# DECISION ON REVIEW
**(delivered on 12 October 2001)**

**Case no. CH/98/1062**

**THE ISLAMIC COMMUNITY IN BOSNIA AND HERZEGOVINA**

**against**

**THE REPUBLIKA SRPSKA**

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 4 September 2001 with the following members present:

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

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

Having considered the applicant's and the respondent Party's requests for review of the decision of the Second Panel of the Chamber on the admissibility and merits of the aforementioned case;

Having considered the First Panel's recommendation;

Having regard to its decision of 9 February 2001 accepting in full the applicant's and in part the respondent Party's requests for review;

Adopts the following decision pursuant to Article X(2) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina, as well as Rule 65 of the Chamber's Rules of Procedure:

## I. FACTS AND COMPLAINTS

1. The Chamber refers to the Second Panel's decision on admissibility and merits delivered on 9 November 2000, which is appended to the present decision (Annex A). In that decision, the Second Panel found that the Republika Srpska violated the Islamic Community's right to freedom of religion, as guaranteed by Article 9 of the Convention, and right to the peaceful enjoyment of its possessions, as guaranteed by Article 1 of Protocol No. 1 to the Convention, and discriminated against the Islamic Community in its enjoyment of these protected rights by preventing the Islamic Community from using the sites of destroyed mosques and reconstructing the destroyed mosques in Zvornik.

2. As remedies for the violations, the Second Panel ordered the Republika Sprska to take the following actions, which are summarised from the decision: a) to allocate a suitable and centrally located building site in the town of Zvornik to permit, upon request of the Islamic Community, the construction of a mosque to replace the former Zamlaz mosque; b) to remove from the Riječanska site all market stands, to put an end to its utilisation as a car park, not to permit the use of the site for any purpose affecting or interfering with the rights of the Islamic Community, and to grant, within 3 months of the receipt of a request from the Islamic Community, the necessary permit for reconstruction of the Riječanska mosque at the location at which it previously existed; c) to allocate a suitable building site in the vicinity of the site of the former Divič mosque to permit, upon request of the Islamic Community, the construction of a mosque to replace the former Divič mosque; and d) to pay to the applicant 10.000 KM as monetary compensation for the moral damage suffered after 14 December 1995 in relation to all sites in question.

## II. SUMMARY OF THE PROCEEDINGS BEFORE THE CHAMBER

3. On 9 November 2000 the Second Panel's decision on admissibility and merits was delivered pursuant to Rule 60 of the Chamber's Rules of Procedure.

4. On 21 November 2000, the Islamic Community submitted a request for review of the decision. On 18 December 2000, the Republika Srpska also submitted a request for review of the decision.

5. In accordance with Rule 64(1), the First Panel considered the requests for review. On 8 February 2001, the First Panel unanimously recommended that the plenary Chamber accept the applicant's request for review in full and accept the respondent Party's request for review in part insofar as it was directed against the award of monetary relief in the decision.

6. On 9 February 2001, the plenary Chamber issued a decision on request for review in accordance with the First Panel's recommendation (Annex B).

7. The Islamic Community submitted supplemental written observations in the review proceedings on 6 March and 3 May 2001, and the Republika Srpska submitted supplemental written observations in the review proceedings on 4 May 2001.

8. The plenary Chamber deliberated on the requests for review on 9 February, 4 June, 7 June, 4 September, and 8 October 2001. On 4 September 2001, the Chamber adopted the present decision on review.

## III. THE REQUESTS FOR REVIEW

### A. By the Islamic Community

9. The Islamic Community requested review of the decision on admissibility and merits with respect to conclusions nos. 6 (ordering the respondent Party to allocate a suitable and centrally located building site in Zvornik to permit the Islamic Community, upon its request, to construct a mosque to replace the former Zamlaz mosque), 8 (ordering the respondent Party to allocate a

suitable building site in the vicinity of the site of the former Divič mosque to permit the Islamic Community, upon its request, to construct a mosque to replace the former Divič mosque), and 9(a) (ordering the respondent Party to pay to the applicant 10.000 KM in monetary compensation for moral damages suffered after 14 December 1995 in relation to all religious sites in question).

10. With respect to conclusions 6 and 8, the Islamic Community argues that although the Chamber found a violation of its rights protected by Article 9 and Article 1 of Protocol No. 1 to the Convention, as well as discrimination in the enjoyment of these rights, the conclusions decided upon by the Chamber to remedy these violations only "legalise" the violations committed by the respondent Party. The Islamic Community elaborates upon its argument as follows:

> "[I]n its conclusions nos. 6 and 8, the Chamber orders the respondent Party to secure other sites for the applicant's construction of the Zamlaz and Divič mosques, and that illegally constructed facilities which represent the basis of the discrimination should stay intact. That means that the rights of the respondent Party which were realised by the unlawfully constructed legal businesses, and which are the basis of the discrimination, are legalised by this decision, and in that way gives the clear sign to the respondent Party that, on all sites of destroyed mosques on the territory of the Republika Srpska which are the applicant's property, it, by illegally constructing legal businesses, can gain rights." (Request for Review dated 21 November 2000).

11. With respect to conclusion no. 9(a) regarding the award of monetary compensation for moral damages, the Islamic Community contends that the Chamber misinterpreted its claim for compensation. As a result, the Chamber ordered an unrealistically low monetary compensation award. The Islamic Community seeks compensation for both pecuniary and non-pecuniary damages. "Pecuniary damages relate to the damage which was caused to the applicant by the destruction of gravestones … and for not having the possibility to use these sites for reconstruction of the facilities in question. Non-pecuniary damages relate to the mental suffering of Muslims, members of the Islamic Community in Bosnia and Herzegovina, due to their inability to perform religious ceremonies on the sites in question." (Request for Review dated 21 November 2000).

12. In conclusion, the Islamic Community requests that the Chamber change conclusions nos. 6, 8, and 9(a) in the decision on admissibility and merits to read as follows:

> "6. The respondent Party is ordered, within 6 months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, to remove at its own expense the constructed business-residential building from the site of the Zamlaz mosque in Zvornik, and within 3 months from the date of the removal of the building in question, to permit, upon the request of the Islamic Community, the appropriate building documentation for reconstruction of the Zamlaz mosque.
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> "8. The respondent Party is ordered, within 6 months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, to remove at its own expense the constructed Orthodox church from the site of the Divič mosque in Zvornik, and within 3 months from the date of the removal of the facility in question, to permit, upon the request of the Islamic Community, the appropriate building documentation for reconstruction of the Divič mosque.
>
> "9(a). The respondent Party is ordered to pay to the applicant, as monetary compensation for suffered pecuniary and non-pecuniary damages, KM 100,000. The established damage amounts to KM 50,000 for the site of the Zamlaz mosque and KM 50,000 for the site of the Divič mosque." (Request for Review dated 21 November 2000).

13. In its supplemental submission of 3 May 2001, the Islamic Community states that "the amount of non-pecuniary compensation is extremely low". The Islamic Community asks that the Chamber award it compensation "on two grounds, *i.e.*, pecuniary and non-pecuniary damages". The pecuniary damages should take into account the removal of the gravestones from the Zamlaz mosque site, the removal of the remains of the Divič mosque, and the Islamic Community's inability

to use its property due to the newly constructed facilities on the former mosque sites. The Islamic Community further emphasises that the Republika Srpska is incurring financial profit from the residential business it constructed on the former Zamlaz mosque site.

### B. By the Republika Srpska

14. The Republika Srpska requested review of the decision on admissibility and merits in full, but in its decision on request for review, the Chamber only accepted the respondent Party's request insofar as it related to the issue of monetary compensation. Accordingly, only the arguments pertaining to monetary compensation are considered by the Chamber in this decision on review.

15. The Republika Srpska challenges the Chamber's award of monetary compensation on a variety of grounds. The Republika Srpska contends that the Chamber exceeded its competence *ratione temporis* by awarding compensation "on behalf of 'moral damages' which the applicant suffered before 14 December 1995." In addition, the Republika Srpska argues that moral damages are "non-material damages", which, according to domestic law, may only be awarded to "a natural person for mental suffering and pain, damaged honour, and violations of freedom and personal rights. Consequently, this type of damage cannot be awarded to legal persons according to domestic law… ." The Republika Srpska also notes that the applicant did not claim compensation for moral damages; therefore, it argues that "the Chamber exceeded the scope of the applicant's claim… ." (Request for Review dated 13 December 2000). Lastly, the Republika Srpska, relying upon domestic law, argues that the claim for compensation is time-barred because more than three years have passed since the damage was caused and acknowledged by the respondent Party.

16. In its supplemental submission of 4 May 2001, the Republika Sprska further argues that the Islamic Community's request for review is "ill-founded and unjustified". The Republika Sprska emphasises that the Islamic Community did not submit a request to the Municipality for reconstruction of the mosques on the sites of the former Zamlaz, Riječanska, and Divič mosques nor a request that the First Instance Court in Zvornik issue a decision requiring that the newly constructed facilities on the former mosque sites be pulled down. Citing the Law on Basic Property and Legal Relations (see paragraphs 21-22 below), the Republika Sprska contends that it "would not be socially justified" for the Chamber to order that the newly constructed facilities on the former mosque sites be pulled down because the builder behaved well and the newly constructed facilities are of higher value than the land upon which the facilities stand.

## IV. THE DECISION ON REQUEST FOR REVIEW

17. In the decision on request for review of 9 February 2001, the First Panel and the Chamber addressed the admissibility of the requests for review. The Chamber declared both requests for review admissible.

18. With respect to the substantive grounds addressed in the requests for review, the First Panel opined that the objections raised by the applicant concerning conclusions 6, 8, and 9(a) and the objections raised by the respondent Party concerning the award of monetary compensation satisfy the conditions of Rule 64(2) of the Chamber's Rules of Procedure. Accordingly, the First Panel recommended that the plenary Chamber accept the requests for review in these respects.

19. The plenary Chamber agreed with the recommendations of the First Panel. Therefore, the Chamber accepted the applicant's request for review in full and accepted the respondent Party's request for review in part insofar as it was directed against the award of monetary compensation.

## V. RELEVANT DOMESTIC LEGAL PROVISIONS IN THE REPUBLIKA SRPSKA

20. The Law on Basic Property and Legal Relations (Official Gazette of the Socialistic Federal Republic of Yugoslavia— hereinafer "OG SFRY"— no. 6/80) governs property relations in the territory of the Republika Srpska in the event a person constructs upon property owned by another. The Law remains effective in Bosnia and Herzegovina in accordance with Article 2 of Annex II to the Constitution of Bosnia and Herzegovina, which provides for transitional arrangements, including the continuation of laws in effect within the territory of Bosnia and Herzegovina as of the date the Constitution entered into force, 14 December 1995, until otherwise determined by a competent governmental body of Bosnia and Herzegovina.

21. Article 25 of the Law on Basic Property and Legal Relations provides as follows:

> "If a builder was aware that he/she constructed on someone else's land or if he/she was unaware of it and the owner failed to immediately object to the construction, then the owner of the land may request that he/she be granted the ownership right over the constructed facility, or that the builder destroys the facility and returns the land to its original state, or that the builder pays him/her the amount of the market price of the land.
>
> "As an exception to the provisions of paragraph 1 of this Article, the court may decide that the constructed facility will not be destroyed if destruction of the facility would not be socially justified, considering the circumstances of the case and especially the value of the facility, the property status of the owner of the land and the builder, as well as their conducts during the construction process.
>
> "In the events set out in paragraph 1 of this Article, the owner of the land is entitled to compensation for his/her damage.
>
> "If the owner of the land requests the right to ownership over the constructed facility, he/she is obliged to compensate the builder for the value of the facility in the amount of the average construction price of the facility in the place in which the facility is located at the time the court decision is issued.
>
> "The owner of the land may exercise the right to options set out in paragraph 1 of this Article at the latest within three years from the date the construction works are completed. After the expiry of this time period, the owner may request payment for the market price of the land."

22. Article 26 of the Law further provides:

> "If the builder is *bona fide* and if the owner of the land was unaware of the construction, then, in the event the constructed facility is worth considerably more than the land, the facility together with the land shall belong to the builder and he/she shall owe to the owner of the land compensation for the land in the amount of the market price of the land.
>
> "If the value of the land is considerably higher than the value of the constructed facility, then the court shall allocate the facility to the owner of the land, upon his/her request, and shall oblige the owner of the land to compensate the builder for the construction value of the facility in the amount of the average construction price applicable in the place in which the facility is located. The owner of the land may file such a request within three years from the date on which the construction works on the facility were completed.
>
> "If the builder is *bona fide* and if the owner of the land was unaware of the construction, then the court shall allocate the constructed facility or the facility and the land, respectively, provided the value of the land and the value of the facility are approximately the same, to the owner of the land and the builder, respectively, taking into account their needs and especially their housing circumstances.
>
> "The owner of the land and the builder, respectively, are entitled to compensation for the land and the constructed facility, respectively, in accordance with the provisions of paragraph 1 of this Article."

## VI. THE CHAMBER'S DECISION ON REVIEW

### 1. Scope of the case on review

23. The Second Panel found that the respondent Party violated the rights of the applicant with respect to freedom of religion as guaranteed by Article 9 of the Convention, peaceful enjoyment of its possessions as guaranteed by Article 1 of Protocol No. 1 to the Convention, and discrimination in the enjoyment of these rights. These conclusions are not subject to review. What is subject to this review are the proper remedies for such violations.

24. In light of its decision on request for review of 9 February 2001, the plenary Chamber will confine its review of the Second Panel's decision on the admissibility and merits of the case, delivered on 9 November 2000, to conclusions nos. 6, 8, and 9(a).

### 2. Review of conclusion no. 6 regarding replacement of former Zamlaz Mosque

25. The Second Panel decided conclusion no. 6 as follows:

> "by 6 votes to 1, to order the respondent Party to allocate, within 6 months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, in consultation with the Islamic Community, and for its use only, a suitable and centrally located building site in the town of Zvornik to permit, upon request of the Islamic Community, the construction of a mosque to replace the former Zamlaz mosque;".

26. The Chamber notes that according to the land register, the land upon which the former Zamlaz mosque was located is socially-owned property, and the Islamic Community was the user and the possessor of the right to use the Zamlaz mosque. In 1992 all the mosques in Zvornik, including the Zamlaz mosque, were destroyed. On 30 June 1997, the Municipality of Zvornik issued a procedural decision granting a right to use the site of the former Zamlaz mosque in favour of the state-owned company "ODGP Inženjering Zvornik". On 3 February 1998, the Municipality of Zvornik issued a building permit to "ODGP Inženjering Zvornik" for the construction of a multi-story building, which was thereafter constructed and currently stands on the site of the former Zamlaz mosque. This multi-story building contains business premises in the ground floor and residential apartments in the above-ground floors. According to the cadaster register, "ODGP Inženjering Zvornik" is the actual possessor of the site of the former Zamlaz mosque at the present time.

27. The Law on Basic Property and Legal Relations is not binding upon the Chamber but offers it persuasive guidance in fashioning an appropriate legal remedy for the human rights violations at issue in the case. Article 25 of this Law provides that when a builder constructs a facility upon the land of another, "the court may decide that the constructed facility will not be destroyed if destruction of the facility would not be socially justified, considering the circumstances of the case and especially the value of the facility, …" (see paragraph 21 above).

28. Considering that the Islamic Community was not and is not the owner of the land of the former Zamlaz mosque, but rather was the user and the possessor of the right to use the mosque which formerly stood upon socially-owned land, and considering that the multi-story building currently standing on the site is commercially valuable and in use by members of the local community, the Chamber finds that it would not be appropriate under the circumstances to order demolition of the multi-story building currently standing on the site of the former Zamlaz mosque.

29. The Chamber finds that it is appropriate under the circumstances that the Islamic Community should be permitted, upon its request, to construct a mosque to replace the former Zamlaz mosque on a suitable and centrally located building site in the town of Zvornik, as ordered by the Second Panel. Accordingly, the plenary Chamber concludes that conclusion no. 6 of the decision on admissibility and merits will remain unchanged.

### 3. Review of conclusion no. 8 regarding replacement of former Divič Mosque

30. The Second Panel decided conclusion no. 8 as follows:

> "by 6 votes to 1, to order the respondent Party to allocate, within 6 months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, in consultation with the Islamic Community, and for its use only, a suitable building site in the vicinity of the site of the former Divič mosque to permit, upon request of the Islamic Community, the construction of a mosque to replace the former Divič mosque;"

31. The Chamber notes that according to the land register, the land upon which the former Divič mosque was located is property owned by the Islamic Community. According to the cadaster register, the Serb Orthodox Church is the current possessor of the land of the former Divič mosque, which land, according to the land registry, remains in the ownership of the Islamic Community.

32. As with its review of the conclusion concerning the site of the former Zamlaz mosque, the Chamber looks to the Law on Basic Property and Legal Relations for persuasive guidance in fashioning an appropriate legal remedy for the human rights violations in the case with respect to the site of the former Divič mosque. Once again the Chamber takes notice of Article 25 of the Law which provides that when a builder constructs a facility upon land owned by another, "the owner of the land may request that he/she be granted the ownership right over the constructed facility, or that the builder destroys the facility and returns the land to its original state, or that the builder pays him/her the amount of the market price of the land". However, the second paragraph of Article 25 offers an exception to this provision: "the court may decide that the constructed facility will not be destroyed if destruction of the facility would not be socially justified, considering the circumstances of the case and especially the value of the facility, the property status of the owner of the land and the builder, as well as their conducts during the construction process" (see paragraph 21 above). Thus, domestic law provides that even in the extreme case when a builder knowingly constructs a facility on land owned by another, the court may decide, in its discretion and considering the circumstances of the case, not to order the destruction of the constructed facility. In any event, "the owner of the land is entitled to compensation for his/her damage" (see paragraph 21 above).

33. The Chamber notes that it is within its competence to order that the Serb Orthodox church be removed from the site of the former Divič mosque and that the land be returned to its original state. Such a result is also contemplated by domestic law in Article 25 of the Law on Basic Property and Legal Relations (see paragraph 21 above). However, bearing in mind the prevailing circumstances in the country, and considering that the Serb Orthodox church has already been in use by members of the local community for some time, the Chamber finds that it would not be appropriate to order demolition of the church currently standing on the site of the former Divič mosque.

34. The Chamber finds that it is appropriate under the circumstances that the Islamic Community should be permitted, upon its request, to construct a mosque to replace the former Divič mosque, as ordered by the Second Panel in conclusion no. 8 of the decision on admissibility and merits. In addition, recognising that the Islamic Community was and continues to be the owner of the land of the former Divič mosque, the Chamber will order that conclusion no. 8 be modified to reflect that the Islamic Community should be given ownership over a suitable alternative site upon which it may construct a mosque to replace the former Divič mosque. The Chamber will order that the respondent Party make this reparation to the Islamic Community for the *de facto* deprivation of its land. Such compensation in kind is necessary under the circumstances because the respondent Party, by permitting construction of the Serb Orthodox church on the site, has effectively divested the Islamic Community of its right to ownership of the land.

### 4. Review of conclusion no. 9(a) regarding monetary compensation

35. The Second Panel decided conclusion no. 9(a) as follows:

> "by 5 votes to 2, a) to order the respondent Party to pay to the applicant, as monetary compensation for the moral damage suffered after 14 December 1995 in relation to all sites in question, KM 10.000 within 30 days from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure;…"

36. The Chamber recognises that the Islamic Community has requested pecuniary compensation for destruction of the gravestones in the graveyard on the site of the former Zamlaz mosque, which graveyard was put out of use more than thirty years ago. However, there is insufficient evidence in the case file to place a pecuniary value on the gravestones. More significantly, the Chamber interprets the compensation claim of the Islamic Community with respect to the gravestones to be more properly characterized in terms of moral damages because the full value of a graveyard and its gravestones cannot be represented by a pecuniary price.

37. Upon review of the case, the Chamber finds that the Second Panel's award of compensation for moral damages suffered by the Islamic Community after 14 December 1995 in the amount of 10.000 Convertible Marks (*Konvertibilnih Maraka*, "KM") is sufficient with respect to the Zamlaz and Riječanska mosque sites.

38. With respect to the Divč mosque site, the Chamber finds that the Second Panel, in deciding upon an appropriate award of compensation, failed to take into consideration the fact that the Islamic Community is the owner of the land. The respondent Party, by permitting construction of the Serb Orthodox church on the site of the former Divič mosque, has effectively divested the Islamic Community of its right to ownership of the land. Taking into account that the respondent Party must transfer ownership of a new site to the Islamic Community for construction of a mosque to replace the former Divič mosque, the Chamber finds it appropriate to order the respondent Party to further compensate the Islamic Community for pecuniary and non-pecuniary damages related to the former Divič mosque. The Islamic Community is entitled to compensation for its loss of property rights in the site of the former Divič mosque. Accordingly, the Chamber will order the Republika Srpska to pay to the Islamic Community an additional sum of 50.000 KM for pecuniary and non-pecuniary damages for effectively divesting the Islamic Community of its property rights in the site of the former Divič mosque.

## VII. CONCLUSIONS

39. For these reasons, the Chamber decides,

1. by 12 votes to 2, that conclusion no. 6 in the decision on admissibility and merits delivered on 9 November 2000 shall remain unchanged;

2. by 11 votes to 3, that conclusion no. 8 in the decision on admissibility and merits delivered on 9 November 2000 shall be modified to read as follows:

> to order the respondent Party to allocate, no later than 12 April 2002, in consultation with the Islamic Community, and for its use only, a suitable building site in the vicinity of the site of the former Divič mosque to permit, upon request of the Islamic Community, the construction of a mosque to replace the former Divič mosque and to grant the Islamic Community ownership rights over the site in question and the replacement mosque; and to order the respondent Party to cause a change to be made in the official land register and cadaster register to list the Islamic Community as the owner and possessor of the new site identified in accordance with this modified conclusion no. 8 for the replacement of the former Divič mosque;

3. by 10 votes to 4, that conclusion no. 9(a) in the decision on admissibility and merits

delivered on 9 November 2000 shall be modified to read as follows:

> a) to order the respondent Party to pay to the applicant, as monetary compensation for the moral damage suffered after 14 December 1995 in relation to the Zamlaz and Riječanska mosque sites, KM 10.000, no later than 12 November 2001, and to order the respondent Party to pay to the applicant, as monetary compensation for pecuniary and non-pecunary damages resulting from its loss of property rights in the Divič mosque site, KM 50.000, by no later than 12 November 2001;

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

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| Annex I | Dissenting opinion of Mr. Mato Tadić |
| Annex II | Dissenting opinion of Mr. Vitomir Popović |
| Annex III | Dissenting opinion of Mr. Hasan Balić |
| Annex IV | Dissenting opinion of Mr. Miodrag Pajić |
| Annex V | Concurring opinion of Mr. Mehmed Deković |
| | |
| Annex A | Decision on admissibility and merits delivered on 9 November 2000 |
| Annex B | Decision on request for review of 9 February 2001 |

## ANNEX I

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Mato Tadić.

## DISSENTING OPINION OF MR. MATO TADIĆ

1. In the decision in question, in its Conclusion no. 3, the majority of the Chamber's members imposed on the respondent Party the obligation to "pay to the applicant, as monetary compensation for pecuniary and non-pecuniary damages resulting from its loss of property rights in the Divič mosque site, KM 50.000 by no latter than 12 November 2001".

2. My dissenting opinion is only in regard to the quoted part of the conclusion referring to "**pecuniary and non-pecuniary damages**" because the pecuniary damage has been compensated through the allocation of the new site that will become property owned by the Islamic Community, as precisely and clearly stated in conclusion no. 2. Compensation for the destroyed facility we could not consider due to *ratione temporis* (the facility was destroyed before 15 December 1995).

(signed)
Mato Tadić

## ANNEX II

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Vitomir Popović.

## DISSENTING OPINION OF MR. VITOMIR POPOVIĆ

1. I do not agree with this decision of the Human Rights Chamber for the following reasons:

2. Acting upon the request of the Islamic Community of 21 November 2000, the First Panel recommended and the Plenary Chamber accepted the applicant's request for review of the decision on admissibility and merits and in this Decision and it ordered the respondent Party to do the following:

> a) to allocate in consultation with the Islamic Community, and for its use only, a suitable building site in the vicinity of the site of the former Divič mosque to permit, upon request of the Islamic Community, the construction of a mosque to replace the former Divič mosque and to grant the Islamic Community ownership rights in the site in question and the replacement mosque; and to cause a change to be made in the official land register and cadaster register to list the Islamic Community as the owner and possessor of the new site identified in accordance with this modified conclusion no. 8 for the replacement of the former Divič mosque;
>
> b) to pay to the applicant, as monetary compensation for the moral damage suffered after 14 December 1995 in relation to the Zamlaz and Riječanska mosque sites, KM 10,000, and, it ordered to the respondent Party to pay to the applicant, as monetary compensation for pecuniary damages resulting from its loss of property rights in the Divič mosque site, KM 50,000.

3. It is more than obvious that these two conclusions of the remedies are contradictory to one another. Namely, the first conclusion, which refers to the allocation of another site close to the former one, with the transfer of the right to ownership by registration in the land register, excludes by itself the possibility of the *payment of KM 50,000 to the applicant for pecuniary damages*.

4. Formally and legally taken the adjudication of this amount excludes the possibility of the allocation of the new site. Therefore, these two conclusions may only be alternative "either the one or the other", but not cumulative as the Chamber has decided; moreover, they are contradictory to the domestic jurisdiction referred to in Article 1 of Annex 6, the Human Rights Agreement, and to the case law of the European Court of Human Rights in Strasbourg. When the court decided the second conclusion, it should have had to assess the value of the land in question in the manner and in accordance with law and case law. It is obvious that the amount adjudicated as a lump sum for the site at a distance of approximately ten kilometers from Zvornik and Vlasenica, in a village and rural area, is too high and does not reflect the real value of the land where the mosque was located. In this part, the Chamber should have assumed that the applicant had not exhausted, in accordance with and in the manner foreseen by the jurisdiction of the Republika Srpska as the respondent Party, all legal remedies being at its disposal before regular courts. Therefore, within the meaning of Article VIII(2)(a) of the Human Rights Agreement and in conjunction with Article 49 of the Chamber's Rules of Procedure, applicant's claim should have been declared inadmissible or the proceedings should have been suspended until the time when these remedies were exhausted.

5. The part of the decision referring to KM 10,000 as a monetary compensation for moral damage suffered after 14 December 1995 represents non-pecuniary damage which may be adjudged only to physical persons but not to legal persons, which the Islamic Community is. However, this form of damage was adjudged anyway although it was not raised in the application and it represents, in a certain way, a stretching of the authority of the Human Rights Chamber.

6. As to the rest of this Decision, I firmly stand on my dissenting opinion annexed to the Decision of 9 November 2000.

(signed)
Vitomir Popović

## ANNEX III

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Dr. Hasan Balić.

## DISSENTING OPINION OF DR. HASAN BALIĆ

1. The Chamber has correctly established the guilt of the respondent Party based on Article 9 of the Convention and Article 1 of Protocol No. 1 to the European Convention on Human Rights, as well as discrimination against the members of the religious community of the applicant. In this situation, according to my opinion, the Chamber should have ordered to the respondent Party to remove the facility which was built.

2. On what grounds do I base my legal argumentation?

3. Firstly, based on the grammar and intended interpretation of Article 25, paragraph 2 of the Law on Basic Property and Legal Relations, which, combined with Article 1 of Protocol No. 1 to the Convention, creates one universal approach to protecting the right to property. According to my understanding, the Chamber widely interprets the notions of "the circumstances of the case", "conducts during the construction process" and "destruction of the facility would not be socially justified". In my opinion, *ratione legis* is clear here if one reads the text in the Bosnian, Croat or Serb language, but it is possible that there is a different interpretation in the English language. According to my opinion, as a condition to not ordering the destruction of the illegally constructed facility, the circumstances of the case should be exceptional and "socially justified". For example, this occurs in cases of the construction of the water supply system, sewage system, or electrical utility stations, the construction of facilities for providing accommodation for persons whose apartments were destroyed during natural disasters, and the construction of schools, hospitals and other public institutions when the building permit could not be obtained in time. I also think that my colleagues who voted differently than I did incorrectly interpret the "conducts [of the parties] during the construction process". This notion refers to the situation when parties were allowed to approach the construction site at any time and to approach the public authorities to request protection on time. In this case we do not have such a situation in Zvornik and Divič–there are no citizens of Bosniak ethnic origin, and they are not able to approach the construction site every day or to approach the local authorities. They were expelled from those locations to a distance more than 150 km away, which is the distance to Tuzla where they mainly live now, or to Sarajevo where the applicant's central office is located. A large number of them are also displaced to other countries throughout the known world.

4. With all respect to the legal knowledge and wisdom of my respected colleagues, I can also not agree with their conclusion that it would not be appropriate to order, under the given circumstances, the destruction of the Orthodox church already in use by the members of the local community. Our legislator brings the notion of "the circumstances of the case" into relation with the notion of "socially justified". Taking into consideration the facts that the Divič mosque was built 200 years ago and that, according to the census of 1991, the area was populated exclusively by people of Bosniak ethnic origin, and that during the 1992-95 war the armed forces of the Socialist Republic of Yugoslavia and the Bosnian Serb rebels, while carrying out genocide against Bosniaks, killed some Bosniaks and expelled others from that region, looted their property and destroyed all religious, sacred and other facilities belonging to Islamic culture, then it is *difficult* to understand the findings of the Chamber that it would not be appropriate to order, under the circumstances of the case, the destruction of the Orthodox church.

5. The destruction of the mosque on the Divič site was a crime committed with premeditation in order to construct the Serb Orthodox church there. This can not be justified by any circumstances that prevail in the country. We have peace in our country now and all people should be allowed to have the chance to repossess their properties and to use their places of worship. This is the sense of law and justice. Justice should punish and prevent violence. Something that was established as a result of the crime should not enjoy legal protection, no matter how expensive it would be to order movement of the facility. A greater damage to human rights and (circumstances that prevail in the country) would occur if a facility built as a result of crime is legally protected. According to my opinion,

this situation can not be founded on correct application of Article 25, paragraph 2 of the Law on Basic Property and Legal Relations, Article 9 of the Convention and Article 1 of Protocol No. 1 to the Convention.

6. These are legal reasons why I voted differently than my colleagues in conclusion no. 8, and I think that a church which was forcibly constructed, if it stays on the mosque foundations, will be a permanent source of instigation for conflicts between the two religious communities.

(signed)
Hasan Balić

## ANNEX IV

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Miodrag Pajić.

## DISSENTING OPINION OF MR. MIODRAG PAJIĆ

1. I opine that this application is inadmissible and I disagree with the decision of the Chamber for the following reasons:

- *Ratione temporis* – the destruction of the sacred facilities was before 14 December 1995.
- Non exhaustion of domestic remedies (Articles 25 and 26 of the Law on Basic Property and Legal Relations, in conjunction with Article 2 of Annex II to the Constitution of Bosnia and Herzegovina – transitional provisions).

2. I do not agree with the part of the decision on compensation:

- Firstly, pecuniary compensation cannot be the obligation of the respondent Party because the principle of *ratione temporis* does not allow that right.
- Secondly, the compensation for moral damages (moral suffering, violation of dignity and freedoms, etc.,) may be awarded only to a physical person because it represents a specific right of an individual but not a right that may be granted to a legal person— a religious group or other group of individuals linked by religious, philosophical or other beliefs.
- The compensation amount was determined as a lump sum (because there are no objective criteria that would define the amount of moral damages of a group of individuals).

3. The reason of failure to use effective domestic remedies, which were ignored in this case, represents a separate issue.

4. Namely, Articles 25 and 26 of the Law on Basic Property and Legal Relations precisely provide the procedure for settling property relations in the case of construction on the property of another person. It is obvious that the applicant did not even try to use the defined legal remedies, and in failing to do so, it took no action to decrease its damage. Therefore, by its failure the applicant caused greater damage to itself. Additionally, by failing to respect the time-limit for submission of the claim for compensation or by failing to institute adequate property procedures to resolve its property rights in dispute, it directly influenced its position in this legal matter, which the Chamber has neglected.

(signed)
Miodrag Pajić

## ANNEX V

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the concurring opinion of Mr. Mehmed Deković.

## CONCURRING OPINION OF MR. MEHMED DEKOVIĆ

1. According to paragraph 37 of the Decision, after review of the case in the legal matter in question, the Chamber found that the compensation for moral damages suffered by the Islamic Community after 14 December 1995, which was awarded by Panel II in the amount of KM 10,000, was awarded in relation to the sites of the Zamlaz and Riječanska mosques. Although non-pecuniary compensation is in question, I opine that this compensation is impermissibly low because, even after the mentioned date, members of the Islamic religion have been prevented from enjoying one of their important human rights, freedom of religion protected by Article 9 of the European Convention on Human Rights. This right includes the freedom that a citizen, either alone or together with others and in public or private, may manifest his religion. By destruction of the sacred facilities in question, the right of a citizen to freedom of religion is limited for a long period of time. Therefore, the established moral damages are not compensated enough by the amount of KM 10,000. Moreover, in case no. CH/99/2425 et al., *Nedeljko Ubović and others against the Federation of Bosnia and Herzegovina* (decision on admissibility and merits of 3 September 2001), the Chamber awarded ten applicants KM 5,000 each, which is the amount they requested, by way of compensation for non-pecuniary damages for moral suffering because they had not been able to visit the graves of their families. In truth, this conclusion, which is conclusion no. 10, and conclusion no. 8 from the *Ubović* case are contradictory as, according to conclusion no. 8, "it is not necessary to rule upon the applicant's complaints under Article 9 of the Convention". Since it is not possible to establish the value of non-pecuniary values, the injured party must obtain compensation as satisfaction which is adequate to the present circumstances, and the court is obliged, when deciding upon the compensation, to assess all the circumstances and to individualize the compensation according to the level of suffering. It is obvious that the Chamber did not take this into account when deciding the present case on review.

2. Additionally, under paragraph 33 of this Decision the Chamber notes that:

> "it is within its competence to order that the Serb Orthodox church be removed from the site of the former Divič mosque and that the land be returned to its original state. Such a result is also contemplated by domestic law in Article 25 of the Law on Basic Property and Legal Relations (see paragraph 21 above). However, bearing in mind the prevailing circumstances in the country, and considering that the Serb Orthodox church had already been in use by members of the local community for some time, the Chamber finds that it would not be appropriate to order demolition of the church currently standing on the site of the former Divič mosque".

While it is true that according to the mentioned legal provision, it is possible not to order demolition of the constructed facility, the Chamber neglects the last part of the provision which reads as follows: "if this [the demolition] would not be socially justified". I opine that the reasons stated by the Chamber in its decision are not sufficient to make the conclusion in this case that it "would not be socially justified" to demolish this facility. I personally think the reasons in the decision should be more persuasive in order to make the Chamber's conclusion in question acceptable.

(signed)
Mehmed Deković