



DECISION ON ADMISSIBILITY AND MERITS
(delivered on 8 October 1999)

Case no. CH/98/892

Dževad MAHMUTOVIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 7 September 1999 with the following members present:

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

Mr. Anders MÅNSSON, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

Having considered the aforementioned application introduced pursuant to Article VIII(1) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

Adopts the following decision pursuant to Article VIII(2) and Article XI of the Agreement as well as Rule 52, 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. This case concerns an order to the applicant by the Prnjavor municipal authorities to exhume his wife from her grave at the Islamic cemetery in Prnjavor, and to re-bury her in a non-existing cemetery.
2. The application raises primarily issues of discrimination in the enjoyment of the rights to manifest one's religious beliefs in practice and to private and family life, guaranteed by Articles 9 and 8 of the European Convention on Human Rights respectively.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was submitted to the Chamber on 20 August 1998 and registered the following day. The applicant requested, as a provisional measure, that the execution of the Procedural Decision of the Prnjavor Municipality of 30 July 1998 and delivered to the applicant on 5 August 1998, be prevented. The decision ordered the exhumation of the remains of the applicant's late wife, Mrs. Bedrija Mahmutović, from the Muslim Town Cemetery in the centre of Prnjavor, and their re-burial at the new town cemetery in the eastern part of Prnjavor. According to the applicant, the new cemetery did not exist.
4. On 24 August 1998 the President of the Chamber issued an order for provisional measures, ordering the respondent Party to desist from implementing the decision of 30 July 1998.
5. At its session on 9 September 1998 the Chamber approved the order for provisional measures issued by the President. It further decided to request additional information from the applicant and to transmit the application to the respondent Party for observations on the admissibility and merits of the case. No response was received from the respondent Party within the period allotted by the Chamber.
6. On 1 December 1998 the Chamber requested the assistance of the Organisation for Security and Co-operation in Europe ("OSCE") in order to obtain information on whether the new cemetery in Prnjavor exists. On 7 December 1998 the OSCE Field Office in Doboj replied that the new cemetery had not been established yet (see paragraphs 30 and 31 below). The letter by OSCE was transmitted to the applicant and to the respondent Party on 22 December 1998 for possible observations.
7. The applicant submitted written observations on 18 December 1998, which were transmitted to the respondent Party on 22 December 1998.
8. The Chamber deliberated on the case on 14 December 1998 and decided to hold a public hearing on 14 January 1999. This hearing was then postponed to 12 February 1999 at the request of the Agent of the respondent Party.
9. By a letter of 13 January 1999 the applicant restated his factual and legal allegations and put forward a detailed claim for pecuniary compensation. This letter was transmitted to the respondent Party on 27 January 1999.
10. At the public hearing there appeared the applicant and his counsel, Mr. Halid Kulenović, and the Agent of the respondent Party, Mr. Stevan Savić. The Chamber took testimony from witness Sakib Ćuran, while witnesses Nedeljko Karanović and Dušan Ljubojević failed to appear (see paragraphs 32 to 36 below).
11. In the course of the hearing, the Agent for the respondent Party stated that he would explore the possibility of an amicable settlement of the case. By a letter dated 2 March 1999 he informed the Chamber of the terms of a friendly settlement proposed by the Municipal Assembly of Prnjavor. By a letter dated 5 April 1999 the applicant's counsel rejected the proposed friendly settlement.
12. On 13 April 1999 the Chamber instructed the Registrar to offer the Chamber's good offices to the Parties in order to reach a friendly settlement of the case. In a memorandum dated 20 April

1999, the Registrar set forth to the Parties the terms of the proposed friendly settlement adopted by the Chamber on 16 April 1999. On 27 April 1999 the Chamber received the acceptance of the proposed friendly settlement by the respondent Party and its refusal by the applicant.

13. On 28 May 1999 the Chamber received a letter from the applicant stating that the new cemetery had not been opened yet. This letter was transmitted to the respondent Party on 1 June 1999 for possible observations. A letter by the respondent Party confirming that the new cemetery had not been opened yet was received on 4 June 1999.

14. The Chamber deliberated on the admissibility and the merits of the case on 14 May, 9 and 10 June, 5 July and 6 and 7 September 1999. On the last-mentioned date the Chamber adopted the decision on the admissibility and merits of the case.

III. ESTABLISHMENT OF THE FACTS

A. Facts as presented by the applicant

1. Death and burial of Mrs. Bedrija Mahmutović

15. The applicant, Mr. Dževad Mahmutović, is of Bosniak origin, residing in Prnjavor, Republika Srpska.

16. On 17 May 1998 the applicant's wife, Mrs Bedrija Mahmutović, died. On 19 May 1998 she was buried in the Muslim Town Cemetery in accordance with Muslim religious regulations and practice.

17. The Muslim Town Cemetery in Prnjavor is located at cadaster lot 741/1, Cadaster Municipality Prnjavor, and is managed and maintained by the Islamic Community of Prnjavor. The Mahmutović family owns a parcel at that cemetery where its members have been buried for decades.

18. On 21 May 1998 the applicant paid to the Board of the Islamic Community of Prnjavor the amount of 600 Dinars for burial expenses.

2. Decision of 21 October 1994 putting out of use the Muslim Town Cemetery

19. On 21 October 1994 the Municipality of Prnjavor had issued decision No. 01-012-77/94, providing that the cemetery ("*harem*") at cadaster lot 741/1 in Prnjavor (the Muslim Town Cemetery) no longer be used. The same decision provided that the burial of deceased Muslims would be performed at the new town cemetery in the eastern part of the town. The decision did not indicate the cadastral land mark of the new town cemetery. The applicant states that the new town cemetery in the eastern part of the town does not exist.

20. The decision of the Municipality provides only for the putting out of use of the Muslim Cemetery, while it does not affect the nearby Orthodox and Catholic cemeteries.

21. Notwithstanding the decision, the Muslim Town Cemetery was used for three burials before the end of May 1995 and again on 26 March 1999. On the latter occasion, Mr. Sakib Ćuran, the President of the Islamic Community Board in Prnjavor, was summoned to the police station after the funeral and was informed that burials in that cemetery were forbidden. On 30 March 1999, a further deceased Muslim citizen of Prnjavor should have been buried in the Town Cemetery, but the funeral could not take place there, because the municipal officials explicitly prohibited it.

3. Order to exhume the remains of Mrs. Mahmutović and the ensuing proceedings

22. On 29 July 1998, the Communal Inspector of the Prnjavor Municipality made an on-site investigation at the Cemetery.

23. On 30 July 1998 the Prnjavor Municipality Communal Inspection issued Procedural Decision

No. 07-371-48/98, ordering the applicant to conduct, at his own expense, the exhumation of his late wife from the Town Cemetery, and to move her remains to the new town cemetery located in the eastern part of town, within 15 days from the day of the receipt of the Procedural Decision. By the same procedural decision, the applicant was obliged to request the Municipal Sanitary Inspection for permission to exhume his late wife. The applicant received the procedural decision on 5 August 1998. The decision provided for the right of appeal within 15 days of receipt but such appeal would not have suspensive effect.

24. On 12 August 1998 the applicant submitted a letter to the OSCE Regional Office in Banja Luka. He wrote that “on the basis of discrimination and over dead bodies, ethnic cleansing of the non-Serb nationality has been performed” because the Muslim Town Cemetery had been put out of use by the Decision of the Prnjavor Municipality from 1994.

25. On 14 August 1998 the applicant filed an appeal against the Procedural Decision of 30 July 1998 to the Ministry of Urbanism, Housing, Communal Activities, Construction and Ecology. He received no reply.

26. On 20 August 1998 the applicant filed an application for provisional measures with the Chamber. On 25 August 1998 the applicant submitted to the Chamber a certificate from the Prnjavor Islamic Community which states that Mrs. Mahmutović and other deceased members of the family are buried at the cemetery on cadastral lot 741/1, Cadaster Municipality Prnjavor, and that the Mahmutović family has a parcel in that cemetery.

B. Facts as presented by the respondent Party

27. The respondent Party did not dispute the substance of the facts as described by the applicant.

28. The respondent Party stated that the cemetery at lot 741/1 of the Prnjavor Municipal Cadaster was put out of use by a decision of the Municipal Assembly and that the Islamic Community was duly informed of that decision. The Agent of the respondent Party was not able to indicate the reasons for the closing of the Muslim Town Cemetery. He noted, however, that in fact the Islamic Community had complied with the decision until the funeral of Mrs. Mahmutović, by burying its deceased in the cemeteries of the villages of Konjuhovci, Lišnja, Mravica and Babanovci.

29. At the Chamber hearing on 12 February 1999 the Agent of the respondent Party produced the decision of the Ministry of Urbanism, Housing, Communal Activities, Construction and Ecology, the second instance organ to which the applicant had appealed against the procedural decision of 30 July 1998. In its decision dated 2 February 1999 the Ministry annulled the first instance decision on the grounds that it did not indicate the exact location of the cemetery in which Mrs. Mahmutović was to be re-buried, and, secondly, that the photocopies of the Municipality decisions in the case file were only photocopies instead of officially verified copies. The Ministry accordingly remitted the case to the Communal Inspector for a renewed decision. It instructed that the new decision should precisely establish where the remains of Bedrija Mahmutović are to be buried. It appears that the Communal Inspector has not rendered the renewed decision up to date.

C. Information provided by the OSCE

30. In reply to a request for assistance by the Chamber, the OSCE Field Office in Doboj stated on 7 December 1998 that the new cemetery did not exist yet. It added, however, that negotiations about the purchase of a piece of land to use as a municipal graveyard were ongoing.

31. The OSCE Field Office in Doboj also stated that the Islamic Community of Prnjavor was currently burying its dead at an Islamic cemetery in Konjuhovci, a suburb of Prnjavor.

D. Oral testimony by witness Mr. Sakib Ćuran

32. Of the three witnesses summoned to the oral hearings on 2 February 1999 only one appeared, Mr. Sakib Ćuran, President of the Islamic Community in Prnjavor. The other two witnesses,

Mr. Nedeljko Karanović, Municipal Inspector of Prnjavor, and Mr. Dušan Ljubojević, Director of JKP "Park" Prnjavor, did not appear at the public hearing.

33. Mr. Ćuran stated that until June 1995 the Islamic Community of Prnjavor had buried its dead at the Muslim Town Cemetery. This cemetery is located within not more than 500 meters from the Orthodox and the Catholic cemeteries in the center of Prnjavor. Before the armed conflict, the Islamic Community was selling parcels of the cemetery to Muslim families. The data available to the Islamic Community showed that the empty space in the cemetery was sufficient for the next fifty years. Mr. Mahmutović had not purchased a land parcel in the Town Cemetery for his wife, but there was space for her in the parcel where all the deceased members of the Mahmutović family had been buried.

34. Mr. Ćuran further stated that he had not been consulted before the adoption of the Municipality Assembly decision putting the graveyard out of use, and that he had not received any communication about the reasons for that decision. Concerning the new cemetery in the Eastern part of town, Mr. Ćuran said that he was not aware of the existence of the new cemetery, and that certainly no right to use that cemetery had been registered in favor of the Islamic Community.

35. From June 1995 until the funeral of Mrs. Mahmutović on 19 May 1998, the Islamic Community did not dare to bury any of its deceased members in the Town Cemetery because of the hostile atmosphere. During that period most of the deceased Moslems were buried in a meadow adjacent to the cemetery of Konjuhovci, a small village at about 2.5 to 3 kilometers from the border of Prnjavor town.

36. In relation to the funeral of Mrs. Mahmutović, Mr Ćuran stated that the Prnjavor police had been notified about the burial and that it had not interfered with it.

E. Relevant domestic law

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

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

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

2. The Law on General Administrative Procedure

39. According to Article 218 of the Law on General Administrative Procedure (Official Gazette of the SFRY no. 47/86) any request submitted to an administrative organ is to be considered refused, if no decision has been made within one or two months (depending on the subject matter).

40. If the competent body does not deliver a decision within the above time-limit, the applicant has a right to appeal against this tacit refusal, "silence of administration", to the higher administrative body, if an appeal against the decision initially sought is allowed (Article 218).

41. The rules applicable to appeals against decisions by first instance administrative bodies are set forth in Articles 239 to 245 of the Law on Administrative Procedure.

42. Pursuant to Article 242, paragraph 1, if the second instance body finds, on the basis of the

facts as they have been assessed in the first instance proceedings, that the matter before the first instance body should have been solved differently, it shall annul the impugned decision and render a new decision directly solving the matter.

43. However, if the second instance body finds that the first instance body is in a better position to remove the flaws of the impugned decision expeditiously and efficiently, it shall remit the case to the first instance body. The first instance body must render a new decision at latest within 30 days from receipt of the case on remittal and shall be bound by the instructions of the second instance body on how to solve the matter. The party has the right to appeal against the new decision by the first instance body (Article 242, paragraph 2).

3. The Republika Srpska Law on Administrative Disputes

44. According to Article 2 of the Law on Administrative Disputes (OG RS no. 12/94), a physical and legal person has a right to initiate an administrative dispute if he considers that his right or personal interest based on law has been violated. According to Article 3, county courts, the Supreme Court of the RS and the RS Military Supreme Court are competent to resolve administrative disputes.

45. According to Articles 7 and 25 of the law, an administrative dispute may be initiated against an administrative decision of a second instance body. An administrative dispute may also be initiated against an administrative decision of a first instance body, if an ordinary appeal against the decision is not allowed.

46. According to Article 9(1) of the law, an administrative dispute cannot be initiated against administrative decisions in matters which a judicial body is competent to adjudicate.

47. According to Articles 23 and 25, an administrative dispute may be initiated within 30 days from the day of delivery of the administrative decision. An administrative dispute may also be initiated if the first or second instance body did not issue a decision on the applicant's request or appeal within sixty days, or within seven days after the request for a decision has been repeated.

4. The Republika Srpska Law on Communal Activities

48. According to Article 2(1)(6) of the Law on Communal Activities of Republika Srpska (OG RS no. 11/95), funerals are an activity of special public interest.

49. According to Article 19 of the law, a cemetery is a communal object which the Municipality Assembly shall allocate for management and maintenance to a public utility company, or other company or local community.

50. According to Article 20, the Municipality Assembly shall prescribe, in particular the modalities of and conditions for the arrangement and maintenance of cemeteries, terms for ceding and reimbursement for use of parcels in a cemetery, terms for erection of family vaults, conditions for erection of tombstones and entry of certain data on these monuments, transfer of mortal remains to the cemetery, and terms under which burials may be performed outside of cemeteries in use.

51. According to Article 21, the company, or religious or local community managing the cemetery shall grant permissions for the erection, removal or replacement of tombstones and tombstone signs in accordance with regulations of the Municipality Assembly.

52. According to Article 24, objects for religious ceremonies on existing cemeteries shall be managed by the religious communities to which they belong.

53. Article 32, finally, provides that by the day of entry into force of this law the validity of the (old) Law on Communal Activities (Official Gazette of the SRBiH no. 20/90) shall cease.

5. The Ordinance on Graveyards of the Prnjavor Municipality

54. On 30 April 1998 the Prnjavor Municipality Assembly passed the Ordinance on Graveyards of

the Prnjavor Municipality, which was published on 4 May 1998 and entered into force eight days later. The ordinance is based on the powers attributed to the Municipality by Articles 19 and 20 of the above-mentioned Law on Communal Activities of Republika Srpska (OG RS no. 11/95). The ordinance provides for the conditions and forms of burials, exhumation of the remains of deceased persons, the transfer of such remains from one graveyard to another and for the conditions for the closing and levelling of graveyards.

55. According to Article 2 of the ordinance, a graveyard out of use, also defined as an “abandoned graveyard”, is a graveyard at which, pursuant to a decision of the Municipality Assembly, no further burials shall take place.

56. According to Article 4 of the ordinance, burials may be performed only in cemeteries or parts of cemeteries in use.

57. Article 6 of the ordinance provides that the establishment of new graveyards and the extension of existing ones can only take place in locations destined for that purpose in the urban planning documentation.

58. According to Article 16 of the ordinance, graveyards in use in the Prnjavor urban area are managed by the communal company “Park”, while graveyards outside the urban area are managed by the respective local community. The same applies to graveyards out of use, until the area is destined to a different use.

59. According to Article 50 of the ordinance, deceased persons can exceptionally be buried at special places, outside of a graveyard in use, provided that special reasons exist and special conditions are met and that the burial does not contravene the public interest, urban planning, sanitary and other regulations.

60. According to Article 52(1) of the ordinance, the remains of persons buried outside graveyards in use can be transferred to graveyards in use, unless the family of the deceased or the person taking care of the grave objects. Paragraph 2 of the same Article provides that the municipal organ for sanitary inspection is competent for the procedural decision on exhumation and subsequent burial. The expenses of the exhumation and the subsequent transfer of the mortal remains are to be borne by the person requesting the exhumation and approving the transfer, or by the Municipality if the exhumation is in the public interest.

61. According to Article 53(1) of the ordinance, the remains of deceased persons may be exhumed and transferred to another place upon request of the family of the deceased and in accordance with the applicable regulations. Paragraph 5 of the same Article provides that the municipal organ for sanitary inspection is competent for the procedural decision on exhumation and subsequent burial. According to Paragraph 6, the expenses of the exhumation and the subsequent transfer of the mortal remains are to be borne by the person requesting the exhumation and approving the transfer, or by the Municipality if the exhumation is in the public interest.

62. Article 54 of the ordinance provides that a graveyard or part of a graveyard shall be put out of use when it is established that there is no more place for further burials, or if the closing is necessary for sanitary or urban planning reasons. According to Article 54(2), the decision to put the graveyard or part of it out of use is taken by the Municipality Assembly. Such decision shall also provide the conditions for the transfer of the remains of persons buried in the closed graveyard.

IV. COMPLAINTS

63. The applicant complains that the order to exhume his wife constitutes discrimination against him on the grounds of religion and national origin in the enjoyment of his right of freedom of religion. In this respect, he asserts that “the act of burial is a highly religious act in any religion”. The applicant also complains that the closing of the Muslim Town Cemetery deprived the Mahmutović family of its parcel in that cemetery. In the course of the public hearing, the applicant further complained that he was prevented from participating in the proceedings leading to the exhumation

order of 30 July 1998.

64. The applicant specifically invokes Articles 6, 9 and 14 of the Convention and Article 1 of Protocol No. 1 to the Convention.

V. FINAL SUBMISSIONS BY THE PARTIES

A. The respondent Party

65. The respondent Party maintains that the application is inadmissible, as the applicant has not exhausted the available domestic remedies. It does not specify which effective remedies were available to the applicant.

66. Should the Chamber examine the merits of the case, the respondent Party contends that Mrs. Mahmutović was unlawfully buried in the closed Muslim Town Cemetery without the knowledge of the competent municipal organ. This violation of the applicable laws and regulations by Mr. Mahmutović could not be justified by his right to freedom of religion. The maintenance of cemeteries is a matter falling within the competence of the municipal authorities, to be exercised in accordance with the regulations concerning urban planning and the protection of natural, historical and other values within the municipality area. Moreover, the respondent Party points out that the applicant could have applied for an exceptional permission to bury his wife in the closed graveyard under Article 50 of the Decision on Graveyards.

67. In relation to the alleged violation of the applicant's property rights, the respondent Party asserts that pursuant to Articles 19 to 24 of the Republika Srpska Law on Communal Activities (OG RS no. 11/95), land intended for burials of deceased persons could not be the object of a property right. Therefore, no such right of the applicant could have been violated by the Prnjavor authorities (see paragraph 49 above).

68. As far as respect for the applicant's rights in the course of the administrative procedure is concerned, the respondent Party points out that the applicant was heard on the occasion of the inspection of the cemetery on 29 July 1998. It can therefore not be said that his right to due process has been violated in that respect.

B. The applicant

69. The applicant maintains his complaints.

70. At the oral hearing the applicant explained that, considering the inefficiency shown by the authorities in dealing with his complaints in the course of the administrative proceedings, he felt it was useless to take other legal steps against the "silence of the administration" that followed his appeal. The applicant has not made any submissions on the issue of available remedies after learning about the decision of the Ministry of Urbanism, Housing, Communal Activities, Construction and Ecology dated 2 February 1999, annulling the decision of 30 July 1998 (see paragraph 29 above).

71. The applicant insists on the discriminatory character of the 1994 Municipality Assembly Decision closing the Muslim Town Cemetery. He suspects that the purpose of the order to exhume his wife is to speed up the levelling of the cemetery and the designation of the area for a different use.

VI. OPINION OF THE CHAMBER

A. Admissibility

1. Requirement to exhaust effective domestic remedies

72. 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.

73. The Chamber has already found that the existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see, e.g., case no. CH/96/17, *Blentić*, decision on admissibility and merits delivered on 3 December 1997, paragraphs 19-21, with further reference, Decisions on Admissibility and Merits 1996-1997). It is necessary to take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants (*ibid.*).

74. In the present case, the respondent Party argues that the application should be declared inadmissible, because the applicant did not indicate that there were no domestic remedies available, nor did he show that he had exhausted the available remedies. The applicant, for his part, asserts that due to the inefficiency of the competent organs, all remedies available would prove to be ineffective.

75. 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).

76. In the present case, the respondent Party has not indicated which remedies were or would be available to the applicant. The procedural decision ordering the exhumation provides that an appeal against it does not have any suspensive effect. The Chamber notes that where the execution of an order by the administrative authority causes irreparable harm to the person concerned by it, the provision that an appeal shall not suspend the execution means that there is in fact no effective remedy against the order.

77. On the information available to it the Chamber determines that no effective remedy was available to the applicant which could have afforded redress in respect of the breaches alleged. The Chamber therefore concludes that the admissibility requirement in Article VIII(2)(a) of the Agreement has been met.

B. Merits

78. Under Article XI of the Agreement the Chamber must next address the question whether the facts found disclose a breach by Republika Srpska of its obligations under the Agreement.

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

79. The applicant complains primarily that he has been the victim of discrimination on the grounds of his religion, as a Muslim, since only the Muslims are prevented from burying their dead in the city. He also submits that he has been discriminated against on the ground of his nationality, as a person of Bosniak descent, and suggests that the case involves “an attempt to eradicate all traces of the existence of that nationality by cleansing even cemeteries and not allocating new burial grounds where burials can be conducted”. He submits that the conduct of the authorities severely upset numerous members of his family, who owned a plot at the cemetery in question and whose family members had always been buried there. The Chamber has considered these complaints in the light of Article II(2)(b) of the Agreement in relation to Articles 8 and 9 of the Convention.

80. Under Article II (2) (b) of the Agreement the Chamber has jurisdiction to consider:

“alleged or apparent discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status arising in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to this Annex ...”.

81. Article 8 of the Convention (which is among the international agreements listed in the Appendix to the Agreement) 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.”

82. Article 9 of the Convention reads 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.”

83. 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 impugned acts of the municipal authorities of Prnjavor fall within the ambit of these rights.

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. The applicant’s statements have not been disputed and the Chamber accepts them as correct. 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.

85. As to Article 9, the Chamber notes that the applicant’s wife was buried in the Muslim Cemetery in accordance with Muslim religious regulations and practice. The Chamber finds that such a burial clearly falls within the ambit of Article 9 in so far as it relates to freedom of religion, including in particular freedom to manifest one’s religion in practice and observance. Equally any interference with the grave by exhumation or an order for exhumation of the deceased after such a burial has taken place, must be considered to fall within the ambit of Article 9.

86. 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.

87. In examining whether there has been discrimination contrary to the Agreement, the Chamber, applying 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).

88. The procedural decision of 30 July 1998, ordering the exhumation, was based on the Municipality's decision of 21 October 1994 which provided for the closure of the Muslim Town Cemetery. The latter decision was taken before 14 December 1995, when the Agreement came into force. Since the Agreement does not have retroactive effect, the Chamber has no competence *ratione temporis* to consider whether any violation of the human rights provisions referred to in the Agreement occurred before that date (see, e.g., case no. CH/96/1, *Matanović*, decision on the merits delivered on 6 August 1997, paragraph 32, Decisions on Admissibility and Merits 1996-1997). In the present case, however, the decision of October 1994 remains in force and forms the legal basis for the decision affecting the applicant. It gives rise to a continuing prohibition on the Muslims of Prnjavor from burying their dead in the Muslim Cemetery, which has been applied in the applicant's case since the Agreement came into force. In considering whether the decision affecting the applicant was discriminatory it is therefore relevant also to consider the decision of October 1994.

89. With reference to the decision of October 1994, the Chamber first notes that it affected only the Muslim Cemetery and not the Orthodox or Catholic cemeteries situated nearby. According to the undisputed testimony of the President of the Islamic Community in Prnjavor, which the Chamber accepts, there is no shortage of space for burials in the Muslim Cemetery, the space available being sufficient for the next fifty years. The decision itself does not state any reason for the closure of the Cemetery. No reason for the decision was communicated to the Islamic Community either at the time of the decision or since. The respondent Party was unable to specify any reason for the decision in the proceedings before the Chamber. In the circumstances the Chamber finds the applicant's suggestion, that the purpose of the 1994 decision was to contribute to the elimination of all traces of the Muslim population from the town centre of Prnjavor, has not been seriously challenged and is the only plausible explanation of that decision.

90. As to the procedural decision of 30 July 1998, the Chamber first notes that no reason has been given by the respondent Party as to why the applicant should have been required to exhume his wife beyond the fact that the Cemetery had been closed by the 1994 decision. The Chamber finds, however, that the continued closure of the Cemetery, under a decision taken in pursuance of a policy of ethnic cleansing, involves differential treatment of Muslims such as the applicant, and cannot be regarded as pursuing any legitimate aim. The decision on exhumation therefore involved discrimination against the applicant for these reasons alone.

91. A number of other factors also support the view that the decision was arbitrary, unreasonable and lacking any legitimate aim. In particular the decision orders that the remains of Mrs. Mahmutović should be transferred to a cemetery that does not exist. The respondent Party has not claimed, nor could it reasonably be claimed, that the Communal Inspector who took the decision was unaware of the non-existence of the "new cemetery in the eastern part of the town". On the evidence before it the Chamber can therefore only conclude that the Inspector knowingly issued an order that the applicant could not possibly comply with. The decision also orders the applicant to proceed with the exhumation of his wife and at the same time orders him to apply to the Municipal Sanitary Inspection

for permission to do so. Additionally, it provides for a very short time limit, of fifteen days, to carry out all the duties imposed. Furthermore, the decision was not accompanied by adequate procedural safeguards, which must be regarded as essential in such a sensitive area. The applicant was not given any opportunity to make representations to the authorities before the decision was taken and the only right of appeal had no suspensive effect and was therefore, as the Chamber has already found, not an effective remedy (see paragraph 76 above).

92. The fact that on 2 February 1999 the Ministry of Urbanism, Housing, Communal Activities, Construction and Ecology annulled the decision on exhumation, does not alter the Chamber's view that the applicant has been the victim of discrimination. The appeal decision merely orders that a new decision to be issued by the Communal Inspector should establish precisely where the remains of Mrs. Mahmutović are to be transferred. It does not deal with the fundamental question of discrimination which is involved in the exhumation decision, regardless of where the applicant's wife might be reinterred, and appears to leave it open to the Communal Inspector to proceed with the exhumation process.

93. The Chamber therefore concludes that the order for the exhumation of the applicant's wife constituted an act of discrimination against the applicant in the enjoyment of his rights to respect for his private and family life under Article 8 of the Convention, and his freedom of religion under Article 9.

2. Other Issues

94. In view of the conclusion which it has reached in relation to the primary issue of discrimination, the Chamber finds it unnecessary to consider whether there has been any breach of Article 8 or 9 of the Convention considered alone. It is also unnecessary to consider whether there has been any violation of the applicant's procedural rights under Article 6 of the Convention or of his property rights under Article 1 of Protocol No. 1 to the Convention.

VII. REMEDIES

95. Under Article XI(1)(b) of the Agreement the Chamber must next address the question what steps shall be taken by the respondent Party to remedy 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.

96. The Chamber notes that the remedy sought by the applicant at the time of the filing of the application is an order permanently prohibiting the execution of the procedural decision to exhume his wife. From the correspondence relating to the attempts to reach a friendly settlement, it appears that the applicant is now seeking a more general prohibition of any interference by the authorities with burials at the Muslim Town Cemetery.

97. The Chamber has found that the order to exhume Mrs. Mahmutović constitutes a violation of the applicant's right not to be subject to discrimination in the enjoyment of his rights to private and family life and to freely practice his religious beliefs. The Chamber therefore deems it appropriate to order the respondent Party to desist from any steps to remove the remains of the applicant's wife from their present place of burial.

98. As to the request for a more general remedy, ordering the respondent Party not to interfere with burials of members of the Muslim community of Prnjavor at the Muslim Town Cemetery, the Chamber notes that the present case has been lodged by only one applicant, Mr. Mahmutović. Consequently the Chamber will not order a remedy which would go beyond the facts directly affecting that applicant.

99. On 13 January 1999 the applicant filed a claim for compensation of non-pecuniary damages and legal costs. He claimed non-pecuniary damages in the amount of 10,000 German Marks (DEM) for the serious suffering inflicted on him by the order to exhume his wife, and 191.80 Convertible Marks (*Konvertibilnih Maraka*, KM) for legal fees calculated in accordance with the Tariff of the

Republika Srpska Bar.

100. In the particular circumstances of this case, the Chamber will exercise its discretion to consider the claim for compensation, although filed out of time.

101. The Chamber considers that its finding that the order to exhume Mrs. Mahmutović amounts to discrimination against the applicant in the enjoyment of the rights guaranteed by the Agreement and the remedy set out in paragraph 97 constitute already some satisfaction for the suffering inflicted on the applicant. In view thereof the Chamber considers the claim for DEM 10,000 of non-pecuniary damages to be too high. It therefore orders the respondent Party to pay the applicant KM 1,000 as monetary compensation for non-pecuniary damages, within three months from the date of this decision.

102. As for legal fees, the Chamber orders the respondent Party to compensate the applicant, within three months from the date of this decision, for the legal fees incurred in the present proceedings, which he has quantified as KM 191.80, a sum not questioned by the respondent Party.

103. Additionally, the Chamber awards interest at an annual rate of 4%, as of the date of expiry of the three-month time period set in paragraphs 101 and 102, for the payment of the sums awarded in the same paragraphs.

VIII. CONCLUSIONS

104. For the reasons given above, the Chamber decides,

1. by 12 votes to 2, to declare the application admissible;
2. by 12 votes to 2, 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, the Republika Srpska thereby being in violation of Article I of the Human Rights Agreement;
3. by 12 votes to 2, that the applicant has been discriminated against in the enjoyment of his right to freedom of religion as guaranteed by Article 9 of the Convention, the Republika Srpska thereby being in violation of Article I of the Agreement;
4. unanimously, not to consider the complaints relating to the alleged violation of the applicant's rights under Article 6 of the Convention, Articles 8 and 9 of the Convention in isolation and Article 1 of Protocol No. 1 to the Convention;
5. unanimously, to order the Republika Srpska to refrain from any steps to remove the remains of Mrs. Bedrija Mahmutović from their present place of burial;
6. by 8 votes to 6, to order the Republika Srpska to pay the applicant, within three months from this decision, KM 1,000 in compensation for non-pecuniary damages;
7. by 13 votes to 1, to order the Republika Srpska to pay the applicant, within three months from this decision, KM 191.80 in compensation for legal fees;
8. by 12 votes to 2, that simple interest at an annual rate of 4 % will be payable over the sum awarded in conclusions nos. 6 and 7 or any unpaid portion thereof, from the day of expiry of the three-month period referred to in conclusions nos. 6 and 7, until the date of the settlement; and
9. unanimously, to order the Republika Srpska to report to it by 7 January 2000 on the steps taken by it to comply with the above orders.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

ANNEX

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the concurring opinion of Mr. Manfred Nowak.

CONCURRING OPINION OF MR. MANFRED NOWAK

I fully agree that the order for the exhumation of the applicant's wife constituted an act of discrimination against the applicant in the enjoyment of his rights to freedom of religion and respect for his private and family life. I am, however, of the opinion that the steps ordered by the Chamber are not sufficient to remedy that breach.

First of all, I would like to point out that this case reveals a particularly serious form of discrimination practiced by the authorities of Prnjavor against the Muslim community. The order to exhume the mortal remains of the applicant's wife from the old Muslim town cemetery and to re-bury them within 15 days at a non-existing new cemetery, together with the order to obtain permission for such exhumation from another department of the Prnjavor Municipality, and the decision that his right to appeal has no suspensive effect, is of a particularly arbitrary nature and seems to aim at humiliating the applicant and at continuing the policy of "ethnic cleansing" even by desecrating the mortal remains of the deceased. The compensation of KM 1,000 for non-pecuniary damages ordered by the Chamber is, therefore, not adequate for providing a remedy for the serious suffering and humiliation inflicted upon the applicant.

Secondly, I disagree with the reasoning of the Chamber in paragraph 98 of the decision. The real issue in this case was not the exhumation order against the applicant but the fact that the authorities of Prnjavor in 1994 had issued a discriminatory decision to put the old Muslim town cemetery out of use and that this discriminatory decision has not been rectified more than three years after the entry into force of the Dayton Peace Agreement. Until the present day, Muslims remaining in this town have no legal possibility, as opposed to members of other religious communities, to bury their deceased family members within Prnjavor. The aim of this policy is to put further pressure on Muslims to leave that town as well as to prevent Muslims from returning, in blatant violation of many provisions of the Dayton Peace Agreement. It would, therefore, have been appropriate for the Chamber to order the Respondent Party to ensure, without any further delay, that Muslims can be buried in Prnjavor and that the municipal authorities refrain from any further interference with burials of members of the Muslim cemetery in Prnjavor. In addition, the authorities of the Republika Srpska should be ordered to take the necessary disciplinary and/or penal measures against individuals responsible for the continuation of such a policy of "ethnic cleansing against the deceased".

(signed)
Manfred Nowak