graveyard site before the 1992-1995 armed conflict in BiH

18. The dispute concerns a plot of land in Rataj, Municipality Foča-Srbinje², Republika Srpska. The Čengić family have buried their family members there for several centuries. The last family member to be buried on the plot is the applicant's mother who was buried in 1991.

19. The site has had a sacral function for several centuries. It is registered as an archaeological site and in 1978 was included in the archaeological lexicon of Bosnia and Herzegovina. The Serb Orthodox Church, as well as the respondent Party in the proceedings before the Chamber, claim that, possibly as early as the 3rd Century A.D., the site contained a Christian church. They also claim that a "monastery church" was destroyed by the Turkish invaders in the 16th or 17th Century. It is undisputed that a mosque was built on the site, probably during the 19th Century, and subsequently destroyed. According to the Orthodox Church, the mosque had been built on the foundations of the Christian church. The Republika Srpska disputes that any traces of the mosque are nowadays visible at the site. In support of these allegations, the Republika Srpska refers to the results of archaeological research carried out in 1997.

20. The applicant, on the other hand, has drawn the Chamber's attention to a report by the historian Vlajko Palavestre published in the Gazette of the Sarajevo National Museum in 1977. This report confirms that remains of the mosque existed during the 20th Century. In his report Vlajko Palavestre states:

"First of all it is necessary to point out the fact that during the archaeological research, conducted in 1977, the remains of a cultural monument (a chapel or church) could not be found that would be older than the Mosque, the foundations of which we have found. The Mosque itself, by indications of the stone cutting used for the stone masonry...was built at the same place as the tower and it is also confirmed by national tradition."

21. It is not in dispute that for several centuries the plot has contained a Muslim graveyard. In the centre of the graveyard there is a cylindrically shaped rock measuring approximately 4-5 metres in height and 5-6 metres in width, which has been described by the applicant as a "Turbe" or "Mausoleum". The centre of the rock has been hollowed out and a small seated area carved into the stone. The Chamber will refer to this rock as "the central stone". The applicant states that the central stone has been an integral part of the Muslim cemetery for centuries and was part of the destroyed mosque. The Republika Srpska disputes that the central stone used to be an integral part of the mosque. It refers to the central stone as an "Orthodox shrine". The graves containing the applicant's ancestors from the 18th and 19th Century are located around the central stone at a distance of approximately 20 to 25 meters (see paragraph 32 below).

22. As to the legal status of the site, before 1918 the land was owned by the applicant's family. During 1918 ownership of the land was removed from the Čengić family in the process of nationalisation, but the family maintained a right to use it. At the time of the Socialist Federal Republic of Yugoslavia, the land became socially owned. The applicant's family kept a right to use it.

² Until 1992 the name of the Municipality was Foča. The Bosnian Serb authorities renamed the town and the Municipality Srbinje. It is currently officially named Foča-Srbinje.

B. Relevant events during the armed conflict

23. According to the 1991 Census, the Foča-Srbinje Municipality had a pre-war population of about 40,513 inhabitants of whom 52% were Muslim. During April 1992, local Serb military, police and civilian authorities took over the town of Foča-Srbinje, and together with Yugoslav National Army units and paramilitary forces, established a local Serb administration through the Municipal Crisis Staff. As Serb forces consolidated their power over the rest of the Municipality, they ethnically cleansed these areas, establishing a number of concentration camps. As a consequence of the concerted effect of the attack upon the civilian population of Foča-Srbinje and surrounding municipalities, all traces of Muslim presence in the area were effectively wiped out. Muslim civilians, but for a handful, had been one way or another expelled from the region³.

24. The applicant himself, according to his undisputed statement, was taken to a detention camp, before he fled to territory controlled by the Army of Bosnia and Herzegovina. The applicant's entire family was displaced from the Foča-Srbinje Municipality during the armed conflict.

25. The applicant states that, during the 1992-1995 armed conflict, the fence surrounding the graveyard and the gate were torn down, the grounds of the cemetery disrupted and gravestones destroyed. The respondent Party confirms this statement. The applicant further alleges that during the period of 1992-1995 the local authorities conducted a number of excavations on the site of the cemetery in order to ascertain whether a Christian Church had in fact existed on the site. The respondent Party disputes this allegation, and the applicant has not submitted any evidence that would support it.

C. Events concerning the graveyard site since 14 December 1995

26. The applicant and his family first visited Rataj at some point after the cessation of hostilities in 1996 and then returned intermittently during 1996 and 1997.

1. Archaeological excavations

27. The applicant alleges that during the period of 1995-1997 archaeological excavations were undertaken by the Academy for Art and Conservation of the Serb Orthodox Church and funded by the Republika Srpska Ministry of Education, Science and Culture. The Republika Srpska disputes that excavations took place before 1997, and there is no evidence in the case file to suggest that archaeological excavations took place during the period alleged by the applicant.

28. On 13 October 1997 the Institute for Protection of Cultural, Historical and Natural Heritage of the Republika Srpska issued a permit in accordance with Article 87 of the Law on Cultural Goods of the Republika Srpska (see paragraph 49 below) for archaeological excavations and research to be conducted in Rataj. The permit was issued to the Academy for Art and Conservation of the Serb Orthodox Church in Belgrade in connection with the project on the "Restoration of Orthodox Heritage in Dabrobosanska Eparchy, Archaeological Research". The research is funded by the Republika Srpska Ministry of Science and Culture, and carried out under the management of the Curator of the Museum of Mining and Metal Industry in Bor (Federal Republic of Yugoslavia), in co-operation with the Institute for Material Culture History of the Russian Academy of Science in Petersburg.

29. The Republika Srpska has submitted contradictory evidence as to when the excavations took place. According to a statement of the Institute for Protection of Cultural, Historical and Natural Heritage of the Republika Srpska, archaeological research was conducted only in October and November 1997. According to a statement of the Head of the Foča-Srbinje police station, however, "during 2001 at the mentioned Bosniak cemetery one archaeological crew performed digging at the site of the main rock, and in the course of digging the remains of an old Orthodox cemetery were found".

³ This information is summarised from the judgement of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") of 22 February 2001 in case no. IT-96-23/1, *Prosecutor v. Kunarac, Kovac and Vukovic* ("Foca").

30. During the on-site visit of 24 March 2003, the Chamber observed that at the front of the central stone, where there was a visible entrance leading to a hollowed out area containing a tomb, traces of excavations were visible. The representatives of the parties agreed that these excavations were from 1997. The Chamber further noted that the excavations were concentrated at a maximum distance of 10-15 metres in front of, and to one side of, the disputed central stone, but all within the formerly enclosed Čengić family cemetery.

31. According to his statement of 7 August 2003, the Head (načelnik) of the Municipality Foča-Srbinje "has no information on any digging performed at the Rataj graveyard, as nobody informed the organs of the Municipality and nobody requested anything".

2. Vandalism affecting the fence, graves and tombstones

32. The applicant alleges that during 1997 the fence around the cemetery was torn down, tombstones were broken and graves disturbed. He claims to have reported this to the Foča-Srbinje Municipality and the Public Security Centre in Foča-Srbinje, but he states that no action was taken to repair the damage to the cemetery. The respondent Party does not dispute that the fence surrounding the graveyard may have been torn down, but it strongly contests that any damage occurred to the tombstones and graves after the end of the armed conflict. The respondent Party also challenges the applicant's allegation that he reported the acts of vandalism to the authorities. The applicant has not submitted any evidence, such as copies of the reports submitted, that would confirm his allegations. During the on-site visit of 24 March 2003, the Chamber observed that the majority of the graves, containing members of the applicant's family, were located approximately 20-25 metres from the central stone at the far end of the cemetery and to one side of the central stone, at a distance of approximately 10 metres, a further 5 or 6 additional graves were located. The tombstones had been broken away from the main graves, and many of the graves had in fact been partially or completely destroyed. The Chamber found no evidence that would allow it to determine whether the devastation of the graves and tombstones occurred in 1997, as claimed by the applicant, or before the end of 1995, as submitted by the Republika Srpska.

33. It is undisputed that during 2001 the applicant hired some residents of Miljevina to erect a new fence around the graveyard. According to the applicant, within a few days the fence was torn down by the local residents in Rataj. The applicant again erected a new fence and gate, but again within a few days the fence and gate was torn down. During October 2001, for the third time in short a space of time, the applicant erected a new fence and gate. Unfortunately, within a few days the fence and gate was again torn down. The applicant again claims to have informed the Foča-Srbinje Municipality about these incidents, but no action was taken. Some time later, the applicant allegedly raised the issue at a meeting of the Local Community in Miljevina in the presence of representatives from the international community. Despite the repeated requests for protection made by the applicant and his family during this period no action was taken. At some point during 2002 the applicant erected a new fence at a distance of approximately 5 metres outside the periphery of the old fence, thus enlarging the overall size of the cemetery. This fence was destroyed shortly thereafter. The applicant has not presented to the Chamber any document or other evidence that would support the claims summarised in this paragraph.

34. The Republika Srpska disputes the applicant's allegation that he repeatedly reported these facts to various authorities and asked them to take action to protect the site. On the contrary, according to the Republika Srpska, it was in fact G.M., a resident of Rataj, who on 28 September 2001 complained to the police station in Miljevina that the applicant, in renewing the fence around the graveyard, had fenced in a part of his land. This claim is confirmed by the relevant entry into the daily book of operations (dnevnik događaja) of the police station. The police referred G.M. to the municipal organs competent for property disputes. Moreover, the Republika Srpska refers to a statement issued by the Public Security Centre in Foča-Srbinje on 9 September 2002, according to which the applicant did not submit a request for protection nor requested the initiation of criminal proceedings against any alleged perpetrators. The Republika Srpska admits that the local populace may have torn down the fence in response to the applicant's enlarging the overall size of the area enclosed by the fence. In a letter of 24 January 2002 the Rector of the Serb Orthodox Church in Miljevina applied to the Head of the Foča-Srbinje Municipality, pointing out that land in Rataj belonging to the Foča-Srbinje Municipality was fenced in. He states that the land was fenced in by

“Bosniaks” under the pretence of “fencing in their cemetery”, even though the cemetery is only in the centre of that plot. The Rector also states in his letter that there are the remains of an early Christian church, which is confirmed by archaeologists who conducted excavations in 1997. At the end of the letter the Rector appeals:

“Please, order the Inspection to remove that fence because there is a great dissatisfaction present among the citizens”.

35. On 7 April 2002, at the request of the Rector, inspectors from the Foča-Srbinje Municipality, Municipal Administration, Department for Physical Planning, Housing and Utility Affairs, visited the plot of land where the Čengić family cemetery is located. The report of the inspection states that the plot of land is registered as social property of the Municipal Assembly of Foča-Srbinje (plot no. 1034) and the Public Utility Company JP “Srpske Šume” and the Forest Holding Company “Maglič” in Foča-Srbinje (plot no. 1035). The report further states that the cemetery was easily accessible as the surrounding fence had been removed and concluded that there were signs of a former Christian church on the grounds of the Čengić family cemetery.

36. On 5 August 2002, the President of the Foča-Srbinje Municipality sent a letter to the President of the Commission for Religious Issues of the Municipality (Komisija za vjerska pitanja Opštine Foča-Srbinje). The letter states that the Čengić family had informed the Islamic Community in BiH, as well as OHR, OSCE, IPTF and the President of the Foča-Srbinje Municipality, of the dispute surrounding the Rataj graveyard, and asks the Commission for Religious Issues to meet and state its views on the matter. The Commission for Religious Issues did not follow this request.

3. The engraving of an cross Orthodox cross on the central stone

37. At some point during 2002, the exact date has remained unknown to the Chamber, an Orthodox cross was engraved into the rear of the central stone and covered with white paint. During the on-site visit of the graveyard, the Chamber has established that the cross measures approximately 20 cm in diameter and is located approximately 70 cm from the ground. The depth of the engraved cross is approximately 1-1.5 cm. According to the respondent Party, the cross was engraved by residents of Miljevinina as a response to the “provocative” enlarging of the cemetery by the applicant.

4. The proclamation announcing a Serb Orthodox liturgy to be performed on the site

38. On 1 August 2002, the Serb Orthodox Church issued a public proclamation that was displayed at several locations in Rataj informing the local residents that on 18 August 2002 a liturgy would take place in Rataj. The proclamation stated:

“His Most Holiness the Metropolitan Dabrobosanski, Mr. Nikolaj, will perform the service of divine archiereus liturgy on 18 August 2002 at 09.00 o'clock, in the village of Rataj.”

The proclamation did not precise the location of the proposed liturgy, but during the on-site inspection on 24 March 2003, the Orthodox Metropolitan clarified that the liturgy had been scheduled to take place in front of the central stone on the grounds of the Čengić family cemetery. According to the Orthodox Metropolitan this was the location of an Orthodox shrine and where a Christian Church was located during the 3rd or 4th Century.

39. The applicant defines the liturgy announced by the proclamation as a “Christening/Consecration” of the site. The Republika Srpska has stated in its observations that no christening or consecration was scheduled on 18 August 2002, but merely “a visit to the sacred object; a cylindrically shaped Orthodox rock”. According to the statement of the Head of the Foča-Srbinje police station, however, “representatives of the Serb Orthodox Church scheduled the religious ceremony of sanctifying the mentioned Orthodox sites on 18 August 2002 (due to the Orthodox holiday *Preobraženije*)”.

5. Events subsequent to the filing of the application

40. On 8 August 2002 a meeting took place at the premises of the Serb Orthodox Church in Sarajevo and was attended by the applicant and representatives of the Serb Orthodox Church, including the Orthodox Metropolitan. It appears that the Serb Orthodox Church requested the local priest from Miljevina to clean the grounds of the graveyard following the archaeological excavations. The Orthodox Metropolitan stated that the meeting was called as a result of the applicant addressing his complaint to the Reis-ul-ulema of the Islamic Community in Bosnia and Herzegovina, the Office of the High Representative, the Municipal Assembly in Foča-Srbinje, other members of the international community and due to publishing his complaints in the media. The Orthodox Metropolitan complained that the applicant had never addressed the Serb Orthodox Church. According to the Orthodox Metropolitan, an agreement was reached that a detailed investigation should be entrusted to a scientific team to ascertain the religious origin of the disputed site. The applicant disputes that any consensus was reached during this meeting.

41. On 4 October 2002, the International Mediator, Dr. Schwarz-Schilling, held a meeting in Foča-Srbinje with representatives of the municipal authorities and representatives of the political parties active in the Municipality. One of the conclusions reached at the meeting is that the authorities are strongly encouraged to assist the religious communities to raise fences around their properties in order to prevent interference with religious sites.

42. The applicant alleges that on 5 October 2002, he went to the Public Security Centre in Foča-Srbinje and submitted a formal complaint and a request to open a criminal investigation against unknown perpetrators. No action was taken upon his complaint. The applicant has not submitted any evidence to the Chamber that would show that he has submitted a formal complaint or request to start an investigation or criminal proceedings.

43. On 17 October 2002, during a meeting of the Municipal Assembly of Foča-Srbinje, Mr. Halim Brajlović, a member of the Assembly, requested the Municipal government to explain why the Commission for Religious Issues had not met to discuss the situation at the Rataj graveyard. No explanation was provided by the Municipality government. As of August 2003, the Commission for Religious Issues has not met to discuss the matter.

44. On 19 October 2002 the applicant went to the Police Sub-Station in Miljevina and orally reported that unknown perpetrators had vandalised his family cemetery. A written report of the applicant's complaints was made by the police. Police officers went to the site immediately thereafter and noted that the fence was partially torn down. According to the statement of the Head of the Foča-Srbinje police station, "in the course of the investigation policemen interviewed a certain number of persons, receiving some knowledge on possible perpetrators, but the case has not been completely solved yet". The files from the Police Sub-Station in Miljevina submitted to the Chamber, however, do not contain any trace of this "investigation", except for the visit to the graveyard.

IV. RELEVANT LEGAL PROVISIONS

A. Criminal Code of the Republika Srpska (Official Gazette of the Republika Srpska, no. 49/03)

45. Articles 253 defines criminal offences against cultural monuments and protected natural objects as follows:

"Article 253

Appropriating, Damaging or Destroying Cultural Monuments and Protected Natural Objects or any Other Object of Special Cultural and Historical Significance

"(1) Whoever during archaeological, geological/palaentological or mineralogical researches and excavations, archive researches or other, misappropriates from the excavation site materials or any

finding that has cultural or historical significance, archive material or natural rarity, shall be punished by imprisonment for a term ranging between six months and five years.

“(2) The punishment defined under paragraph 1 of this article shall also be imposed onto whoever in contravention of law destroys or damages a cultural monument, protected natural object or an object constituting a public good.

“(3) Whoever without authorisation carries out conservation, restoration or research work on a cultural monument, or whoever carries out archaeological excavation or researches whereby causing significant damage or destruction of the monument, shall be fined or punished by imprisonment term not exceeding three years.

“(4) If the offences set forth under paragraphs 1, 2 and 3 of this article have been committed against a cultural monument or a protected natural object of special value or if substantial damage has occurred, the perpetrator shall be punished by imprisonment term ranging between one and eight years.”

B. Code of Criminal Procedure of the Former Socialist Federal Republic of Yugoslavia (Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 26/86, 74/87, 57/89, 3/90) adopted by the Republika Srpska (Official Gazette of the Republika Srpska nos. 26/93, 14/94, 6/97 and 61/01):

46. Chapter XV of the Code of Criminal Procedure, concerning the reporting of a crime, provides as follows:

Article 148

“(1) All government bodies and agencies...and other self-managed organizations and communities have a duty to report crimes which are automatically prosecuted of which they have been informed or which they have learnt of in some other manner.

“...”

Article 149

“(1) Private citizens should report crimes which are *ex officio* prosecuted in order to ensure self-protection.

“...”

Article 151

“If there are grounds to suspect that a crime which is *ex officio* prosecuted has been committed, law enforcement agencies must take steps necessary to locate the perpetrator of the crime, to prevent the perpetrator or accomplice from hiding or fleeing, to detect and preserve clues to the crime and articles which might serve as evidence, and to gather all information which might be of use to the effective conduct of criminal proceedings.

On 1 July 2003 a new Code of Criminal Procedure of the Republika Srpska entered into force (OG RS 50/03). This new Code of Criminal Procedure also provides for the obligation to report offences as provided in the old Code of Criminal Procedure.

C. Law on Public Utility Services of the Republika Srpska (Official Gazette of the Republika Srpska no. 11/95 and 51/02)

47. Under the Law on Public Utility Services the maintenance of cemeteries is a public function to be taken care of by the Municipality:

Article 2

“As public utility services of particular interest, in terms of this law, are regarded to be:

...

(6) funeral activities which include maintenance of cemeteries and crematories, rendering funeral services, performing all activities related to funerals of citizens (preparation of burial lots, preparation of the deceased, their transport, conducting of burial services or cremation services, taking care of and maintaining of graves etc.)”

Article 3

“(1) The municipality or, respectively, city provides for organised performance of public utility services and by its decision provides for the conditions and ways of implementing this obligation.”

Article 19

“Cemeteries are public utility facilities which municipal assemblies give to public utility companies, other kinds of companies of local communities to manage and maintain.”

Article 20

“Municipal assemblies, in particular, regulate: the manner and conditions of taking care of and maintaining of cemeteries, conditions for ceding and payment for using burial lots, conditions for construction of tombs/vaults, conditions for putting up tombstones/monuments and inscription of specified information on those tombstones/monuments, transport of mortal remains to the cemetery and conditions governing the burials outside of the cemeteries that are in use.”

Article 21

“(1) The company or the religious of local community managing the cemetery shall give its consent for putting up, removal or replacing of tombstones/monuments and symbols/characters on them in accordance with the regulation of the municipal assembly.”

Article 24

“The facilities for performing of religious ceremonies that are located within the existing cemeteries shall be managed by the religious communities those facilities belong to.”

Article 25

“(1) Supervision over performing of public utility services as well as enforcing of the provisions of this law, other regulations and by-laws pertaining to public utilities field shall be performed by the municipal organ of administration competent for the public utilities.”

Article 29

“A public utility company shall be fined between 300 and 10,000 Convertible Marks for offences as follows:

...

“(6) if it gives its consent for putting up, removal or replacement of tombstones/monuments and symbols/characters on them contrary to the regulation of the municipal assembly or, respectively, city (Article 20).”

D. Decision on Funeral Activities, Development and Use of Cemeteries (Official Gazette of Foča-Srbinje Municipality, no. 5/96)

48. The Decision on Funeral Activities, Development and Use of Cemeteries provides, insofar as is relevant, as follows:

Article 7

“(1)...

“(2) The maintenance of cemeteries is performed by interested entities/persons.

“(3) An enterprise, which governs the cemetery, could, upon the request of interested persons, maintain the cemeteries itself with appropriate compensation.

“...”

Article 12

“(1) Any cemetery is to be fenced and cleaned regularly in a manner regulated by this decision.

“(2) The enterprise which governs the cemetery takes care of the fencing and maintenance.

“(3) The expense of maintenance of graves and tombs are paid by the closest relatives of the deceased.”

E. Law on Cultural Goods of the Republika Srpska (Official Gazette of the Republika Srpska, no. 11/95)

49. In respect of authorized excavations, the Law on Cultural Goods provides, insofar as is relevant, as follows:

Article 3

“...”

“(2) In accordance with artistic, cultural, scientific and historical features, immobile cultural goods are:

- 1) cultural monuments,
- 2) spatial cultural and historical units;
- 3) archaeological sites.”

Article 5

“(1) A cultural good is evaluated as a good of exceptional significance, in case it meets one of the following criteria:

- 1) it has particular significance for historical, spiritual or cultural development of the Serb nation;

“...”

Article 11

“(1) Activities regarding protection and use of cultural goods is performed by the Republika Institute for Protection of Cultural Monuments (hereinafter: the Institute) and regional units organised in accordance with the Book of Regulations on internal organisation and systematisation of work positions in the Institute.

“...”

Article 13

“(1) A cultural good can be given for safeguarding and use to another legal entity.

“(2) An immobile cultural good in state property can be expropriated or, the property located at it could be limited only aiming at its fuller and more efficient protection, if it is in the general interest and in accordance with law.”

Article 17

“Provisions of this law on rights and obligations of owners of a cultural good relate to persons who upon any legal basis retain the cultural good.”

Article 65

“(1) The Institute and its regional units perform the protection activities of cultural monuments, spatial cultural-historical units, archaeological sights and places of prominence.

“...”

Article 66

“ The Institute and its regional units besides activities stated under Article 59 of this law shall:

“ ...

“(10) take care of the uniform application of international conventions and other international charters on cultural goods;

Article 87

(1) The excavation and research of an archeological site shall be done by a scientific institution or protection institution.

(2) The institute, that is its field offices, shall approve archeological excavations and research of archeological sites.

(3) Approval may be issued to the scientific or protection institution if it has prepared a project on the research of an archeological site, adequate expert personnel, equipment and provided means for research and protection of the site and findings.”

F. Constitution of the Republika Srpska

50. Article 28 of the Constitution of the Republika Srpska provides as follows:

“(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.”

51. 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 unconstitutional. This provision ceased to be in force on 31 December 2000 when the partial Decision was published in the BiH Official Gazette.

V. COMPLAINTS

52. The applicant claims that the repeated interference with his family graveyard amounts to a violation of his right to private and family life, as guaranteed under Article 8 of the Convention and his right to freedom of religion, as guaranteed under Article 9 of the Convention. He further claims to have been discriminated against in the enjoyment of such rights due to his Muslim religion.

53. The applicant claims that the acts of the Serb Orthodox Church and the citizens of Rataj, that amount to a repeated interference with and destruction of his family graveyard, fall under the responsibility of Bosnia and Herzegovina and the Republika Srpska.

VI. SUBMISSIONS OF THE PARTIES

A. The Republika Srpska⁴

54. The Republika Srpska, in its observations of 24 December 2002, accepted the submissions of the Serb Orthodox Church as the observations of its office and therefore the latter's submissions have been detailed throughout the draft as the submissions of the Government of the Republika Srpska.

1. Facts

55. The Republika Srpska challenges many of the factual allegations made by the applicant. Its submissions regarding the facts have been summarised in part III of this decision above.

2. Admissibility

56. The Republika Srpska objects to the admissibility of the application on four grounds. Firstly, that the application does not meet the formal requirements under Rule 46 of the Chamber's Rules of Procedure. The Republika Srpska points out that beside the statement of facts, an applicant is required to submit all relevant arguments and documentation.

57. Secondly, the Republika Srpska submits that the applicant has failed to exhaust domestic remedies, as he did not submit his complaint to all the relevant organs of the Republika Srpska. By his own admission on page 7 of the application, the applicant states that he has not made use of domestic remedies as he believes such remedies to offer no prospect of success. According to *Bozano* (Eur. Court HR, judgment of 18 December 1986, Series A no. 111) an applicant is required to show that domestic remedies have been exhausted or that they would be ineffective or inadequate. According to the statement of the Public Security Centre in Foča-Srbinje of 9 September 2002, the applicant never submitted a request for protection or requested the initiation of criminal proceedings against the alleged perpetrators.

58. Thirdly, the Republika Srpska objects to the admissibility of the application on the ground of compatibility *ratione personae*, as the Serb Orthodox Church is not an authorised organ acting on behalf of the Republika Srpska.

59. Fourthly, the Republika Srpska argues that the applicant cannot be considered a victim or have standing in the present case before the Chamber, as the cemetery cannot be the property of a natural person. In this respect, the Islamic Community in Bosnia and Herzegovina, and not the applicant, should have submitted the application. The Republika Srpska also points out that the applicant's allegation that the Muslim graveyard is his property is ill founded as the graveyard is the property of the Municipal Assembly of Foča-Srbinje and of the company JP "Srpske Šume and the Forest Holding Company 'Maglić'". In support of this claim, the Republika Srpska submitted the relevant details from the title deed of 5 April 2002 and a copy of the Cadastral plan of the same date.

3. Merits

a. Article 8 of the Convention

60. The Republika Srpska states that there has been no violation of the right to respect for private and family life. The Republika Srpska states that family life under Article 8 of the Convention is not *de jure*, but *de facto* family life (see e.g., Eur. Court HR, *Marckx v. Belgium*, judgment of 13 June 1979, Series A No. 31). The Republika Srpska states that the factual background presented in the application cannot fall within the protection of Article 8, which differentiates between family life and kinship, the latter falling outside the scope of Article 8. The Republika Srpska is of the opinion

⁴ As the application has not been transmitted to Bosnia and Herzegovina, the submissions of the respondent Party are only those of the Republika Srpska.

that the application merely refers to the applicant's expression of piety for deceased members of his family, which is not a right protected under the Convention.

b. Article 9 of the Convention

61. As to the alleged violation of Article 9 of the Convention, the Republika Srpska points out that the protection of the *forum internum* implies that a person cannot be subjected to treatment which aims to change his process of thinking, and that any form of forcing a person into expressing thoughts with a view to change that belief, or disclose religious orientation or beliefs in general falls under Article 10 of the Convention. However, Article 9 of the Convention provides the "collective" dimension of freedom of religion and belief, that is to say that the right does not represent an exclusive right to the individual, but a right guaranteed in "community with others". The Republika Srpska refers to *X & The Church of Scientology v. Sweden* (Eur. Commission H.R, decision of 5 May 1979, Decisions and Reports 16) in which the European Commission held that the Church has the right to manifest its own religion. Accordingly, the Republika Srpska states that there has been no violation in the present case, but, on the assumption that there has been a violation, it would fall under the collective dimension of the freedom of religion and not as pleaded by the applicant.

c. Discrimination

62. As to the complaint of discrimination, the Republika Srpska points out that the Strasbourg organs have consistently stated that the prohibition on discrimination does not ensure an independent right, but establishes a prohibition of discrimination in conjunction with other rights and freedoms set out in the Convention. For the reasons as set out above, the applicant has not been discriminated against in the enjoyment of any of the rights protected under the Convention.

B. The applicant

1. Facts

63. The applicant's submissions as to the facts of the case are summarised in part III above. In response to the written submissions of the Republika Srpska of 9 and 10 October 2002, the applicant points out that he has never claimed to be the owner of the property on which his family cemetery is located. He states that the land is socially owned and appears in the Cadastral plans of the Foča-Srbinje Municipality as socially owned land. However, he states that it was established during the on-site inspection of 24 March 2002 that the maintenance of the cemetery falls within the competence of the Municipality by virtue of the Law on Public Utility Services of the Republika Srpska.

2. Admissibility

a. Ratione personae

64. In reply to the Republika Srpska's objections as to the admissibility of the application, the applicant states that, according to the Law on Public Utility Services of the Republika Srpska Services, the Foča-Srbinje Municipality is obliged to take care of the maintenance and protection of religious cemeteries. Accordingly, the maintenance of the cemetery is within the competence of the Republika Srpska. Additionally, under Article I of Annex 6 to the Agreement, the Republika Srpska, as a Party to the Agreement, is obliged to secure to all persons within its jurisdiction the highest level of internationally recognised human rights and fundamental freedoms. The applicant maintains that the facts complained of in the application were sufficiently brought to the attention of the organs of the Republika Srpska, but the latter took no effective steps to remedy the complaints, prevent future interference or investigate acts that constitute a violation of the Agreement.

65. The applicant also points to the fact that the excavations during 1997, part of a project entitled "Renewal of Orthodox Heritage in Dabar-Bosnia Eparchy, Archaeological Researches", conducted on the grounds of the Čengić family cemetery, were funded by the Republika Srpska Ministry of Education, Science and Culture and therefore fall within its competence. In this respect, the applicant considers the excavations to constitute a direct interference with his rights as protected

under the Agreement.

b. Exhaustion of domestic remedies

66. As to the Republika Srpska's statement that he could have requested the initiation of criminal charges, the applicant states that on 5 October 2002 when the surrounding fence that had been previously moved by the applicant without due authorisation was pulled down, he attended the Public Security Centre in Foča-Srbinje and formally requested the initiation of criminal charges against unknown perpetrators. However, no action was taken in response to this complaint. The applicant also states that he submitted a complaint to the Foča-Srbinje Municipality and prior to that date had submitted a number of complaints to the Foča-Srbinje Municipality, the Municipal Assembly and members of the Public Security Centre in Foča-Srbinje, all of whom remained passive despite his protestations. Due to the lack of assistance from the domestic authorities and the failure to take his complaints seriously, the applicant submitted his application to the Chamber.

3. Merits

67. As to the merits, the applicant states that the submissions of the Republika Srpska concerning discrimination, the right to respect for private and family life and the right to freedom of religion lack substance. The applicant repeats his previous statements that the acts of the Republika Srpska and the Serb Orthodox Church constitute a direct or indirect interference with his family cemetery thus falling within Articles 8 and 9 of the Convention and discrimination in the enjoyment of such rights.

68. In response to the friendly settlement offer from the Republika Srpska, the applicant maintains his position that the Chamber should issue a decision on the merits. In his letter of 15 April 2003, the applicant stated that he did not see how the offer of the Republika Srpska, requesting a public apology, amounted to a friendly settlement offer.

4. Conclusion

69. The applicant states that the on-site inspection, conducted on 24 March 2003, confirmed a number of important facts. Firstly, the Republika Srpska acknowledged that a "proclamation", published by the Serb Orthodox Church, invited citizens to attend an Orthodox "liturgy" on 18 August 2002 known to be intended to take place on the grounds of the Muslim cemetery in Rataj. Secondly, an Orthodox cross has been cut into the stone located in the centre of the cemetery. Thirdly, that all the graves and tombstones located on the grounds of the Čengiċ family cemetery have been almost completely destroyed. Fourthly, he states that it has been established that the surrounding fence and gate have been repeatedly torn down, and fifthly, that several piles of refuse have been dumped on the grounds of the cemetery, a short distance from the graves. Finally, the applicant submits that the Agent of the Government of the Republika Srpska has accepted the position of the Serb Orthodox Church as that of his office.

VII. OPINION OF THE CHAMBER

A. Admissibility

70. In accordance with Article VIII(1) of the Agreement "The Chamber shall receive...on behalf of an applicant, or directly from any Party or person, non-governmental organisation, or group of individuals claiming to be the victim of a violation by any Party or acting on behalf of alleged victims who are deceased or missing, for resolution or decision applications concerning alleged or apparent violations of human rights within the scope of paragraph 2 of Article VIII." Further, in accordance with Article VIII(2) of the Agreement, "the Chamber shall decide which applications to accept.... In so doing, the Chamber shall take into account the following criteria: ... "(a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted(c) The Chamber shall also dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded, or an abuse of the right of petition."

1. As directed against Bosnia and Herzegovina

71. The applicant directs his application against Bosnia and Herzegovina and the Republika Srpska. He has extensively argued why the Republika Srpska should be held responsible for the impugned acts detailed in his application, but has not provided any indication that Bosnia and Herzegovina is in any way responsible for the actions he complains of, nor can the Chamber on its own motion find any such evidence. The application is therefore incompatible *ratione personae* with the provisions of the Agreement, within the meaning of Article VIII(2)(c), insofar as it is directed against Bosnia and Herzegovina. The Chamber therefore decides to declare the application inadmissible against Bosnia and Herzegovina.

2. As directed against the Republika Srpska

a. Content of application under Rule 46 of the Chamber's Rules of Procedure

72. The Republika Srpska objects to the admissibility of the application as not complying with the formal requirements under Rule 46 of the Chamber's Rules of Procedure. The Republika Srpska points out that besides the statement of facts, an applicant is required to submit all relevant arguments, documentation and information on the steps he has taken to comply with the criteria on admissibility under Article VIII(2)(a) of the Agreement.

73. The Chamber notes that on examination of the application submitted by the applicant, the facts detailed are sufficiently precise and substantiated to comply with Rule 46 of its Rules of Procedures. The question as to whether the facts as disclosed by the applicant constitute a violation of the rights guaranteed under the Agreement is to be answered on the merits. Accordingly, the Chamber will not declare the application inadmissible on this ground of failing to comply with the formal application procedures under Rule 46.

b. Locus standi of the applicant

74. The Republika Srpska argues that the applicant cannot be considered to be a victim or have standing in the present case before the Chamber, as the cemetery cannot be the property of natural persons. In this respect, the Islamic Community in Bosnia and Herzegovina, and not the applicant, should have submitted the application. The Republika Srpska also argues that the right to religious freedom protected by Article 9 of the Convention protects the rights of religious communities, and benefits individuals only insofar as they are complaining of a violation of their *forum internum*.

75. The Chamber notes that the applicant is not complaining of a violation of his property rights under Article 1 of Protocol No. 1 to the Convention. The applicant has always recognised that the property on which his family cemetery is located is socially owned property. The arguments of the Republika Srpska in this respect are therefore irrelevant.

76. As to the objection to the applicant's standing with regard to the alleged violation of the right to religious freedom, the Chamber recalls that it has previously held (see e.g., case no. CH/98/892, *Mahmutović*, decision on admissibility and merits of 7 September 1999, Decisions July-December 1999) that Article 9 of the Convention protects individual rights in a case that involved the interference with the burial site of a relative of the applicant. Accordingly, the Chamber will not declare the application inadmissible on this ground.

c. Compatibility *ratione personae* with the Agreement

77. The Republika Srpska objects to the admissibility of the application *ratione personae*, on the ground that neither the Serb Orthodox Church nor the individuals who may have interfered with the graveyard are authorised organs acting on behalf of the Republika Srpska. The application therefore cannot engage the Republika Srpska's responsibility.

78. Article I of the Agreement provides, insofar as is relevant, as follows:

“The Parties shall secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols...”

79. The applicant alleges that the repeated interference with his family cemetery, consisting of the tearing down of the fence and gate, devastation of graves and tombstones, engraving of a cross and archaeological excavations, has been ongoing since 1995. In addition, the applicant complains that the continued threat posed by the Serb Orthodox Church’s desire to consecrate the central stone, contained on the grounds of his family cemetery, and to protect what it believes to be Orthodox heritage, is in violation of his right to freedom of religion. The applicant states that he has, on a number of occasions, requested the protection of the authorities and that all of his complaints have been disregarded and the Republika Srpska now accepts no liability for the actions of “private individuals and members of the Serb Orthodox Church”. According to the applicant, the passivity shown by the authorities by failing to respond to his complaints has permitted those responsible to continue interfering with the peaceful enjoyment of his family cemetery.

80. The Chamber recalls in the *Islamic Community – Banja Luka* decision (case no. CH/96/29 *Islamic Community in Bosnia and Herzegovina*, decision on admissibility and merits of 11 May 1999, paragraphs 161 and 171, Decisions January-June 1999) it held that:

“161. Before scrutinising the alleged acts and omissions of the respondent Party’s authorities the Chamber finds it necessary to recall the undertaking of the Parties to the Agreement to “secure” the rights and freedoms mentioned in the Agreement to all persons within their jurisdiction. This undertaking not only obliges a Party to refrain from violating those rights and freedoms, but also imposes on that Party a positive obligation to ensure and protect those rights (see the above-mentioned *Matanović* case, decision on the merits of 6 August 1997, paragraph 56, Decisions 1996-97, and *Marčeta v. The Federation of Bosnia and Herzegovina*, CH/97/41, decision of 3 April 1998, paragraph 65, Decisions and Reports 1998).

“ ...

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

81. Secondly, the Chamber notes that it is not in dispute that, according to the Law on Public Utility Services (see paragraph 47 above), the Foča-Srbinje Municipality is obliged to take care of the maintenance and protection of religious cemeteries. Accordingly, the maintenance of the cemetery grounds, including the reparation of the graves and tombstones, removal of the engraved cross, re-erecting the fence and gate, falls within the competence of the organs of the Republika Srpska.

82. Thirdly, as the Chamber will explain below (paragraphs 94-96), the excavations carried out on the grounds of the Čengić family cemetery during 1997, part of the project entitled “Restoration of Orthodox Heritage in Dabrobosanska Eparchy, Archaeological Research”, are an important part of the overall interference with the applicant’s rights. These excavations were partially funded by the Republika Srpska Ministry of Education, Science and Culture and a permit for archaeological excavations and research was issued by the Republic Institute on 13 October 1997 in accordance with the Law on Cultural Goods of the Republika Srpska (see paragraph 49 above). The Chamber recalls that in *Lopez-Ostra v. Spain* (Eur. Court HR, judgment of 9 December 1994, Series A no. 303-C, paragraph 52) the European Court, in holding the respondent state responsible for pollution caused by a private company, attributed relevance to the fact that the government had granted permission for the construction of a treatment plant and subsidised its construction. Additionally, the powers conferred on the Republic Institute consist of the exercise of powers conferred by public law and duties assigned to safeguard the general interests of the state or of other public authorities. It therefore follows that the Republic Institute is a public body and that the Republika Srpska may be held responsible for the acts of the Institute, as complained of in the application.

83. In light of the above, the Chamber will not declare the application inadmissible *ratione personae* on the ground that the Serb Orthodox Church is not an authorised organ acting on behalf of the Republika Srpska. The Chamber finds, on the contrary, that the respondent Party was under an obligation to secure the protection of the applicant's rights against the actions of the Serb Orthodox Church and of individuals belonging to the local population.

d. Requirement to exhaust effective domestic remedies

84. According to Article VIII(2)(a) of the Agreement, the Chamber shall take into account whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted.

85. The Republika Srpska submits that the applicant failed to exhaust effective domestic remedies, as required by Article VIII(2)(a) of the Agreement. It argues that the applicant did not submit his complaint to "all the relevant organs of the Republika Srpska". In particular, they argue that before 19 October 2002 the applicant never submitted a request for protection or requested the initiation of criminal proceedings against any alleged perpetrators.

86. The Chamber recalls that Article VIII(2)(a) requires applicants to make "normal use" of available remedies that are "likely to be adequate and effective". The burden of proof is on a respondent Party arguing non-exhaustion of domestic remedies to satisfy the Chamber that there was an effective remedy available to the applicant both in theory and in practice (see, e.g., case no. CH/96/21, *Čegar*, decision on admissibility of 11 April 1997, paragraph 12, Decisions on Admissibility and Merits 1996-1997). In this respect, the Chamber notes that the Republika Srpska has not stated, other than the initiation of criminal proceedings or a request for protection, which remedies the applicant failed to exhaust.

87. As to the initiation of criminal proceedings, the applicant submits that he has on numerous occasions already before 19 October 2002 complained to the police about the acts of vandalism affecting the graveyard. He does not, however, possess any documents that would support this claim and asks the Chamber to request them from the Republika Srpska. The Chamber has done so, and has been assured by the Republika Srpska that the records of the police stations in Foča-Srbinje and Miljevina do not reveal any complaints of the applicant before 19 October 2002. The Chamber can therefore only base its decision on the assumption that the applicant did not formally seek the initiation of criminal proceedings or request police protection before 19 October 2002.

88. This conclusion, however, does not solve the question of admissibility of the application. The Chamber recalls that the applicant is claiming that the respondent Party is discriminating against him in the enjoyment of his rights to respect for family life and religious freedom by tolerating and even encouraging a variety of activities. These activities consist on the one hand of the alleged acts of vandalism on the graveyard by private individuals, but also of the neglect of its duties by the municipal authority in charge of maintaining the graveyard, as well as the conduct of the Serb Orthodox Church, aimed at establishing that the Rataj graveyard is in reality an Orthodox sacred site. Only with regard to the first interference mentioned filing complaints to the police appears to the Chamber a useful remedy, and also in that regard, as the applicant is not seeking punishment of the perpetrators but an end to the interference, it would have been sufficient for the public utility service to regularly perform its activities. As to the archaeological excavations, the Chamber notes that they were officially supported by the competent Republika Srpska authorities. With regard to the conduct of the Serb Orthodox Church, the Chamber notes that Article 28(4) of the Republika Srpska Constitution, in force until 19 August 2000, provides that the Republika Srpska "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", which apparently includes re-claiming the Rataj graveyard to the Serb Orthodox heritage. For these reasons, the Chamber concludes that the initiation of criminal proceedings or requests for police protection are not a remedy "likely to be adequate and effective" in addressing the discrimination complained of by the applicant.

89. The Chamber will accordingly not declare the application inadmissible on the ground of a failure to exhaust domestic remedies.

3. Conclusion as to admissibility

90. The Chamber finds that no other ground for declaring the application inadmissible has been established. Accordingly, the Chamber declares the application in respect of discrimination in the enjoyment of the rights guaranteed under Articles 8 and 9 of the Convention admissible against the Republika Srpska.

B. Merits

91. Under Article XI of the Agreement the Chamber must next address the question of whether the facts established above disclose a breach by the Republika Srpska of its obligations under the Agreement. Under Article I of the Agreement the Republika Srpska is obliged to “secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms”.

92. 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 grounds of sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property birth or other status, 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).

1. Definition of the facts established by the Chamber

93. The Chamber observes that in the present case many factual questions have remained disputed between the Parties. The applicant has made numerous allegations which he has failed to substantiate, notwithstanding repeated invitations by the Chamber and without indicating any adequate reasons for his inability to submit evidence in support of his claims. The Republika Srpska, on the other hand, has made several factual statements that are either contradictory or hard to believe. Many of the facts debated between the Parties are of no relevance to the Chamber’s decision, e.g. whether there once was a medieval Orthodox church on the site of the Rataj graveyard, or when the mosque was built and destroyed, or whether the central stone once formed part of an Orthodox church, or of a mosque, or first of one and then of the other. The following is a short summary of the facts relevant for the Chamber’s decision that the Chamber finds established on the basis of the Parties’ submissions and documents submitted to it.

94. The Rataj graveyard was vandalised during the 1992-95 armed conflict. While it has not been established that tombstones and graves were destroyed or otherwise damaged after the end of the armed conflict, it remains a fact that the Municipality took no steps to ensure that the graveyard is cleaned up, repaired, fenced in or otherwise protected from further devastation, as it is required by the Republika Srpska Law on Public Utility Services and its own Decision on Funeral Activities, Development and Use of Cemeteries. At least once, in autumn 2001, the applicant re-erected the fence surrounding the graveyard. It was very soon torn down again by residents of Miljevina. Both the police and the Municipality learnt of this fact, even made reports about it, but did not consider it necessary to take any action. Moreover, during the year 2002, a cross was engraved into the rear of the central stone and covered with white paint. Again, the Municipality took no action.

95. During the same 1996-2002 period, the Muslim graveyard in Rataj has been the object of efforts aimed at reclaiming it to the “Serb heritage”, i.e. to establish that it has a long tradition as an Orthodox sacred site and to return it to that function. These efforts have consisted firstly of archaeological research aimed at establishing the Orthodox roots of the site. The Republika Srpska Ministry of Education, Science and Culture has funded archaeological excavations on the ground of the cemetery, aimed at finding traces of an ancient Orthodox shrine in the framework of a project entitled “Renewal of Orthodox Heritage in Dabar-Bosnia Eparchy, Archaeological Researches”. The researchers authorised to carry out the excavations appear to have been active for only two months,

in October and November 1997 (see paragraph 29). Thereafter, however, an “archaeological crew” continued to dig at the site throughout the year 2001 and to find what is claimed to be “remains of an old Orthodox cemetery”, as recorded by the local police (see paragraph 29 above).

96. In the year 2002, the efforts to reclaim the Muslim graveyard in Rataj to the “Serb heritage” have shifted their focus from archaeological research to explicitly religious activity. Residents of Miljevina engraved an Orthodox cross in the central stone, which is claimed by both the applicant and the Serb Orthodox Church as the gravitational center of the sacred site. On 1 August 2002, finally, the Serb Orthodox Church issued a public proclamation that was displayed at several locations in Rataj informing the local residents that on 18 August 2002 a liturgy would take place in Rataj . The proclamation stated:

“His Most Holiness the Metropolitan Dabrobosanski, Mr. Nikolaj, will perform the service of divine archiereus liturgy on 18 August 2002 at 09.00 o'clock, in the village of Rataj.”

The proclamation did not precise the location of the proposed liturgy, but during the on-site inspection on 24 March 2003, the Orthodox Metropolitan clarified that the liturgy had been scheduled to take place in front of the central stone on the grounds of the Čengiđ family cemetery. The Republika Srpska has in its submissions attempted to play down the planned liturgy to a mere “visit” to the central stone, but the statements of the Head of the Foča-Srbinja police station and of the Orthodox Metropolitan leave no doubt about the fact that the intended purpose was to convert the central stone and the surrounding part of the graveyard back into an Orthodox site (see paragraphs 38 and 39 above). The authorities of the Republika Srpska did not take any action to prevent this liturgy from taking place, nor have they expressed the opinion that it should be prevented. The liturgy was prevented by the order for provisional measures issued by the Chamber on 16 August 2002.

2. Discrimination in the enjoyment of the right to private and family life and the right to freedom of religion

97. The applicant complains primarily that he has been the victim of discrimination on the grounds of his religion, as a Muslim, since only Muslim cemeteries are subject to repeated interference in the Foča-Srbinja Municipality. He also submits that the case involves an attempt to remove all traces of the existence of a Muslim cemetery and his family’s heritage in the village Rataj in the Foča-Srbinja Municipality. The Chamber has considered these complaints under Article II(2)(b) of the Agreement in relation to Article 8 and Article 9 of the Convention.

98. Article 8 of the Convention provides as follows:

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

“(2) 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.”

99. 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.”

(a) Whether the complaints fall within the scope of the right to respect for private and family life and of the right to freedom of religion

100. In order to determine whether the applicant has been discriminated against, on the ground of

his religion, national origin or association with a national minority, in the enjoyment of his rights to freedom of religion and respect for his private and family life, the Chamber must first determine whether the applicant's complaints fall within the ambit of these rights.

(i) *The right to respect for private and family life*

101. As regards Article 8 of the Convention the Chamber held in *Mahmutović* (see case no. CH/98/892, decision on admissibility and merits of 7 September 1999, Decisions July-December 1999, paragraph 84):

“84. As to Article 8 of the Convention, the European Commission of Human Rights held in the case of *X. v. the Federal Republic of Germany* (Decisions and Reports 24, p. 137) that the refusal of the German authorities to allow the applicant in that case to have his ashes scattered on his garden was so closely related to private life that it came within the sphere of Article 8 (ibid. at p. 139). In the present case, the applicant asserts that his family originates from Prnjavor and that for many years family members have been buried at the family plot at the Muslim Cemetery where his late wife is buried. He also claims that numerous members of the family were severely upset by the authorities' action in ordering her exhumation....In the circumstances of the case the Chamber considers that the authorities' action in ordering the exhumation of the applicant's wife from the family plot was so closely related to the private and family life of the applicant that it came within the ambit of Article 8 in so far as it relates to respect for private and family life.”

102. Additionally, in *Hopu & Others v. France* (UN Human Rights Committee, communication 549/1993, views adopted on 29 July 1997) the UN Human Rights Committee held that the applicants in that case considered the relationship to their ancestors to be an essential element of their identity and to play a significant role in their family life. They could not, contrary to the contentions of France, be reproached for failing to establish a direct kinship connection between the remains discovered in the burial grounds and themselves. The construction of a hotel complex on their ancestral burial grounds therefore constituted interference with their right to respect for family life and privacy. The UN Committee then went on to state:

“(10.3)...The Committee observes that the objectives of the Covenant require that the term 'family' be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term 'family' in a specific situation. It transpires from the authors' claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life.”

103. In the circumstances of the present case, considering that the Rataj graveyard has been the graveyard of the applicant's family for many generations, and that the applicant's mother was buried there in 1991, the Chamber finds that the applicant's complaints falls within the ambit of Article 8 of the Convention.

(ii) *The right to freedom of religion*

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

105. The Chamber recalls that in the *Jakeš Cemetery Case* (case no. CH/00/4889, *The Islamic Community in Bosnia and Herzegovina v. Republika Srpska*, decision of 8 October 2001, Decisions July-December 2001, paragraph 45) it held:

“(45) The Chamber has previously found that 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 this case, the Chamber further finds that the unauthorised burial of non-Muslims and the erection of crosses in the Jakeš Cemetery, an exclusively Muslim cemetery, without the consent of the Islamic Community falls within the scope of Article 9 of the Convention because such actions interfere with the religious practice and observance of the Islamic Community in burying their deceased in a religious cemetery maintained exclusively for Muslims in accordance with Bosnian tradition.”

The Chamber therefore considers that the alleged interference with the applicant’s family cemetery falls within the ambit of Article 9 of the Convention, insofar as it relates to freedom of religion, including in particular freedom to manifest one’s religion in practice and observance.

106. The Chamber therefore finds that the facts of the case fall within the ambit of Articles 8 and 9 of the Convention and that it therefore has jurisdiction under Article II(2)(b) of the Agreement to consider whether the applicant has been the victim of discrimination in relation to the enjoyment of his rights under those provisions.

(b) Whether the applicant has been subject to differential treatment based on his religion

107. 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).

108. The applicant complains that the interference with his family cemetery is based solely on discriminatory grounds and that the local residents of Rataj, largely of Orthodox faith, receive preferable treatment. The applicant draws the Chamber’s attention to the fact that the Republika Srpska materially supports the work of the Serb Orthodox Church, as is evidenced by the excavations conducted on the grounds of the applicant’s family cemetery. The applicant maintains that he has, at various stages, sought the protection of the authorities, but to no avail. He considers the tearing down of the surrounding fence, desecration of graves and tombstones and engraving of an Orthodox cross into the central stone a direct interference with his rights on discriminatory grounds. He states that there is a continued threat of an interference concerning the “consecration-christening” of the central stone that has not been entirely removed by the Chamber’s order for provisional measures.

109. The respondent Party has not addressed the question of differential treatment, but states that no issue of discrimination could arise, as there was no interference with any protected right, an argument that the Chamber has already dismissed.

110. The Chamber is of the opinion that the conduct of the Republika Srpska authorities in the present case does in fact disclose a great solicitude in ensuring and promoting the heritage of the Serb Orthodox Church, while showing utter neglect of the religious feelings of the Muslim community that has been burying its dead at the cemetery in Rataj over the last few centuries. The Republika Srpska Ministry of Education, Science and Culture has funded archaeological excavations on the ground of the cemetery, aimed at finding traces of an ancient Orthodox shrine in the framework of a project entitled “Renewal of Orthodox Heritage in Dabar-Bosnia Eparchy, Archaeological Researches”. Additionally, the necessary permission to conduct the excavations was given to the project by the Republic Institute, a public body of the Republika Srpska, in accordance with the provisions of the Law on Cultural Goods of the Republika Srpska. Under Articles 5 and 65 of the Law, the Republic Institute is empowered to protect cultural heritage in the Republika Srpska, and the meaning of

“cultural good/heritage” is defined as an object that has “particular significance for historical, spiritual or cultural development of the Serb nation” (emphasis added). The Foča-Srbinje Municipal authorities (as well as the Ministry and the Republic Institute) have at the same time shown no interest in the protection of an active Muslim cemetery, which at the same time constitutes an important piece of Muslim religious heritage. The Chamber thus concludes that the facts established do reveal differential treatment between the applicant as a member of the Muslim community in the Foča-Srbinje Municipality and the Serb Orthodox community in the same Municipality.

111. As a background to this differential treatment, 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 BiH Official Gazette (see paragraph 51 above). Nonetheless, until 2000 the 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 first part of 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.

(c) Whether the difference in treatment is justified

112. As already stated above, 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.

113. The Chamber notes that the conduct of the Republika Srpska constituting differential treatment consists of neglect of its duty to protect the Rataj graveyard, in particular by assisting the applicant in maintaining a fence around it, support to a program of archaeological excavations and toleration of acts of the Serb Orthodox Church and of individuals aimed at “reclaiming” a Muslim graveyard to the Orthodox heritage.

114. As to the inaction regarding the acts of vandalism affecting the graveyard, the Chamber notes that the Republika Srpska authorities have neglected their own laws. Article 20 of the Law on Public Utility Services of the Republika Srpska Services (see paragraph 47 above) confers a duty on the Municipality for the maintenance of cemeteries. Accordingly, the complaints concerning the tearing down of the fence, the desecration of graves and tombstones and the engraving of an Orthodox cross on the central stone create a legal obligation to protect the applicant’s cemetery. As mentioned above, such acts also constitute criminal offences prosecuted *ex officio* under Article 253 of the Republika Srpska Criminal Code. Even if the desecration of tombstones and graves occurred prior to the entry into force of the Dayton Peace Agreement, the failure to pursue criminal investigations after 14 December 1995 reinforces the impression in the local population that impunity is granted to those who attack Muslim religious sites. The Chamber concludes that, as the lack of responsive action of the Republika Srpska authorities to the repeated acts of vandalism against the Muslim graveyard in Rataj is in violation of the duties imposed on the authorities by Article 20 of the Law on Public Utility Services and of the Decision on Funeral Activities, Development and Use of Cemeteries and of the Criminal Code, it cannot be said to pursue any legitimate aim. In this respect, therefore, the inaction of the respondent Party amounts to discrimination against the applicant on grounds of religion in the enjoyment of the right to freedom of religion and to respect for his private and family life.

115. As to the archaeological excavations on the site of the graveyard, the Chamber recalls that this was in accordance with the Law on Cultural Goods of the Republika Srpska. The Chamber is of

the opinion that scientific research aimed at finding traces of an ancient Orthodox shrine and at reviving the heritage of the Serb Orthodox Church in the area does pursue a legitimate aim. This research, however, interferes with the religious feelings of the Muslim families who have in more recent times buried their dead at the cemetery in Rataj. The Chamber must therefore determine whether the Republika Srpska authorities have respected a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

116. Similarly, the Chamber finds that tolerance or even support by the Republika Srpska authorities for the efforts of the Serb Orthodox Church to revive what it perceives to be an ancient Orthodox sacral site does pursue a legitimate aim, i.e. the religious freedom of the Serb Orthodox believers. In the instant case, however, the religious freedom of the Serb Orthodox Church and of its members clashes with the religious feelings of the applicant and, presumably, of other Muslim families of the area. The Chamber must therefore again determine whether the Republika Srpska authorities have respected a reasonable relationship of proportionality between the protection of the freedom of religion of the Serb Orthodox Church and the applicant's right to respect for family life and freedom of religion.

117. In the context of the present case, the establishment of such a reasonable relationship of proportionality cannot disregard the dramatic events that took place in the Foča-Srbinje Municipality during the armed conflict of 1992-1995. As the ICTY Trial Chamber found in the *Kunarac & Others* judgment (paragraph 47): "As a consequence of the concerted effect of the attack upon the civilian population of Foča and surrounding municipalities, all traces of Muslim presence in the area were effectively wiped out. Muslim civilians, but for a handful, had been one way or another expelled from the region. According to the 1991 Census, Foča municipality had a pre-war population of about 40,513 inhabitants of whom 52% were Muslim. According to the Prosecutor's evidence, only about ten Muslims remained at the end of the conflict".

118. 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 Annex 7). 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.

119. Under these circumstances the Chamber concludes that the Republika Srpska's toleration and support for the search of Serb Orthodox heritage at the Muslim graveyard in Rataj, and their toleration of the attempts of the Serb Orthodox Church to perform religious ceremonies on that graveyard, fail to strike a reasonable balance between the conflicting needs of the two religious communities. In the light of the events in the Foča-Srbinje Municipality during the recent armed conflict in Bosnia and Herzegovina, particularly of the successful campaign to "cleanse" the Foča-Srbinje area of its non-Serb population (as stated in the *Kunarac & Others*, Appeals Chamber, judgment of 22 June 2002, paragraph 3) and of all traces of Muslim presence in the area, the Chamber finds that the toleration of and support to the activities of the Serb Orthodox Church on the Muslim graveyard in Rataj amounts to discrimination against the applicant in the enjoyment of his rights to freedom of religion and to respect for his private and family life.

(d) Conclusion

120. In conclusion, the Chamber finds that the Republika Srpska has discriminated against the applicant in the enjoyment of his rights protected by Articles 8 and 9 of the Convention.

3. Conclusion as to the merits

121. In summary, the Chamber finds that the applicant has been discriminated against in the enjoyment of his right to freedom of religion under Article 9 of the Convention as well as in the enjoyment of right to respect for private and family life under Article 8 of the Convention, due to his Muslim religion.

IX. REMEDIES

122. 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".

123. In his application the applicant requests that the Republika Srpska be ordered to repair the destroyed graves and tombstones, to remove the Orthodox cross engraved in the central stone, to erect a new fence and gate and to clean the cemetery of refuse. In the event that the Chamber is unable to order such remedies, the applicant requests that the Republika Srpska be ordered to compensate him in the amount of 15,000 KM (Convertible Marks) in order to restore the cemetery to its original condition. The applicant further requests that the Republika Srpska be ordered to ensure regular maintenance of the cemetery and to compensate the applicant for moral damage in the amount of 20,000 KM and for legal costs and expenses in the amount of 5,000 KM, all to be paid within a time limit as determined by the Chamber.

124. The Republika Srpska has not commented on the applicant's requests for remedies.

125. In the light of the applicable law, and in particular of Article 12(1) and (2) of the Decision on Funeral Activities, Development and Use of Cemeteries of the Foča-Srbinje Municipality (see paragraph 48 above), the Chamber finds it appropriate to order the Republika Srpska to ensure that the competent enterprise properly fences in, cleans and maintains the Rataj Muslim graveyard.

126. Similarly, the Chamber finds it appropriate to order the Republika Srpska to take all necessary steps to prevent the Serb Orthodox Church from carrying out any further activities on the Rataj Muslim graveyard.

127. The Chamber will now turn to the question of monetary relief. In this respect, the Chamber recognises the difficulties inherent in the determination of adequate monetary compensation for the violations found. Regarding compensation for pecuniary damages suffered, i.e. the demolition of the fence and the future expenses the applicant will have to incur in order to restore the graveyard, the Chamber finds it appropriate to order the Republika Srpska to pay to the applicant compensation for pecuniary damage in the amount of 1,000 KM. Turning to compensation for the moral damage suffered, the Chamber notes that the present decision in itself will in large part constitute recognition of the wrongs done to the applicant. Nevertheless, the Chamber considers it appropriate to award the applicant financial compensation commensurate to the harm suffered. The Chamber will therefore order the Republika Srpska to pay to the applicant compensation for non-pecuniary damage in the amount of 2,000 KM. As to the question of legal costs and expenses, taking into account that the applicant has been legally represented throughout the proceedings before the Chamber, and that his legal representative has, at the request of the Chamber or in response to the Republika Srpska's written observations, submitted numerous written submissions and attended an on-site inspection on 24 March 2003, and taking into consideration the particular facts of the case and the complexity of the issues, the Chamber finds it appropriate to award the applicant 1,000 KM in respect of legal costs incurred. These amounts are to be paid within one month of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure.

128. The Chamber will dismiss the remainder of the applicant's claims for compensation.

129. The Chamber will further award simple interest at an annual rate of 10% as of the date of expiry of the one-month period set in paragraph 127 above for the implementation of the compensation awards in full or any unpaid portion thereof until the date of settlement in full.

X. CONCLUSIONS

130. For the above reasons, the Chamber decides,

1. unanimously, to declare the application as directed against Bosnia and Herzegovina inadmissible;

2. by 6 votes to 1, to declare the application as directed against the Republika Srpska admissible;

3. by 6 votes to 1, that the applicant has been discriminated against in the enjoyment of his right to private and family life as guaranteed by Article 8 of the European Convention on Human Rights and of his right to freedom of religion as guaranteed by Article 9 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Agreement;

4. by 6 votes to 1, to order the Republika Srpska to take all steps necessary to ensure that the competent enterprise properly fences in, cleans and maintains the Rataj Muslim graveyard;

5. by 6 votes to 1, to order the Republika Srpska to take all necessary steps to prevent the Serb Orthodox Church from carrying out any further activities on the Rataj Muslim graveyard;

6. by 6 votes to 1, to order the Republika Srpska to desist from taking any steps, and to ensure that no other party takes such steps, that constitute a continued interference with the applicant's rights as defined by this decision;

7. by 6 votes to 1, to order the Republika Srpska to pay to the applicant, within one month of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the sum of 1,000 KM (one thousand Convertible Marks) by way of compensation for pecuniary damage suffered by the applicant;

8. by 6 votes to 1, to order the Republika Srpska to pay to the applicant, within one month of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the sum of 2,000 KM (two thousand Convertible Marks) by way of compensation for non-pecuniary damage suffered by the applicant;

9. by 6 votes to 1, to order the Republika Srpska to pay to the applicant, within one month of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the sum of 1,000 KM (one thousand Convertible Marks) by way of compensation for legal costs and expenses incurred in the proceedings before the Chamber;

10. by 6 votes to 1, that simple interest at an annual rate of 10% (ten percent) will be payable on the sums awarded in conclusions 7, 8 and 9 above from the expiry of the one-month period set for such payment until the date of final settlement of all sums due to the applicant under this decision; and

11. by 6 votes to 1, to order the Republika Srpska to report to the Human Rights Chamber or its successor institution within two months of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedures on the steps taken by it to comply with the above orders.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Mato TADIĆ
President of the Second Panel