



DECISION ON ADMISSIBILITY AND MERITS
(delivered on 11 February 2000)

Case no. CH/99/2177

THE ISLAMIC COMMUNITY IN BOSNIA AND HERZEGOVINA

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 11 January 2000 with the following members present:

Ms. Michèle PICARD, President
Mr. Giovanni GRASSO, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Želimir JUKA
Mr. Jakob MÖLLER
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 Articles VIII(2) and XI of the Agreement as well as Rule 52, 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The present case concerns the prohibition by the municipal authorities of Prnjavor, Republika Srpska, to carry out burials at the Muslim Town Cemetery in Prnjavor. It was brought before the Chamber by the Vakuf Head Office, the organ of the Islamic Community in Bosnia and Herzegovina (hereinafter "the Islamic Community") entrusted with the administration of all Vakuf property in Bosnia and Herzegovina. For reasons set forth below (see paragraphs 83 to 87), the Chamber considers that the applicant is the Islamic Community, acting on its own behalf and on behalf of the Muslim population of Prnjavor.

2. The application primarily raises issues of discrimination in the enjoyment of the right to freedom of religion, guaranteed by Article 9 of the European Convention on Human Rights.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced to the Chamber on 13 May 1999 and registered on 19 May 1999. The applicant is represented by Mr. Esad Hrvačić, a lawyer practicing in Sarajevo. The applicant requested the Chamber to issue an order for a provisional measure ordering the respondent Party to refrain from any steps in respect of the exhumation of persons buried at the Muslim Town Cemetery in Prnjavor and prohibiting the respondent Party to interfere in any way with further burials at the cemetery in question.

4. By a letter of 20 May 1999 the applicant was invited to submit any information in relation to decisions issued by the Municipality in Prnjavor prohibiting any individual burial of Bosniaks or ordering the exhumation thereof. No such information was received at that time.

5. On 10 June 1999 the Chamber refused to issue an order for a provisional measure, as there had not been any individual threat of exhumation or interference with burials at the Muslim Town Cemetery in Prnjavor. It decided, however, to transmit the case to the respondent Party.

6. The Chamber also requested the applicant to clarify whether the Islamic Community would appear as applicant in respect of the whole or part of the case. The applicant was also requested to submit its statutes as well as other documentation concerning its possible standing in respect of the different grievances.

7. By a letter of 8 July 1999 the applicant submitted the requested information.

8. On 13 August 1999 the respondent Party submitted its observations on admissibility and merits of the case. On 14 October 1999 the applicant submitted its observations in reply, which were forwarded to the respondent Party for information.

9. By a letter of 3 December 1999 the applicant informed the Chamber that, on 23 November 1999, the authorities of the Municipality Prnjavor had issued a decision prohibiting the burial of Mrs. Behija Zec in the Muslim cemetery in Prnjavor. Referring to the Chamber's letter of 20 May 1999, the applicant requested the Chamber to issue an order for a provisional measure prohibiting the Prnjavor municipal authorities from obstructing further burials at the Muslim Town Cemetery in Prnjavor.

10. On 9 December 1999 the Chamber decided to issue the requested order for provisional measures. On 10 December 1999 it ordered the respondent Party not to forbid or interfere with any burials in the Muslim Cemetery in Prnjavor, located at cadastral lot k.č. 741/1 k.o. in Prnjavor, carried out by or with the authority of the applicant.

11. On 13 December 1999 the Chamber transmitted the applicant's letter of 3 December 1999 and the enclosed documents to the respondent Party for information and possible comments.

12. On 7 January 2000 the Chamber received a further submission by the applicant concerning the authorities' interference with yet another burial at the Muslim Town Cemetery. It was forwarded to the respondent Party for its information.

13. The Chamber deliberated on the admissibility and the merits of the case on 9 December 1999 and 10 and 11 January 2000. On the latter date the Chamber adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

A. The facts of the case

14. The facts of the case are essentially not in dispute, with the exception of the question of the applicant's legal title to the cemetery. In establishing the facts in the present case the Chamber will rely on the parties' submissions, the documents before it and its own findings in the related case no. CH/98/892, *Mahmutović* (decision on admissibility and merits delivered on 8 October 1999, Decisions August-December 1999).

1. The Muslim Town Cemetery in Prnjavor

15. The Muslim Town Cemetery is located at the parcel indicated as cadastral lot k.č. 741/1 k.o. (Cadastral Municipality) of Prnjavor.

16. The applicant states that it is fully owned by the Vakuf of the Prnjavor Mosque. According to the respondent Party, on the contrary, the record in the land books shows that the Muslim cemetery is socially owned property, presently state owned, and that the Vakuf of the Prnjavor Mosque enjoys a right to use it, pending a decision by the competent organ allocating the possession of the land to the municipality or to another person.

17. According to the undisputed testimony rendered by Mr. Sakib Ćuran, President of the Islamic Community in Prnjavor, at the public hearing of 12 February 1999 in the *Mahmutović* case (paragraph 33 of the aforementioned *Mahmutović* decision), the Islamic Community of Prnjavor buried its dead at the Muslim Town Cemetery until June 1995. Mr. Ćuran also stated that this cemetery is located less than 500 meters from the Orthodox and the Catholic cemeteries in the center of Prnjavor. According to Mr. Ćuran, 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.

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

18. On 21 October 1994 the Municipality of Prnjavor issued an ordinance (*odluka*), which was published in the local official gazette, providing that the cemetery at cadastral lot k.č. 741/1 k.o. in Prnjavor (the Muslim Town Cemetery) was put out of use. The same ordinance prohibited any further burial at that cemetery and provided that the burial of deceased Muslims would be performed at a new town cemetery in the eastern part of town, of which it did not, however, indicate the cadastral land mark. In fact, to date the new town cemetery in the eastern part of town does not exist.

19. The ordinance of the Municipality provides only for the closure of the Muslim Cemetery, while it does not affect the nearby Orthodox and Catholic cemeteries.

20. At the public hearing in the *Mahmutović* case, Mr. Ćuran stated that he had not been consulted before the adoption of the Municipality Assembly ordinance putting the cemetery out of use, and that he had not been informed of the reasons for that decision. In the *Mahmutović* case, the Agent of the respondent Party was not able to indicate the reasons for closing the Muslim Town Cemetery (paragraph 28 of the aforementioned *Mahmutović* decision).

21. Notwithstanding the ordinance, the Muslim Town Cemetery was used for three burials before the end of May 1995. From June 1995 until the funeral of Mrs. Bedrija Mahmutović on 19 May

1998, the Islamic Community refrained from burying its deceased members at 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 3 kilometers from the border of Prnjavor town.

3. Death and burial of Mrs. Bedrija Mahmutović, the order to exhume her and ensuing proceedings (Chamber's case no. CH/98/892)

22. On 17 May 1998 Mrs. Bedrija Mahmutović, a member of the Muslim community of Prnjavor, died. She was buried on 19 May 1998 at the Muslim Town Cemetery in accordance with Muslim religious regulations and practice. Her husband, Mr. Dževad Mahmutović, paid to the Board of the Islamic Community of Prnjavor the amount of 600 dinars for burial expenses.

23. On 29 July 1998 the Communal Inspector of the Prnjavor Municipality made an on-site investigation at the cemetery. By a decision of 30 July 1998 the Prnjavor Municipality Communal Inspection ordered Mr. Mahmutović to exhume, at his own expense, 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 of receipt of the decision. The applicant was further obliged to request the Municipal Sanitary Inspection for permission to exhume his late wife. The decision provided for an appeal within 15 days, but such an appeal did not have suspensive effect.

24. On 12 August 1998 Mr. Mahmutović sent 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 Prnjavor Municipality's 1994 decision.

25. On 14 August 1998 Mr. Mahmutović filed an appeal against the decision of 30 July 1998 to the Republika Srpska Ministry of Urbanism, Housing, Communal Affairs, Construction and Ecology. He received no reply. However, at the hearing before the Chamber on 12 February 1999, the Agent of the respondent Party produced a decision of the Ministry dated 2 February 1999. The Ministry annulled the first instance decision as the decision did not indicate the exact location of the cemetery in which Mrs. Mahmutović was to be re-buried, and as 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 renewed consideration. It instructed that the new decision should establish precisely where the remains of Mrs. Bedrija Mahmutović were to be re-interred.

26. On 20 August 1998 Mr. Mahmutović filed an application with the Chamber. On 24 August 1998 the President of the Chamber ordered the respondent Party, the Republika Srpska, to desist from implementing the decision of 30 July 1998. On 12 February 1999 the Chamber held a public hearing in the case. On 7 September 1999 the Chamber adopted its decision on admissibility and merits, which was delivered at a public hearing on 8 October 1999.

27. In its decision the Chamber concluded that Mr. Mahmutović had been discriminated against in the enjoyment of his right to private and family life and his right to freedom of religion, as guaranteed by Articles 8 and 9 of the Convention, respectively. The Chamber, therefore, ordered the respondent Party to refrain from any steps to remove the remains of Mrs. Mahmutović from her place of burial. The Chamber's conclusions were based, *inter alia*, on the finding that "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" (paragraph 89 of the *Mahmutović* decision).

28. On 1 December 1999 the Prnjavor Municipal Inspector rendered a procedural decision terminating the proceedings concerning the order to exhume Mrs. Mahmutović.

4. Death and burial of Mrs. Behija Zec

29. At an unspecified date before 23 November 1999 Mrs. Behija Zec, another member of the Prnjavor Muslim community, died and the Islamic Community of Prnjavor requested from the municipal authorities a permission to bury her at the Muslim Town Cemetery.

30. On 23 November 1999 the Municipality Prnjavor rendered a procedural decision forbidding the burial of Mrs. Behija Zec at the Muslim Town Cemetery and ordering that she be buried at the cemetery in Konjuhovci, a village near Prnjavor (see paragraph 20 above).

31. On 29 November 1999 the *medžlis* (an organisational unit of the Islamic Community) of Prnjavor filed an appeal against the above decision. The burial of the deceased, however, was not performed at the Town Cemetery. The applicant appears not to have received any answer to this appeal.

5. Death and burial of Mrs. Alema Mešić

32. On 31 December 1999 Mrs. Alema Mešić, a further member of the Prnjavor Muslim community, died. The deceased had reserved and paid for a parcel in the Muslim Town Cemetery since 1971.

33. The Islamic Community of Prnjavor requested from the municipal authorities permission to bury her at the Muslim Town Cemetery and informed the International Police Task Force (“IPTF”) station in Prnjavor. However, when on 1 January 2000 the deceased’s son, Mr. Ejub Mešić, was digging his mother’s grave, the Municipal Inspector of Prnjavor and a policeman appeared, ordered Mr. Mešić to cover up again the commenced grave and made a report of the incident. The representatives of the Islamic Community of Prnjavor reminded the municipal authorities of the Chamber’s recent order forbidding any interference with burials at the Muslim Town Cemetery (see paragraph 10 above), but the Municipal Inspector replied that the Chamber’s order was not binding. Finally, after several hours of negotiations between the Islamic Community, the municipal authorities and IPTF, the burial of Mrs. Alema Mešić was performed at the Muslim Town Cemetery.

B. Relevant provisions of the Constitution of the Islamic Community in Bosnia and Herzegovina

34. The Constitution of the Islamic Community in Bosnia and Herzegovina was adopted by the Community’s Council on 26 November 1997.

35. Article I states that “the Islamic Community in Bosnia and Herzegovina is the sole and united community of Muslims in Bosnia and Herzegovina, of Bosniaks outside their homeland, and of other Muslims who accept it as their own”.

36. According to Article XXX , the property of the Islamic Community consists of, amongst others, the Vakuf property [i.e. property held in perpetuity by a religious or charitable foundation] and other real estate and movable property of the Islamic Community, the revenue of the organs and institutions of the Islamic Community, and endowments and gifts.

37. Article XXXII provides that the Vakuf property is managed by the Vakuf Head Office.

C. Relevant domestic law

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

38. Under Article 2 of Annex II to the Constitution of Bosnia and Herzegovina (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 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.

39. 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 of the Socialist Republic of Bosnia and Herzegovina 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. Religious communities

40. The status of a religious community is regulated by the Law of the Socialist Republic of Bosnia and Herzegovina ("SRBiH") on the Legal Status of Religious Communities (Official Gazette of SRBiH – hereinafter "OG SRBiH" – no. 36/76). The religious communities are separated from the State (Article 3). Within religious communities, their bodies or organisations, it is forbidden to perform activities of social concern and to establish organs for the purpose of such activities. An exception is made for the preservation of objects belonging to the religious communities and forming part of the cultural, historic and ethnological heritage (Article 6).

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

42. Article 28 of the Republika Srpska Constitution guarantees the freedom of religion. Religious communities shall be equal before the law and shall be free to conduct religious activities and services. The Serbian Orthodox Church shall be the church of the Serb people and other peoples of Orthodox religion. The State shall support the Orthodox Church materially and cooperate with it in all fields and, in particular, in preserving, cherishing and developing cultural, traditional and other spiritual values.

3. The Law on General Administrative Procedure

43. The Law on General Administrative Procedure (Official Gazette of the SFRY no. 47/86) was taken over as a law of the Republika Srpska. It governs all administrative proceedings unless otherwise provided (Article 2).

44. According to Article 11 paragraph 1, parties have the right to appeal to a second instance administrative organ against the decisions of first instance organs. Paragraph 3 of the same Article provides for such an appeal also where the first instance organ fails to take a decision within the time-limit provided by law ("silence of administration").

45. According to Article 218, 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). 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 to the higher administrative body, if an appeal against the decision initially sought is allowed.

46. The rules applicable to appeals against decisions by first instance administrative bodies are set forth in Articles 239 to 245.

47. Article 242 paragraph 1 provides that 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.

48. 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 within 30 days of 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).

4. The Republika Srpska Law on Administrative Disputes

49. 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, regional courts, the Supreme Court and the Military Supreme Court of the Republika Srpska are competent to resolve administrative disputes.

50. According to Article 6, an administrative dispute may be initiated against an administrative decision. Paragraph 2 of Article 6 defines an administrative decision as a decision by which an administrative authority or a publicly owned company decides upon a right or an obligation of a particular citizen or legal person in an administrative matter.

51. According to Articles 7 and 25, 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.

52. Article 22 provides that an administrative dispute is initiated by a complaint to the competent court. 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.

53. Under Article 20, a party can submit a request for extraordinary review to the Supreme Court against final decisions, adopted in an administrative dispute, of the courts of the Republika Srpska and of the Supreme Military Court. Such a request can be submitted on the ground of a violation of a law, other provision, ordinance or other decision of a general nature, or on the ground of a breach of a procedural rule, where such breach could have been of influence to the decision on the substantial matter.

54. Article 65 provides that, where a freedom or right guaranteed by the Constitution is violated by a final administrative decision and no other court protection is provided, a request for the protection of rights and freedoms guaranteed by the Constitution lies to the court competent to deal with administrative disputes.

5. The Republika Srpska Law on Communal Activities

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

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

57. Under 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.

58. Article 21 provides that 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.

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

6. The Ordinance on Cemeteries of the Prnjavor Municipality

60. On 30 April 1998 the Prnjavor Municipality Assembly passed the Ordinance [*odluka*] on Cemeteries 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. The Ordinance provides for the conditions and forms of burials, exhumation of the remains of deceased persons, the transfer of such remains from one cemetery to another and for the conditions for the closing and levelling of cemeteries.

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

62. Under Article 4, burials may be performed only in cemeteries or parts of cemeteries in use.

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

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

65. Under Article 50, deceased persons can exceptionally be buried at special places, outside of a cemetery 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.

66. According to Article 52 paragraph 1, the remains of persons buried outside cemeteries in use can be transferred to cemeteries 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.

67. Article 54 of the Ordinance provides that a cemetery or part of a cemetery shall be put out of use when it is established that there is no more place for further burials, or if the closure is necessary for sanitary or urban planning reasons. According to Article 54 paragraph 2, the decision to put the cemetery or part of it out of use is taken by the Municipality Assembly. Such a decision shall also state the conditions for the transfer of the remains of persons buried in the closed cemetery.

IV. COMPLAINTS

68. The applicant complains that, by prohibiting burials at the Muslim Town Cemetery in Prnjavor on the basis of the decision of 21 October 1994, the Prnjavor Municipal authorities violate the Prnjavor Bosniaks’ fundamental human right to freedom of religion. The applicant also claims that this practice constitutes discrimination against the Prnjavor Bosniaks in the enjoyment of their right to freedom of religion.

69. The applicant furthermore claims that the ongoing prohibition of burials at the Muslim Town Cemetery in Prnjavor constitutes a violation of the Islamic Community’s right to enjoy its possessions guaranteed by Article 1 of Protocol No. 1 to the Convention, as well as discrimination on religious grounds in the enjoyment of that right.

V. SUBMISSIONS OF THE PARTIES

A. The respondent Party

70. The respondent Party objects to the applicant's standing to submit the application on behalf of an unspecified number of citizens. Allegedly, the Convention protects individual rights and not the rights of groups. Thus, only persons directly affected by a violation of one or several rights as protected by the Convention should be allowed to submit an application to the Chamber. Every individual within the group would have to demonstrate that he or she has been the victim of a human rights violation. The respondent Party stresses that the protection against discrimination is interrelated with the other fundamental rights and that therefore the same objections to the applicant's standing apply to the complaint of discrimination.

71. The applicant's standing to submit the application is further challenged on the ground that it does not fall within the persons or organisations who may submit applications under Article VIII(1) of the Agreement and of Rules 30-36 of the Chamber's Rules of Procedure.

72. The respondent Party also specifically challenges the applicant's standing to submit a complaint in relation to the alleged violation of Article 1 of Protocol No. 1 to the Convention. It alleges that the applicant cannot claim to have suffered a violation of its rights under Article 1 of Protocol No. 1 as the Vakuf Head Office is neither the owner of the land nor the holder of the right to use it. The respondent Party further states that the organisational by-laws of the Vakuf Head Office were enacted on 22 May 1999 and that therefore the applicant did not legally exist at the time when the alleged violation occurred.

73. In case the Chamber should find that the applicant has legal standing, the respondent Party objects to the admissibility of the application on the ground that domestic remedies against the alleged violation have not been exhausted. It claims that there are effective domestic remedies and that the applicant did not seek to avail itself of them. Under Article 22 of the Law on Administrative Disputes (see paragraphs 50 above), the applicant allegedly could have asserted its right before the competent regional court in Banja Luka by initiating an administrative dispute against the decision of the Municipal Assembly Prnjavor of 21 October 1994. Against a possible negative decision, the applicant could have appealed to the Supreme Court of the Republika Srpska (Article 20 of the Law on Administrative Disputes), as well as requested protection of freedoms and rights as guaranteed by the Constitution in terms of Article 65 of the above law.

74. Furthermore, the respondent Party points out that the Chamber has no competence *ratione temporis* to consider alleged or apparent violations which occurred before the entry into force of the Agreement on 14 December 1995. The decision putting the cemetery in Prnjavor out of use was issued on 21 October 1994, thus before the relevant date. Allegedly, there is no evidence as to any subsequent act of the authorities, issued after 14 December 1995, which would constitute a breach of the Agreement. Therefore, the respondent Party concludes that the application should be refused in terms of Article VIII(2)(c) of the Agreement.

75. As to the alleged violation of Article 1 of Protocol No. 1 to the Convention, the respondent Party argues that, according to the record in the land books, the Muslim Town Cemetery is socially owned, i.e presently state owned. The Vakuf of the Prnjavor Mosque only enjoys a right to use it, pending a decision by the competent organ allocating the possession of the land to the municipality or to another person.

B. The applicant

76. The applicant maintains its complaints. It asserts that there is an obvious intention of the Prnjavor authorities to enforce the ordinance of 1994 and, by reacting against the burial of Mrs. Bedrija Mahmutović, to prevent any further burials of Bosniaks in Prnjavor. The applicant also states that there is sufficient space to bury the deceased persons in the cemetery in question.

77. As to the respondent Party's objection that the applicant does not have legal standing before the Chamber, the applicant submits that the Islamic Community is authorised to organise the

religious life of Muslims in Bosnia and Herzegovina. It is therefore legitimised to complain about violations of the right to freedom of religion.

78. The applicant further submits that the Vakuf Head Office was established on 28 June 1996, the date of entry into the court register, and not on 22 May 1999, the date of adoption of its Statute. Furthermore, the applicant points out that, according to Article XXXII of the Constitution of the Islamic Community, the Vakuf Head Office administers Vakuf property. Therefore, the Vakuf Head Office represents the Vakufs in all disputes.

79. As to the respondent Party's contention that the Chamber lacks competence *ratione temporis*, the applicant asserts that the direct violation of the right to freedom of religion occurred in 1998 when the enforcement of the 1994 ordinance began.

80. With regard to the respondent Party's objection of non-exhaustion of domestic remedies, the applicant argues that domestic remedies were not pursued because all domestic remedies exhausted by Mr. Dževad Mahmutović (see paragraphs 26 above) proved ineffective. The applicant further states that the violation of the freedom of religion is directly connected not only to the case of Mr. Mahmutović, but also to all citizens of Prnjavor of Muslim religion. Therefore, the applicant concludes that no remedy is effective and that if it were to pursue such ineffective remedies the respondent Party would only gain additional time to realise its illegal action.

VI. OPINION OF THE CHAMBER

A. Admissibility

1. Competence *ratione personae*

81. Before considering the merits of the case the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII of the Agreement. Under Article VIII(1) the Chamber shall receive, from any Party or person, non-governmental organisation, or group of individuals claiming to be a "victim" of a violation by any Party, applications concerning alleged or apparent violations of human rights within the scope of Article II(2) of the Agreement.

82. The respondent Party objects on different grounds to the Vakuf Head Office's status as a "victim" of the alleged violations and, thereby, to its standing to submit the application (see above paragraphs 69-71).

83. The Vakuf Head Office states that, under Article XXXII of the Constitution of the Islamic Community, it is entrusted with the administration of all Vakuf property, and that it submits the complaints relating to property issues in that capacity. It also submits a document by which the Islamic Community empowers the Vakuf Head Office to represent it before the Human Rights Chamber "without limitations in all phases of the procedure in the case CH/99/2177", insofar as the case concerns the violation of the right to freedom of religion and discrimination in the enjoyment of this right.

84. The Chamber recalls that it has previously found that, for the purposes of Article VIII(1), the Islamic Community can legitimately have standing on behalf of its members where the case concerns the alleged discrimination against its members in the enjoyment of their right to freedom of religion as guaranteed by Article 9 of the Convention (case no. CH/96/29, *The Islamic Community in Bosnia and Herzegovina*, decision on admissibility and merits delivered on 11 June 1999, Decisions January-July 1999 – hereinafter "the *Islamic Community Banja Luka* decision" – paragraphs 127-129). The Chamber takes this opportunity to clarify that the Islamic Community is capable of possessing and exercising the rights contained in Article 9 paragraph 1 of the Convention not only on behalf of its members, but also on its own behalf (see the decision of the European Commission of Human Rights of 5 May 1979 in *X. and Church of Scientology v. Sweden*, application no. 7805/77, Decisions and Reports 16, at p. 70).

85. The Chamber also notes that, pursuant to Article XXX of the Constitution of the Islamic Community, the property of the Islamic Community consists of, *inter alia*, the Vakuf property. As the applicant itself has repeatedly stressed, the Vakuf Head Office does not claim to own the Vakuf of the Prnjavor Mosque or any other Vakuf property. It is just entrusted with its administration. The Chamber therefore concludes that, also with regard to the issues the present case might raise under Article 1 of Protocol No. 1 to the Convention, the Vakuf Head Office is acting on behalf of the Islamic Community. The latter is the purported victim of the alleged violations and, accordingly, the applicant in the present case.

86. With respect to the alleged violation of the right to the peaceful enjoyment of possessions, the Chamber recalls its finding in the *Islamic Community Banja Luka* decision (paragraph 130):

“The applicant further complains of a violation of the right to the peaceful enjoyment of its possessions. The Chamber understands this complaint to have been brought not on behalf of individual Muslim believers but by the Islamic Community in its own right, being recognised under domestic law as a legal person capable of possessing property. For this reason, the applicant may also claim status as a “victim” in relation to the alleged violation of its rights under Article 1 of Protocol No. 1 to the Convention”.

87. The Chamber sees no reason to differ from its previous finding and therefore accepts that the Islamic Community meets the requirement of a “victim” within the meaning of Article VIII(1) of the Agreement. The application is therefore compatible *ratione personae* with the Agreement within the meaning of Article VIII(2)(c) in its entirety.

2. Competence *ratione temporis*

88. The Chamber must next address the question to what extent it is competent *ratione temporis* to consider the present case, bearing in mind that according to generally accepted principles of international law and to its own case-law, it is outside its competence to decide whether events occurring before the coming into force of the Agreement on 14 December 1995 involve violations of human rights (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).

89. The Chamber shall therefore not consider whether the adoption of the ordinance closing the Muslim Town Cemetery by the Municipality Prnjavor on 21 October 1994 constituted a violation of the applicant’s human rights. However, as in the *Mahmutović* case, the Chamber is competent to examine whether the continued enforcement of the ordinance after the entry into force of the Agreement constitutes a violation of the Agreement.

3. Requirement to exhaust effective domestic remedies

90. According to Article VIII(2)(a) of the Agreement, in deciding whether to accept an application, the Chamber shall also take into account whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted.

91. In the present case, the respondent Party argues that the application should be declared inadmissible, because the applicant did not avail itself of the right to appeal against the decision closing the Muslim Town Cemetery before the courts of Republika Srpska, as provided by the Law on Administrative Disputes. The applicant, for its part, asserts that, as the case of Mr. Mahmutović would prove, all remedies available are ineffective.

92. The Chamber notes that in the present case the respondent Party argues that the applicant should have initiated an administrative dispute against the 1994 decision to close the cemetery, a remedy Mr. Mahmutović had not pursued.

93. The Chamber recalls that the applicant is complaining of an ongoing violation of its rights guaranteed by Article 9 of the Convention and Article 1 of Protocol No. 1 to the Convention, which began before the entry into force of the Agreement. It takes the view that it is not necessary to

assess whether at the time when the alleged violation began, a remedy effective in theory and practice would have been available to the applicant. The Chamber is satisfied that the remedy indicated by the respondent Party, i.e. the initiation of an administrative dispute against the ordinance of 21 October 1994, is currently not available to the applicant and has not been available since the entry into force of the Agreement, as the deadline to initiate an administrative dispute had long expired (see paragraph 52 above).

94. The Chamber furthermore notes that the other remedies referred to by the respondent Party, i.e. proceedings for extraordinary review under Article 20 of the Law on Administrative Disputes (see paragraph 53 above) and the request for the protection of rights and freedoms guaranteed by the Constitution pursuant to Article 65 of the same law (see paragraph 54 above), are extraordinary remedies that the applicant need not pursue for the purposes of Article VIII(2)(a) of the Agreement. The Chamber therefore concludes that the admissibility requirement in Article VIII(2)(a) of the Agreement has been met.

4. Conclusion as to admissibility

95. As no other ground for declaring the application inadmissible has been established, the Chamber declares the application admissible.

B. Merits

96. 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 freedom of religion

97. The applicant complains primarily that its members in Prnjavor have been victims of discrimination on the ground of their religion, since only Muslims are prevented from burying their dead in the city. In this respect, the applicant asserts that “the act of burial is a highly religious act in any religion”. The case of the prohibition to bury Mrs. Behija Zec is, according to the applicant, an example for all other Muslim citizens in Prnjavor, meaning that they cannot practice their religious ceremonies at the traditional religious cemetery. According to the applicant, the local authorities indirectly prevent the return of displaced persons by violating their fundamental rights, such as the right to be decently buried. The Chamber has considered these complaints in the light of Article II(2)(b) of the Agreement in relation to Article 9 of the Convention.

98. 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 ...”.

99. 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.”

100. The Chamber has held in the case of *Mahmutović* (paragraph 85) that burials carried out in accordance with Muslim religious regulations and practice clearly fall 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. In the present case, the applicant has re-affirmed the highly religious character of burials. The respondent Party has not disputed this assertion.

101. The Chamber therefore finds that the facts of the case fall within the ambit of Article 9 of the Convention and that it therefore has jurisdiction under Article II(2)(b) of the Agreement to consider whether the applicant and its members in Prnjavor have been victims of discrimination in relation to the enjoyment of their rights under those provisions.

102. In examining whether there has been discrimination contrary to the Agreement, the Chamber, applying the case-law of the European Court of Human Rights and of other international human rights monitoring bodies, has consistently found it necessary to determine whether the applicant was treated differently from others in the same or a relevantly similar situation (see e.g. case no. CH/97/45, *Hermaš*, 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 II(2)(b) 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).

103. Both the procedural decision of 30 July 1998, ordering the exhumation of Mrs. Bedrija Mahmutović, and the procedural decision of 23 November 1999, prohibiting the burial of Mrs. Behija Zec at the Muslim Town Cemetery, are based on the ordinance of 21 October 1994, which provided for the closure of the Muslim Town Cemetery. They are in fact strictly instrumental to its continued enforcement. The ordinance was adopted 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 above paragraphs 88 and 89). In the present case, however, the ordinance of October 1994 forms the legal basis for the decisions affecting the applicant's members in Prnjavor. It gives rise to a continuing prohibition on the Muslims of Prnjavor to bury their dead in the Muslim Town Cemetery. In considering whether the decisions affecting the applicant were discriminatory, it is therefore relevant also to consider the ordinance of October 1994.

104. With reference to the ordinance of October 1994, the Chamber recalls its opinion in the *Mahmutović* case (paragraph 89). The Chamber first noted that the ordinance affected only the Muslim Cemetery and not the Orthodox or Catholic cemeteries situated nearby. The Chamber also found that there was no shortage of space for burials in the Muslim Cemetery, the space available being sufficient for the next fifty years. The ordinance of October 1994 itself does not state any reason for the closure of the cemetery. No reason for the ordinance was communicated to the Islamic Community either at the time of its adoption or since. The respondent Party was unable to specify any reason for the ordinance in the proceedings before the Chamber in the *Mahmutović* case. The Chamber also considers that the respondent Party has had an additional opportunity to explain the reasons for the closure of the cemetery in the course of the written proceedings in the present case. It has failed to do so.

105. In the circumstances the Chamber finds the applicant's suggestion, that the purpose of the continued enforcement of the 1994 ordinance is to discourage the return of Bosniak refugees and displaced persons to Prnjavor by preventing them from freely pursuing their religious traditions, has not been seriously challenged and is the only plausible explanation of that decision. The continued closure of the cemetery, under an ordinance adopted in pursuance of a policy of ethnic cleansing, involves differential treatment of Muslims, and cannot be regarded as pursuing any legitimate aim. It therefore involves discrimination against the applicant and its members for this reason alone.

106. The Chamber also recalls that in the *Mahmutović* decision (paragraph 91) it found that a number of factors, in addition to the discriminatory character of the decision closing the Muslim Town Cemetery, supported the view that the order to exhume Mrs. Mahmutović was arbitrary, unreasonable and lacking any legitimate aim. Particularly the order that the remains of Mrs. Mahmutović be

transferred to a cemetery that did and does not exist reinforced this finding. The Chamber concluded that the Municipal Inspector knowingly issued an order that Mr. Mahmutović could not possibly comply with. The Chamber holds that the arbitrary and unreasonable character of the order to exhume Mrs. Mahmutović reinforces the finding of discrimination against the applicant and its members in Prnjavor.

107. The Chamber therefore concludes that the continued enforcement, after the entry into force of the Agreement, of the ordinance of 21 October 1994, putting the Muslim Town Cemetery out of use, constitutes discrimination against the Islamic Community and the Muslim population of Prnjavor in their enjoyment of the right to freely manifest religious beliefs in practice and observance.

108. 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 9 of the Convention considered alone.

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

109. The Chamber considers that the present case concerns religious observance on a particular piece of property, i.e. the Prnjavor Muslim Town Cemetery. Therefore, the Chamber holds that, in the particular circumstances of the case, the issue of the alleged violation of the applicant's right to enjoy its possessions is subsumed by the Chamber's finding of discrimination in the enjoyment of the right to freely manifest its religious beliefs. Accordingly, the Chamber finds it unnecessary to consider whether there has been any breach of Article 1 of Protocol No. 1 to the Convention or any discrimination in the enjoyment of the right protected by that provision.

VII. REMEDIES

110. 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.

111. The Chamber has found that the continued enforcement of the ordinance of 21 October 1994, putting the Muslim Town Cemetery out of use and prohibiting further burials at that cemetery, constitutes discrimination against the Islamic Community and the Muslim population of Prnjavor in the enjoyment of their right to freely practice religious beliefs. The Chamber therefore deems it appropriate to order the respondent Party to revoke the ordinance of 21 October 1994 within one month from the date of delivery of this decision and to desist from any further steps of enforcement, such as prohibiting burials at that cemetery or ordering the exhumation of the remains of persons buried there.

VIII. CONCLUSIONS

112. For the reasons given above, the Chamber decides:

1. by 10 votes to 2, to declare the application admissible;
2. by 10 votes to 2, that the Islamic Community and its members in Prnjavor have been victims of discrimination in the enjoyment of their right to freedom of religion as guaranteed by Article 9 of the European Convention on Human Rights, the Republika Srpska thereby being in violation of Article I of the Human Rights Agreement;
3. unanimously, not to consider the complaints relating to the alleged violation of the applicant's rights under Article 9 of the Convention in isolation;
4. by 10 votes to 2, not to consider the complaints relating to the alleged violation of the applicant's rights under Article 1 of Protocol No. 1 to the Convention;

5. by 10 votes to 2, to order the Republika Srpska to revoke the ordinance of 21 October 1994 putting out of use the Muslim Town Cemetery at cadastral lot k.č. 741/1 k.o. Prnjavor within one month from the date of delivery of this decision and to desist from any further steps of enforcement, such as prohibiting burials at that cemetery or ordering the exhumation of the remains of persons buried there; and

6. unanimously, to order the Republika Srpska to report to it by 11 April 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 Dissenting Opinion of Messrs. Vitomir Popović and Miodrag Pajić

ANNEX

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Messrs. Vitomir Popović and Miodrag Pajić.

DISSENTING OPINION OF MESSRS. VITOMIR POPOVIĆ AND MIODRAG PAJIĆ

In our opinion the decision of the Chamber in the part concerning its competence *ratione temporis* (chapter VI A 2) and remedies (chapter VII) do not correspond with the legal state of affairs:

1. The ordinance closing the cemetery was adopted by the Assembly of the Municipality of Prnjavor on 21 October 1994, i.e. before the General Framework Agreement for Peace entered into force on 14 December 1995.

Thus, the evaluation of whether the reasons for closing the cemetery are discriminatory or not falls outside the competence of the Chamber *ratione temporis*. Accordingly, the Chamber could only have established the existence of a violation of human rights in respect of the burials of Muslims at the new cemetery (which has not been opened) and not in respect of the old 1994 ordinance closing down the cemetery and prohibiting further burials in it.

2. In Chapter VII ("Remedies") it is stated that the Chamber has to decide which steps the respondent party should take in order to remedy the established breach of the Agreement, including orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries) and provisional measures (Article XI(1)(b) of the Agreement). In our opinion the Chamber wrongly decided to order the revocation of the ordinance of the Assembly of the Prnjavor Municipality of 21 October 1994 within a time-limit of one month. What should have been done was to put an obligation upon the respondent Party to open a new cemetery in the eastern part of town in accordance with the legal procedure and urban planning of the town of Prnjavor. The annulment of the ordinance of 21 October 1994 is connected to the problem *ratione temporis* and the only effective remedy is to open a new cemetery.

(signed)
Vitomir Popović

(signed)
Miodrag Pajić