DECISION ON ADMISSIBILITY

Case no. CH/00/3577

A.M. and V.M.

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 5 July 2000 with the following members present:

Mr. Giovanni GRASSO, Acting President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Rona AYBAY
Mr. Želimir JUKA
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Miodrag PAJIĆ
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)(c) of the Agreement and Rules 49(2) and 52 of the Chamber's Rules of Procedure:

I. FACTS

1. The application was brought before the Chamber by V.M. in her own right and on behalf of her son, A.M., in accordance with Article VIII(1) of the Agreement, which provides in relevant part, that "the Chamber shall receive ... from any person ... acting on behalf of alleged victims who are deceased or missing, for resolution or decision applications concerning alleged or apparent violations of human rights ...".

2. On 8 June 1992 A.M. was arrested in Rogatica by armed forces loyal to the Serbs of Bosnia and Herzegovina. The applicant claims that her son was tortured during his detention and killed afterwards. She has never been informed of the whereabouts of his mortal remains to date.

II. COMPLAINTS

3. V. M. alleges that her son's right to life and all his civil rights were violated.

4. On her own behalf, V. M.'s claims that criminal proceedings should be initiated against those responsible for her son's ill-treatment and death. Furthermore, she requests compensation from the Republika Srpska in the amount of 2,000,000 Convertible Marks for her mental suffering. The applicant also wishes to obtain sufficiently reliable information about the mortal remains of her son.

III. PROCEEDINGS BEFORE THE CHAMBER

5. The application was introduced on 25 January 2000 and registered on 27 January 2000.

IV. OPINION OF THE CHAMBER

6. 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(2) of the Agreement. According to Article VIII(2)(c), the Chamber shall dismiss any application which it considers incompatible with the Agreement or manifestly ill-founded.

7. Under the Agreement, the Chamber is only competent to examine events that took place after its entry into force. It cannot examine alleged violations that occurred before that date, unless they continued thereafter. The Chamber notes that A.M. was arrested on 8 June 1992 and that, according to V.M., he was killed while in detention. The alleged violations of A.M.'s rights thus occurred before the entry into force of the Agreement. Accordingly, the Chamber is not competent *ratione temporis* to deal with that matter.

8. As regards V.M.'s claim that a criminal investigation be opened, the Chamber notes that, in principle, there is no specific right of a victim to have such an investigation opened under the Agreement or in any of the treaties listed in the Appendix to the Agreement. However, the Chamber finds that this cannot release the respondent Party of its duty to take action to pursue human rights violations that occurred even before the entry into force of the Agreement.

9. Concerning V.M.'s request to obtain information about the mortal remains of her son, the Chamber notes that it might raise an issue under Article 8 of the European Convention on Human Rights if there was evidence that the respondent Party is in possession of such information which is arbitrarily withheld from her. V.M. has not made an allegation in this respect. Therefore, the Chamber finds that this part of the application is manifestly ill-founded.

10. Accordingly, the Chamber decides not to accept the application, it being partly incompatible with the Agreement and partly manifestly ill-founded within the meaning of Article VIII(2)(c) thereof.

V. CONCLUSION

11. For these reasons, the Chamber, by 10 votes to 3,

DECLARES THE APPLICATION INADMISSIBLE.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Giovanni GRASSO
Acting President of the Chamber

Annex: Dissenting opinion of Mr. Dietrich Rauschning, joined by Mr. Giovanni Grasso

In accordance with the Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Dietrich Rauschning, joined by Mr. Giovanni Grasso.

DISSENTING OPINION OF MR. DIETRICH RAUSCHNING, JOINED BY MR. GIOVANNI GRASSO

1. I agree with the decision of the Chamber under paragraph 7, that the application on behalf of A.M. is inadmissible *ratione temporis*, because it must be assumed that he was killed before the conclusion of the General Framework Agreement on 14 December 1995. I share as well the view of the Chamber that the claim of V.M., the mother of the victim, to open a criminal investigation is inadmissible under the circumstances of this case (see paragraph 8 above).

2. However, I disagree with the conclusion under paragraph 9 of the decision to declare inadmissible the application of V.M. concerning information about the fate of her son and the location of his mortal remains.

3. The Chamber found that this question "might raise an issue under Article 8 of the European Convention on Human Rights" (the "Convention") (see paragraph 9 above). Indeed, Article 8 of the Convention forms the basis of the applicant's right. The Chamber has decided in its decision in the case of *Mahumtović v. The Republika Srpska* that the question of a final resting place is so closely related to private and family life that it falls within the ambit of Article 8 of the Convention (case no. CH/98/872, decision on admissibility and merits of 8 October 1999, Decisions August— December 1999, paragraph 84). It is obvious that by withholding information about the fate of the applicant's son and the location of his mortal remains, the respondent Party did not directly "interfere" in her private or family life. However, as the European Court on Human Rights established in the case of *Gaskin v. United Kingdom*, from the "right to respect for private or family life" follows, under certain conditions, a positive obligation to act, *i.e.* in this case to provide information to the next of kin (Eur. Court HR, *Gaskin v. United Kingdom*, judgment of 7 July 1989, Series A no. 160, paragraphs 38, 41).

4. Whether or not such a positive obligation exists depends on "the fair balance that has to be struck between the general interest of the community and the interest of the individual" (*id.* at paragraph 42). On the one hand, close relatives of a missing or deceased person have a legitimate and strong interest in obtaining information about the fate of their relative and the location of his mortal remains. On the other hand, there is no legitimate community interest on the side of the public authority to withhold information in this respect. In practice information might be withheld to protect officials who acted illegally from responsibility or punishment. It is not necessary to underline that the motivation to omit responsibility for illegal acts can never be considered to be in "the general interest of the community"; moreover, the information can be provided in such a way that individual responsibility cannot be based upon it. Consequently, there is a positive obligation of a respondent Party to disclose information about the fate — and in the worst case about the mortal remains — of a person who disappeared after having been in the custody of the respondent Party to the close relatives upon their request.

5. This reasoning does not contradict the first part of the first sentence of paragraph 9 of the Chamber's decision, where it is stated that a corresponding request for information about mortal remains might raise an issue under Article 8 of the Convention. However, the second part of this sentence burdens the applicant with the responsibility to prove with evidence that the respondent Party is in possession of such information. This requirement renders the right of close relatives ineffective. If the applicant provides evidence that the missing person was taken into custody by forces or authorities under the responsibility of the respondent Party, then an assumption arises that records were taken in case of his death and on the location of his mortal remains.

6. In this case, the applicant V.M. provided specific information that her son was detained by forces loyal to Bosnian Serbs at Rogatica on 8 June 1992. After transmittal of the application, it would have been the burden of the respondent Party at least to state and perhaps to prove that for the forces under its responsibility, it was usual not to record the death of detainees and to dispose of their mortal remains informally and in unknown locations.

7. For these reasons, I respectfully dissent.

(signed)
Dietrich Rauschning

(signed)
Giovanni Grasso