HUMAN RIGHTS CHAMBER
FOR BOSNIA AND HERZEGOVINA

ДОМ ЗА ЉУДСКА ПРАВА
ЗА БОСНУ И ХЕРЦЕГОВИНУ

DECISION ON ADMISSIBILITY AND MERITS
(Delivered on 11 January 2001)

Case no. CH/99/3196

Avdo and Esma PALIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 9 December 2000 with the following members present:

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

Mr. Peter KEMPEES, 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 Rules 52, 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The application was brought before the Chamber by Ms. Esma Palić in her own right and on behalf of her husband, Colonel Avdo Palić, in accordance with Article VIII(1) of the Agreement, which provides in the 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. The applicant's husband was a military commander of the Army of the Republic of Bosnia and Herzegovina in the Žepa enclave. In July 1995, when intensive fighting with Bosnian Serb forces was going on in that area, Colonel Palić was negotiating on UN premises and under UN safety guarantee the evacuation of civilians. On 27 July 1995 Colonel Palić was forcibly taken away by Bosnian Serb forces in the presence of UN soldiers and monitors and taken in the direction of General Ratko Mladić's command position. As of today, Colonel Palić is still registered as a missing person.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced on 18 November 1999 and registered on the same day. Both Bosnia and Herzegovina and the Republika Srpska were indicated as respondent Parties. On 27 December 1999 the case was transmitted only to the Republika Srpska since the Chamber could not find any indication of responsibility of the State of Bosnia and Herzegovina. The Republika Srpska submitted observations on 24 February 2000. Further submissions of the applicant were received on 17 January and 13 April 2000. The Chamber deliberated on the case on 9 December 1999 and on 13 May, 7 June and 6 July 2000. On the latter date the Chamber issued a Partial Decision on Admissibility declaring the application inadmissible in so far as it is directed against Bosnia and Herzegovina.

4. On 5 September 2000 the Panel held a public hearing in Sarajevo. The following witnesses summoned by the Chamber gave evidence at the hearing: Mr. Hasan Muratović, Prime Minister of the Republic of Bosnia and Herzegovina in the spring of 1996; Mr. Amor Mašović, former President of the State Commission for Missing Persons, the body responsible on the Bosniac side for negotiations concerning prisoner exchanges; Mr. Dragan Bulajić, President of the Republika Srpska State Commission for the Exchange of War Prisoners and Missing Persons, and Mr. Abdurahman Malkić and Mr. Sado Ramić, who were detained together with Colonel Palić in the summer of 1995. The respondent Party was represented by its agent, Mr. Stevan Savić. The applicant Ms. Palić was present in person.

5. At the close of the oral hearing the respondent Party requested the Chamber to hear Mr. Momčilo Krajišnik, who was the President of the Bosnian Serb Assembly until the beginning of 1996 and has been in the custody of the International Criminal Tribunal for the former Yugoslavia (ICTY) since 3 April 2000, as a witness in relation to the question whether Colonel Palić was imprisoned on or after 14 December 1995. Moreover, the respondent Party asked to be granted a certain time in order to obtain information about the alleged detention of Colonel Palić in the Vanekov Mlin military prison in Bijeljina and to submit a report to the Chamber. Following the hearing the Chamber decided to reject both requests.

6. In response to its inquiry of 22 September 2000, the Chamber was informed by the representative of the International Committee of the Red Cross (ICRC) in Sarajevo on 4 October 2000 that Colonel Palić "appeared on the ICRC list of persons missing in Bosnia and Herzegovina" and that the corresponding "Tracing Request was still opened". On 9 December 2000 the Chamber adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

A. Established facts

7. It is uncontested that Mr. Palić was a military officer with the rank of colonel commanding the

Army of Bosnia and Herzegovina detachment defending the Žepa enclave. In July 1995, when this region was occupied by the Bosnian Serb Army and when the Bosniac population left Žepa, Colonel Palić negotiated with the Bosnian Serb Army about the peaceful evacuation of civilians. The negotiations took place in the UNPROFOR base (manned by the Ukraine battalion) in Žepa in the presence of UN officers and monitors who were intended to guarantee the personal safety of the negotiators. The Bosnian Serbs were represented by General Zdravko Tolimir. The Commander of the Bosnian Serb Army, General Ratko Mladić, was at that time at the entrance to Žepa and directed the military operation from that place. When problems arose in regard to the negotiations a meeting with General Rupert Smith, the UNPROFOR Commander for Bosnia and Herzegovina, was scheduled for 27 July 1995. However, General Smith never came to this meeting. When Colonel Palić arrived at the UNPROFOR base on that day he was forcibly taken away by armed Serb soldiers in front of the present UN soldiers and monitors and taken into the direction of General Mladić's command position.

B. Additional facts as presented by the applicant Ms. Palić

8. Ms. Palić states that after his arrest her husband was taken to the secret prison Vanekov Mlin in Bijeljina. She found out through private connections that her husband was transferred to another secret prison in Vlasenica in February 1996. Furthermore, in March 1996 General Đorđe Đurković and Colonel Krsmanović were returned from The Hague to Sarajevo and her husband was supposed to be exchanged for one of these officers. Mr. Amor Mašović, the President of the State Commission for Tracing Missing Persons, allegedly proposed the exchange of Colonel Palić and the Serb party, headed by Mr. Momčilo Krajišnik, agreed. However, the exchange did not take place.

9. Ms. Palić's has no reliable information as to her husband's fate after March 1996. However, she strongly believes that her husband is still alive since he was a respected reserve officer of the former JNA who, moreover, was personally acquainted with General Ratko Mladić. Ms. Palić points out that her husband is registered with the State Commission for Tracing Missing Persons.

C. Additional facts as presented by the respondent Party

10. The respondent Party claims to have no knowledge of the arrest and detention of Colonel Palić. It contends that he was neither detained in the Vanekov Mlin military prison in Bijeljina in August 1995 nor held incommunicado anywhere within the territory of the Republika Srpska after the General Framework Agreement came into force on 14 December 1995. In support to this the respondent Party first states that the State Commission for Tracing Missing and Detained Persons has never had his name in its registers on Prisoners of War (POW). Furthermore, the respondent Party stresses that ICRC and IFOR inspected all prisons within the Republika Srpska; if Colonel Palić had been detained in any prison in Bijeljina, as alleged by Ms. Palić, these organisations would have found him and registered him.

11. The respondent Party confirmed during the oral hearing on 5 September 2000 that no official investigation has been carried out in respect to the alleged detention of Colonel Palić in the Vanekov Mlin military prison in Bijeljina. The respondent Party is of the opinion that it is up to the applicant to prove that Colonel Palić was held in prison by the respondent Party on or after 14 December 1995.

D. Oral testimony

1. Mr. Hasan Muratović (witness)

12. Mr. Hasan Muratović is at present the Ambassador of Bosnia and Herzegovina to the Republic of Croatia and was in the spring of 1996 the Prime Minister of the Republic of Bosnia and Herzegovina. In respect to an article published in the newspaper "Oslobođenje" on 5 August 1999 which refers to talks between him and Mr. Momčilo Krajišnik in the spring of 1996 about a possible exchange of Colonel Palić he testified as follows:

> "(...) we learned that General Nemanja Đukić would be released from The Hague due to his illness. I was convinced that the Serbs did not know yet and I therefore requested Krajišnik to meet me urgently at the airport. I did not tell him what it was about, but I said that it was very urgent and that we had to meet immediately. At the meeting I told him that we could arrange to have General Đukić released, but under the condition that he be exchanged for Colonel Palić. He questioned me for a while, I do not remember details any more, and when he was convinced that General Đukić could return he agreed (...) but he had to meet General Mladić first and would inform me the following day. Unfortunately, the Office of UN in Sarajevo was informed thereof in the meantime and people who favoured the Serbs revealed that he would be released anyway. On the following day when we met he told me that he had talked with General Mladić and that he thought that Palić was not alive."

13. Mr. Muratović stressed that he was convinced at that time that Colonel Palić was alive. He explained to the Chamber that this conviction was based on Mr. Krajišnik's reaction when he suggested Colonel Palić's exchange; Mr. Krajišnik was "very happy to exchange General Đukić for him". Mr. Muratović added that in his opinion the Serbs were keeping Colonel Palić "in reserve for a major exchange".

2. Mr. Amor Mašović (witness)

14. Mr. Amor Mašović was formerly the Vice-President of the State Commission for the Exchange of Prisoners of War until April 1996. Since then he has been the President of the State Commission for Tracing Missing Persons. He testified that Colonel Palić was registered in the list of this commission as a missing person soon after his arrest and has never been deleted from that list.

15. Mr. Mašović testified that on 30 December 1995 he suggested to General Zdravko Tolimir at the Sarajevo airport the exchange of Colonel Palić against a Serb soldier called Kosmajac. General Tolimir answered that only General Mladić could decide on this matter and that in his opinion General Mladić would not agree to release Colonel Palić in exchange for Mr. Kosmajac. Mr. Mašović stated that he could conclude from this answer that Colonel Palić was still alive at this time.

16. Furthermore, Mr. Mašović informed the Chamber of a conversation he had with Mr. John Shattuck, then US Assistant Secretary of State for Human Rights, in December 1995 after the Agreement had been signed. Mr. Schattuck was sent from the United States of America in order to support the implementation of the part of the Agreement relating to prisoners of war. Mr. Mašović had been requested by Mr. Alija Izetbegović, then Chair of the Presidency of the Republic of Bosnia and Herzegovina, to give Mr. Schattuck the names of four persons, among them Colonel Palić. Mr. Izetbegović conditioned the implementation of the above part of the Agreement on the release of these four persons because he had reliable information that they were still detained. Afterwards Mr. Schattuck went to Belgrade in order to discuss this issue with Mr. Slobodan Milošević, then President of Serbia.

17. Mr. Mašović emphasized that he was convinced "as in no other case" that Colonel Palić was alive at least until the end of 1996 and might be in a Serb prison even today. Mr. Mašović based his conviction mainly on three facts. Firstly, he described General Tolimir as a person who had considerable military experience and who was a lawyer having good knowledge of the Geneva conventions. According to Mr. Mašović, General Tolimir would therefore never have allowed the liquidation of Colonel Palić as a colonel of the opposing forces who additionally had become a negotiator. Secondly, Mr. Mašović emphasized that General Mladić "appreciated as adversaries only two officers", among them Colonel Palić. According to Mr. Mašović, General Mladić personally knew Colonel Palić and had been his commander at a major military exercise for a while. Mr. Mašović, therefore, concluded that General Mladić would never have deprived Colonel Palić of his live. As a third reason Mr. Mašović set forth that General Mladić was keeping Colonel Palić in detention in order to be able to put pressure on ICTY in case that he or one of the other high ranking officers would get before the ICTY.

3. Mr. Dragan Bulajić (witness)

18. Mr. Dragan Bulajić is the former President of the State Commission for War Prisoners of the Republika Srpska. He testified that, according to the documents he had available, Colonel Palić had not been in any official prison of the Republika Srpska. Moreover, Mr. Bulajić stated that Colonel Palić was not registered in the list on war prisoners of the commission he presided over and that he knew absolutely nothing about Colonel Palić's fate. However, Mr. Bulajić also stated that there probably were unregistered and hidden detainees held by all the former warring factions.

4. Mr. Abdurahman Malkić (witness)

19. Mr. Abdurahman Malkić was detained together with the applicant Colonel Palić in the summer of 1995. He testified that he had been arrested and taken to the camp "Batkovići" in Bijeljina on 24 July 1995. Around 4 August 1995 he was brought to the Vanekov Mlin military prison in Bijeljina where he stayed incommunicado until 1 September 1995. Then he was brought back to the camp "Batkovići" where he was imprisoned until 24 December 1995. Around 14 August 1995 he saw Colonel Palić in the corridor of the Vanekov Mlin military prison in Bijeljina. Specifically questioned on that point the witness stated that he had no doubt that the person he saw was Colonel Palić whom he knew by sight. Afterwards he did not meet Colonel Palić any more and he had never talked to him but he knew that he was still there when he left the prison on 1 September 1995 as he had the cell next to Colonel Palić's cell.

5. Mr. Sado Ramić (witness)

20. Mr. Sado Ramić was detained together with the applicant Colonel Palić in the summer of 1995. He testified that he was detained incommunicado in the Vanekov Mlin military prison in Bijeljina from 4 August 1995 to 1 September 1995. During this time Mr. Ramić saw Colonel Palić only once. Specifically questioned on that point, the witness stated that he was sure that he had no doubt that the person he had seen was Colonel Palić whom he had known before. He was sure that Colonel Palić was still there when he left the prison on 1 September 1995.

E. Relevant law

1. UN Declaration on the Protection of All Persons from Enforced Disappearance of 18 December 1992 (A/RES/47/133)

21. The UN Declaration on the Protection of All Persons from Enforced Disappearance of 18 December 1992 defines in its preamble enforced disappearances in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of the liberty, which places such persons outside the protection of the law.

22. According to Article 1, any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, *inter alia*, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.

2. Annex 1 A of the General Framework Agreement

23. Art. IX of Annex 1 A of the General Framework Agreement (Agreement on the Military Aspects of the Peace Settlement) reads as follows:

"Prisoner Exchanges

1. The Parties shall release and transfer without delay all combatants and civilians held in relation to the conflict (hereinafter "prisoners"), in conformity with international humanitarian law and the provisions of this Article.
    1. The Parties shall be bound by and implement such plan for release and transfer of all prisoners as may be developed by the ICRC, after consultation with the Parties.
    2. The Parties shall cooperate fully with the ICRC and facilitate its work in implementing and monitoring the plan for release and transfer of prisoners.
    3. No later than thirty (30) days after the Transfer of Authority, the Parties shall release and transfer all prisoners held by them.
    4. In order to expedite this process, no later than twenty-one (21) days after this Annex enters into force, the Parties shall draw up comprehensive lists of prisoners and shall provide such lists to the ICRC, to the other Parties, and to the Joint Military Commission and the High Representative. These lists shall identify prisoners by nationality, name, rank (if any) and any internment or military serial number, to the extent applicable.
    5. The Parties shall ensure that the ICRC enjoys full and unimpeded access to all places where prisoners are kept and to all prisoners. The Parties shall permit the ICRC to privately interview each prisoner at least forty-eight (48) hours prior to his or her release for the purpose of implementing and monitoring the plan, including determination of the onward destination of each prisoner.
    6. The Parties shall take no reprisals against any prisoner or his/her family in the event that a prisoner refuses to be transferred.
    7. Notwithstanding the above provisions, each Party shall comply with any order or request of the International Tribunal for the Former Yugoslavia for the arrest, detention, surrender of or access to persons who would otherwise be released and transferred under this Article, but who are accused of violations within the jurisdiction of the Tribunal. Each Party must detain persons reasonably suspected of such violations for a period of time sufficient to permit appropriate consultation with Tribunal authorities.
2. In those cases where places of burial, whether individual or mass, are known as a matter of record, and graves are actually found to exist, each Party shall permit graves registration personnel of the other Parties to enter, within a mutually agreed period of time, for the limited purpose of proceeding to such graves, to recover and evacuate the bodies of deceased military and civilian personnel of that side, including deceased prisoners."

3. Law on Criminal Procedure of the Republika Srpska

24. The relevant provisions of the Law on Criminal Procedure of the Republika Srpska (Službeni list SFRY Nos. 26/86, 74/87, 57/89, 3/90, 27/90; Službeni glasnik RS Nos. 26/93, 14/94, 6/97) are the following:

a. Initiation of Criminal Proceedings

25. Art. 17 (1) reads as follows:

"Criminal proceedings shall be initiated upon the request of an authorized prosecutor."

26. Art. 18 provides as follows:

"The public prosecutor must undertake criminal prosecution if there is evidence that a crime has been committed which is automatically prosecuted."

27. Art. 149 (1) provides as follows:

"Private citizens should report crimes which are automatically prosecuted in order to ensure social self-protection."

28. Art. 150 (1) reads as follows:

"An allegation shall be filed with the competent public prosecutor in writing or orally."

b. Detention

29. Article 190 (1) reads as follows:

"Detention may be ordered only under the conditions envisaged in this law."

30. Article 191 (1) and (2) provides as follows:

"(1) Custody shall always be ordered against a person if there is a reasonable suspicion that he has committed a crime for which the law prescribes the death penalty. Custody is not mandatory if the circumstances indicate that in the particular case involved the law prescribes that a less severe penalty may be pronounced.

(2) If there is a reasonable suspicion that an individual has committed a crime, but the conditions do not obtain for mandatory custody, custody may be ordered against that person in the following cases:

1. if he is in hiding or if his identity cannot be established, or if there are circumstances indicating that he might escape;

2. if particular circumstances indicate that he will hinder the investigation by influencing witnesses, fellow defendants or accessories after the fact;

3. if particular circumstances provide justified fear that the crime will be repeated, or an attempted crime completed, or a threatened crime committed;

4. if there is a reasonable fear that he will destroy the evidence to allow a severe penalty to be pronounced under the law and if because of the manner of execution, the consequences or other circumstances of the crime, there has been or might be such disturbance of the citizenry that the ordering of custody is urgently necessary for the unhindered conduct of criminal proceedings or human safety."

31. Article 192 provides as follows:

"(1) Custody shall be ordered by the investigative judge of the competent court.

(2) Custody shall be ordered in a written decision containing the following: the first and the last name of the person being taken into custody, the crime he is charged with, the legal basis for custody, instruction as to the right of appeal, a brief substantiation, in which the basis for ordering custody is specifically argued, the official seal, and the signature of the judge ordering custody.

(3) The decision on custody shall be presented to the person to whom it pertains at the moment when he is arrested, and no later than 24 hours from the moment he is deprived of liberty. The time of his detention and the time of presentation of the warrant must be indicated in the record.

(4) An individual who has been taken into custody may appeal against the decision on custody to the panel of judges (Article 23, paragraph 6) within 24 hours from the time when the warrant was presented. If the person taken into custody is examined for the first time after that period has expired, he may file an appeal at the time of his examination. The appeal, a copy of the transcript of the examination, if the person taken into custody has been

examined, and the decision on custody shall be immediately delivered to the panel of judges. The appeal shall not stay execution of the warrant.

(5) If the investigative judge does not concur in the public prosecutor's recommendation that custody be ordered, he shall seek a decision on the issue from the panel of judges (Article 23, paragraph 6). A person taken into custody may file an appeal against the decision of the panel of judges which ordered custody, but that appeal shall not stay execution of the order. The provisions of paragraphs 3 and 4 of this Article shall apply in connection with presentation of the warrant and the filing of the appeal.

(6) In the cases referred to in paragraphs 4 and 5 of this Article the panel of judges ruling on an appeal must render a decision within 48 hours."

32. Article 193 provides as follows:

"(1) The investigative judge shall immediately inform a person who has been detained and brought before him that he may engage defence counsel, who may attend his examination, and, if necessary, he shall help him to find defence counsel. If within 24 hours of the time of this communication a person taken into custody does not engage defence counsel, the investigative judge shall immediately examine that person.

(2) If a person who has been detained declares that he will not engage defence counsel, the investigative judge has a duty to examine him within 24 hours.

(3) If in the case of mandatory defence (Article 70, paragraph 1) a person taken into custody does not engage defence counsel within 24 hours from the time when he is instructed concerning that right or if he declares that he will not engage defence counsel, counsel shall be automatically appointed for his defence.

(4) Immediately after the examination the investigative judge shall decide whether to release the individual who has been taken into custody. If he feels that the person arrested should be detained, the investigative judge shall immediately inform the public prosecutor to that effect unless the latter has already submitted a petition for the conduct of an investigation. If within 48 hours from the time of being informed about custody the public prosecutor does not file a petition for the conduct of an investigation, the investigative judge shall release the person who has been taken into custody."

33. Article 195 provides as follows:

"(1) Authorised officials of the Ministry of Internal Affairs may detain a person if any of the reasons envisaged in Article 191 of this law obtain, but they must bring that person without delay before the competent investigative judge or the investigative judge of the lower court in whose jurisdiction the crime was committed, if the seat of that court can be reached more quickly. When the authorised official of the law Ministry of Internal Affairs brings the person before the investigative judge, the official shall inform him of the reasons and the time of the person's apprehension.

(2) If impediments which could not be overcome made it impossible to bring a person who has been apprehended before the investigative judge within 24 hours, the officer must give a specific justification for this delay. The delay must also be justified when an individual is being brought in at the request of the investigative judge.

(3) If, because of the delay in bringing the accused before the investigative judge, the latter is unable to make the decision on custody within the period referred to in Article 192, paragraph 3, of this law, he is obliged to render a decision on custody as soon as the person who has been apprehended is brought before him."

34. Article 196 provides as follows:

"(1) In exceptional circumstances custody can be ordered by an authority of the Ministry of Internal Affairs before an investigation is carried out, if it is necessary for establishing an identity, checking an alibi or for other reasons it is necessary to gather information required for the conduct of proceedings against a particular person, and reasons for pre-trial custody prescribed in Article 191 paragraph 1 and paragraph 2 points 1 and 3 of this law exist, although in cases prescribed by Article 191 paragraph 2 point 2 this can be done only if there is a well-founded fear that the person will destroy evidence of the crime.

(2) The Ministry of Internal Affairs may also order pre-trial custody if the investigative judge has entrusted it to perform certain investigatory actions (Article 162, para. 4) and the grounds for pre-trial custody obtain as envisaged in Article 191 of this law.

(3) Custody ordered by an authority of the Ministry of Internal Affairs may last at most for three days, from the moment of apprehension. The provisions of Article 192 paragraphs 2 and 3 of this law shall apply to this custody. A detained person may appeal against a decision on custody to the panel of judges of the competent court within 24 hours from the moment of receipt. The panel is obliged to render a decision on appeal within 48 hours from the moment of receipt of appeal. The appeal has no suspensive effect. The authority of the Ministry of Internal Affairs shall provide the detainee with legal assistance for the lodging of his appeal.

(4) The Ministry for Internal Affairs is obliged to communicate promptly the order for the detention to the public prosecutor, and in the case referred to in paragraph 2 of this Article to the investigative judge, who may request that the detained person is brought before him without delay.

(5) If, after the expiry of the three days time-limit, the detainee is not released, the authority of the Ministry of Internal Affairs shall act in accordance with Article 195 of this law, and the investigative judge before whom the detainee is brought shall act in accordance with Article 193 of this law."

IV. COMPLAINTS

35. On behalf of her husband, Ms. Palić alleges a violation of his right to liberty and to respect for his family life as well as of all his civil rights. In case that he is no longer alive, she complains that he has been deprived of his right to life and of the right to be buried decently.

36. In her own right, Ms. Palić complains that she and her children suffer severely under the uncertainty of the whereabouts of Colonel Palić and asserts a violation of "the right to know about the fate of one's husband and father". Describing her personal situation, Ms. Palić sets forth that the respondent Party has not only degraded her husband's life, but also her own life and the life of her children. She stresses that she and her children have lived for more than five years in agony and that it becomes more and more difficult every day as her children are now old enough to ask her questions about their fathers fate. She requests that those responsible for the disappearance are indicted before the International Criminal Tribunal for the former Yugoslavia. Ms. Palić furthermore claims to be entitled to compensation from the Republika Srpska for the mental distress suffered.

V. SUBMISSIONS OF THE PARTIES

A. The respondent Party

37. The respondent Party is of the opinion that the application is inadmissible on two grounds. Firstly, it holds that the Chamber is not competent *ratione temporis*. Furthermore, the respondent Party stresses that Ms. Palić did not exhaust the domestic remedies available under Articles 148-150 of the RS Law on Criminal Procedure. As to the merits the respondent Party states that the application is ill-founded.

B. The applicant

38. Ms. Palić states that Mr. Momčilo Krajišnik's agreement to the exchange of her husband negotiated in March 1996 proves that he was still alive at that point. She therefore feels that the Chamber is competent *ratione temporis* to deal with the application. In relation to the requirement to exhaust domestic remedies she states that she has filed a claim with the competent commission in the Republika Srpska. Moreover, she points out that she has written innumerable letters to various authorities in Bosnia and Herzegovina and the Republika Srpska, among them the Prime Minister of the Republika Srpska, Milorad Dodik, as well as to the ICRC, the State Commission for Tracing Missing Persons and the High Representative for Bosnia and Herzegovina asking for assistance in her efforts to discover the fate of her husband. These efforts, however, have been without any success.

VI. OPINION OF THE CHAMBER

A. Admissibility

39. 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. According to Article VIII(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.

1. Competence *ratione temporis*

40. The Chamber will first address the question whether it is competent, *ratione temporis*, to consider the case, bearing in mind that the applicant was deprived of his liberty before the entry into force of the Agreement on 14 December 1995. In accordance with generally accepted principles of law, the Agreement cannot be applied retroactively. Accordingly, the Chamber is not competent to consider events that took place prior to 14 December 1995, including the arrest and detention of Colonel Palić up to 14 December 1995.

41. However, the fact that Colonel Palić, as most of the other missing persons in Bosnia and Herzegovina, disappeared before the entry into force of the Dayton Peace Agreement, does not preclude the Chamber from considering such cases if there is circumstantial evidence that he was still held in detention on or after 14 December 1995 (see case no. CH/96/1, *Matanović*, decision on the admissibility of 13 September 1996, Decisions on Admissibility and Merits March 1996-December 1997; case no. CH/96/15, Grgić, decision on the admissibility of 5 February 1997, Decisions on Admissibility and Merits March 1996-December 1997).

42. Ms. Palić claims that her husband has continued to be arbitrarily detained and thus deprived of his liberty after 14 December 1995. The respondent Party denies that Colonel Palić was detained anywhere within the territory of the Republika Srpska after the General Framework Agreement came into force.

43. Two of the witnesses heard by the Chamber provided substantial indications that the applicant remained detained by the respondent Party also after 14 December 1995. Firstly, witness Mašović testified that on 30 December 1995 he had suggested to General Zdravko Tolimir at the Sarajevo airport the exchange of Colonel Palić against a Serb soldier called Kosmajac. Mr. Mašović informed the Chamber that General Tolimir answered that only General Mladić could decide on this matter and that in his opinion General Mladić would not release Colonel Palić in exchange only for Mr. Kosmajac. Mr. Mašović stated that he could conclude from this answer that Colonel Palić was still alive at this time. Secondly, witness Muratović testified before the Chamber that he had suggested to Mr. Momčilo Krajišnik in spring 1996 the exchange of Colonel Palić against General Nemanja Đukić. Mr. Muratović informed the Chamber that Mr. Krajišnik agreed with his proposal but told him that he first had to meet General Mladić. Mr. Muratović stressed that Mr. Krajišnik's reaction when he suggested to him Colonel Palić's exchange clearly showed that Mr. Krajišnik knew that Colonel Palić was still alive at that time.

44. In light of the above witness statements the Chamber finds that there is strong circumstantial evidence that Colonel Palić was still held in detention after 14 December 1995. It concludes that, in so far as an ongoing violation of the above mentioned rights is claimed, the application is compatible with the Agreement and comes within the competence of the Chamber *ratione temporis*.

2. Requirement to exhaust effective domestic remedies

45. The Chamber will next address the question whether the applicant Ms. Palić has exhausted effective domestic remedies. Ms. Palić states that she has filed a claim with the competent commission in the Republika Srpska. Moreover, she alleges that she wrote letters to various authorities in Bosnia and Herzegovina and the Republika Srpska, among them the Prime Minister of the Republika Srpska, Milorad Dodik, as well as to the ICRC, the State Commission for Tracing Missing Persons and the High Representative for Bosnia and Herzegovina asking for assistance in her efforts to discover the fate of her husband. These efforts, however, have been without any success. The respondent Party does not contest that. However, the respondent Party states that Ms. Palić did not exhaust the remedies available under Articles 148-150 of the RS Law on Criminal Procedure, i.e. she did not report to the police what had happened to her husband.

46. The Chamber has already stated in its case law that normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. 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. It has found that in applying the rule on exhaustion of domestic remedies it is necessary to take realistic account not only of the existence of formal remedies in the national legal system but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant (see case no. CH/96/29, *The Islamic Community in Bosnia and Herzegovina*, decision on admissibility and merits of 11 May 1999, paragraphs 142-143).

47. To that extent Article 13 and Article 35(1) of the Convention and, hence, Article VIII(2)(a) of the Agreement are interrelated. The Chamber recalls the jurisprudence of the European Court of Human Rights on Article 13 of the Convention according to which, where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, "a thorough and effective investigation capable of leading to the identification and punishment of those responsible" (*Kurt v. Turkey*, judgment of 25 May 1998, Reports of Judgments and Decisions 1998-III, paragraph 140). In the Chamber's opinion it is no less important that such an investigation should be capable of clarifying the whereabouts or fate of the victim. The Chamber further considers that this thorough and effective investigation has to be initiated by the competent authorities of their own motion as soon as it is apparent that such disappearance has taken place.

48. Moreover, the Chamber has held, in previous cases, that the burden of proof is on the respondent Party to satisfy the Chamber that there was a 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 March 1996-December 1997). Afterwards, it is up to the applicant to prove that these remedies were either made use of or were or would have been ineffective in the case at hand.

49. In the present case, the applicant Ms. Palić has filed, *inter alia*, a claim with the competent commission in the Republika Srpska. However, she has never received any information on the whereabouts of her husband. In fact, the respondent Party has recognized that no investigation has ever been carried out in respect of the arrest and detention of Colonel Palić. The respondent Party has not shown that a complaint to the Republika Srpska police would have been any more effective.

50. The Chamber, therefore, finds that Ms. Palić did not have to report to the police authorities of the respondent Party what had happened to her husband and rejects the respondent's Party's argument. It concludes that that Ms. Palić complied with the requirement to exhaust effective domestic remedies.

3. Conclusion

51. The Chamber concludes that the admissibility requirements in Article VIII(2) of the Agreement have been met.

B. Merits

52. Under Article XI of the Agreement the Chamber must next address the question whether this case discloses a breach by the respondent Party of its obligations under the Agreement. Article I of the Agreement provides that the Parties shall secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms, including the rights and freedoms provided in the Convention and the other international agreements listed in the Appendix to the Agreement.

53. Under Article II(2) of the Agreement, the Chamber has competence to consider (a) alleged or apparent violations of human rights as provided in the Convention and its Protocols and (b) alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the 16 international agreements listed in the Appendix (including the Convention), where such a violation is alleged or appears to have been committed by the Parties, including by any official or organ of the Parties, Cantons, Municipalities or any individual acting under the authority of such an official or organ.

1. Article 5 of the Convention (right to liberty and security of person) in relation to Colonel Palić

54. The Chamber will next deal with Ms. Palić's complaint that her husband's right to liberty was violated by the respondent Party. Ms. Palić claims that her husband was detained incommunicado by the respondent Party first in the Vanekov Mlin military prison in Bijeljina in August 1995, transferred to another secret prison in Vlasenica in February 1996 and afterwards detained in some place unknown to her. The respondent Party contends that Colonel Palić was neither detained in the Vanekov Mlin military prison in Bijeljina in August 1995 nor held incommunicado anywhere within the territory of the Republika Srpska after the General Framework Agreement came into force on 14 December 1995. The respondent Party emphasizes that it is up to the applicant Ms. Palić to prove that Colonel Palić was held in prison by the respondent Party on or after 14 December 1995.

55. Two witnesses heard by the Chamber, Mr. Malkić and Mr. Ramić, testified that Colonel Palić was held incommunicado together with them in the Vanekov Mlin military prison in Bijeljina in August 1995. Both of them, furthermore, stated that Colonel Palić stayed behind in that prison when they left on 1 September 1995. It follows from this evidence that Colonel Palić was detained by the respondent Party from 27 July 1995 to 1 September 1995.

56. There are also various substantial indications that the applicant remained detained by the respondent Party also after 1 September 1995 and, in particular, after 14 December 1995 (see witness testimonies in paragraph 43 above).

57. The Chamber was, moreover, informed by Mr. Mašović, the President of the State Commission for Tracing Missing Persons, that Colonel Palić was registered soon after his arrest and has never been deleted from this list. He also appears on the ICRC list of persons missing in Bosnia and Herzegovina; the corresponding tracing request is still open.

58. Notwithstanding the denial of the respondent Party, the evidence before the Chamber confirms beyond doubt that Colonel Palić was forcibly taken away by Serb forces, prior to 14 December 1995, and subsequently detained. A blunt denial of these established facts cannot absolve the respondent Party from the responsibility that attaches to his deprivation of liberty. Until his fate is clarified, it must be assumed that Colonel Palić is either still kept in captivity or that the ultimate violation of the right to life has occurred. Should the latter be the case, the respondent Party has an obligation to clarify the circumstances of his death. No such clarifications have been offered.

59. The Chamber, therefore, is satisfied that Colonel Palić was, after his arrest on 27 July 1995, detained by the respondent Party, and that this detention continued or Colonel Palić died after the Agreement came into force on 14 December 1995.

60. Referring to the judgment of the European Court of Human Rights in case *Kurt v. Turkey*, the Chamber recalls the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. The Court has repeatedly stressed in its case-law that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness. This insistence on the protection of the individual against any abuse of power is illustrated by the fact that Article 5(1) gives an exhaustive listing of the circumstances in which individuals may be lawfully deprived of their liberty, it being stressed that these circumstances must be given a narrow interpretation having regard to the fact that they constitute exceptions to a most basic guarantee of individual freedom. The Court has emphasized that the unacknowledged detention of an individual is a complete negation of the guarantees contained in Article 5 and a most grave violation of this Article. It is incumbent on the authorities when they have assumed control over an individual to account for his or her whereabouts. For this reason, the Court sees Article 5 as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since (Eur. Court HR, *Kurt v. Turkey*, judgment of 25 May 1998, Reports of Judgments and Decisions 1998-III, paragraphs 122 and 124).

61. Against that background the Chamber notes with concern that the respondent Party has not made available either to Ms. Palić or to the Chamber any information concerning Colonel Palić's whereabouts. Although the respondent Party, during the oral hearing, asked to be granted a certain time in order to obtain information about the alleged detention of Colonel Palić in the Vanekov Mlin military prison in Bijeljina and to submit a report to the Chamber it is a fact that no steps have been taken in that direction during the last five years. Apparently, Colonel Palić's detention was not recorded and there exists no official trace of his subsequent whereabouts or fate. That fact in itself must be considered a most serious failing since it not only deprives the applicants of elementary human rights guarantees but also enables those responsible for the act of deprivation of liberty to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of the detainee. The Chamber draws very strong inferences from the lack of any documentary evidence relating to where Colonel Palić was detained after 14 December 1995 and from the inability of the respondent Party to provide a satisfactory and plausible explanation as to what happened to him.

62. Having regard to these considerations and taking into account the evidence before it the Chamber concludes that the authorities of the respondent Party have failed to offer any credible and substantiated explanation for the whereabouts and fate of Colonel Palić after 14 December 1995 and that no investigation was conducted when Ms. Palić presented credible indications that her husband was in detention and that she was concerned for his life. The respondent Party has failed to discharge its responsibility to account for him and it must be accepted that he has been held in unacknowledged detention in the complete absence of the safeguards contained in Article 5 of the Convention.

63. It follows that the respondent Party has violated Colonel Palić's right to liberty and security of person under Article 5 of the Convention.

2. Article 2 of the Convention (right to life) in relation to Colonel Palić

64. Ms. Palić complains that Colonel Palić was deprived of his right to life.

65. The respondent Party confines itself to denying that Colonel Palić was either detained in the Vanekov Mlin military prison in Bijeljina in August 1995 or held incommunicado anywhere within the territory of the Republika Srpska after the General Framework Agreement came into force. In support of this the respondent Party states that the State Commission for Tracing Missing and Detained Persons never had his name in its registers of Prisoners of War (POW).

66. The Chamber finds that the facts surrounding his deprivation of liberty disclose that Colonel Palić was a victim of enforced disappearance within the meaning of the UN Declaration on the Protection of All Persons from Enforced Disappearance, taking into account that any act of enforced disappearance violates or constitutes a grave threat to the right to life (see Article 1 of the UN Declaration). This UN Declaration, which was unanimously adopted by the General Assembly on 18 December 1992, constitutes, although not legally binding, the most elaborate and authoritative international instrument in this field. The Chamber takes it into account as enforced disappearances are not explicitly referred to in the European Convention. The UN Declaration defines in its preamble enforced disappearances in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of the liberty, which places such persons outside the protection of the law (see above paragraph 21).

67. The Chamber recalls that the European Court of Human Rights has ruled that whether the failure on the part of the authorities to provide a plausible explanation as to a detainee's fate, in the absence of a body, might also raise issues under Article 2 of the Convention depends on all the circumstances of the case, and in particular on the existence of sufficient circumstantial evidence, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody (Eur. Court HR, *Tas v. Turkey*, judgment of 14 November 2000, paragraph 63). It also recalls that the Inter-American Court of Human Rights ruled that "circumstantial or presumptive evidence is especially important in allegations of disappearances, because this type of repression is characterised by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim" (*Velasquez Rodriguez v. Honduras*, judgment of 29 July 1988, para. 131). In this context, the Chamber notes that the respondent Party has not provided any factual information at all. In particular, it has not disclosed the fate of Colonel Palić, nor has it given any reasons why its authorities would not be able to do so.

68. Ms. Palić requested the competent State Commission of the respondent Party to investigate her husband's fate and to inform her about it. The Chamber notes with serious concern the total absence of action on the part of the respondent Party to investigate the fate of Colonel Palić and to make all relevant information about him, particularly as to whether he is still alive, available to Ms. Palić and, in accordance with to Article X(5) of the Agreement, to the Chamber. The respondent Party did not provide a credible and substantiated explanation of what has happened and did not show that effective steps were taken at all to investigate the occurrence and ascertain the fate of Colonel Palić. The respondent Party has, therefore, refused, to disclose the fate or whereabouts of Colonel Palić.

69. Moreover, the Chamber recalls that, according to the European Court of Human Rights, the period of time which has elapsed since the person was placed in detention, although not decisive in itself, is a relevant factor to be taken into account. It must be accepted that the more time goes by without any news of the detained person, the greater the likehood that he or she has died (Eur. Court HR, *Tas v. Turkey*, judgment of 14 November 2000, paragraph 64).

70. Taking into account that about five years have passed without information as to Colonel Palić's whereabouts or fate the Chamber concludes that the respondent Party has violated Colonel Palić's right to life as guaranteed under Article 2 of the Convention.

3. Article 3 of the Convention (right not to be subjected to inhuman and degrading treatment)

a) In relation to Colonel Palić

71. The Chamber will next consider whether Colonel Palić's right not to be subjected to inhuman and degrading treatment under Article 3 of the Convention has been violated.

72. The Chamber has already found that the facts surrounding Colonel Palič's deprivation of liberty disclose that he was a victim of enforced disappearance within the meaning of the UN

Declaration on the Protection of All Persons from Enforced Disappearance (see paragraph 66 above). According to Article 1 of this Declaration, any act of enforced disappearance constitutes a violation of the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment.

73. The Chamber also notes that the UN Human Rights Committee in a number of cases, for example in its views on *Celis Laureano v. Peru* of 25 March 1996 (Communication No. 540/1993, Reports of the Human Rights Committee (1997), Volume II, paragraph 8.5), held that the abduction and disappearance of the victim and prevention of contact with his family and with the outside world constitutes cruel and inhuman treatment.

74. In the present case the Chamber is convinced, for the above reasons (see paragraphs 55-59), that Colonel Palić, after he was forcibly taken away on 27 July 1995, was held incommunicado by the respondent Party from that day until some unknown date after the Agreement came into force on 14 December 1995. This incommunicado detention and the suffering and fear of Colonel Palić that may safely be presumed to have been caused by it reveal inhuman and degrading treatment in violation of Article 3 of the Convention in relation to Colonel Palić.

b) In relation to Ms. Palić

75. The Chamber will further consider whether Article 3 of the Convention has also been violated in respect of the applicant Ms. Palić herself. Ms. Palić claims that she has lived for more than five years in agony. She explained to the Chamber that it becomes more and more difficult every day as her children are now old enough to ask her about their father's fate.

76. The Chamber recalls that, according to the European Court of Human Rights, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see Eur. Court HR, *Cruz Varas and Others v. Sweden*, judgment of 20 March 1991, Series A no. 201, p. 31, paragraph 83; *Kurt v. Turkey*, judgment of 25 May 1998, Reports of Judgments and Decisions 1998-III, paragraph 133).

77. Moreover, the Chamber recalls the practice of the UN Human Rights Committee in the case of *Elena Quinteros v. Uruguay* where inhuman treatment was found in respect to the applicant whose daughter had disappeared. The UN Human Rights Committee stated that it "understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts". It found that the mother of the victim had "the right to know what has happened to her daughter". The Committee then concluded that, in these respects, the mother too was a victim of the violation of Article 7 of the International Covenant on Civil and Political Rights (right not to be subjected to cruel, inhuman or degrading treatment) suffered by her daughter (*Elena Quinteros v. Uruguay*, Communication No. 107/1981 of 17 September 1981, Reports of the Human Rights Committee (1983), paragraph 14).

78. However, the Chamber also recalls that, according to the European Court of Human Rights, the essence of a violation of Article 3 in relation to a family member does not so much lie in the fact of the disappearance of the family member but rather concerns the authorities' reactions and attitudes to the situation (Eur. Court HR, *Tas v. Turkey*, judgment of 14 November 2000, paragraph 79),

79. The Chamber notes that Ms. Palić has suffered uncertainty, doubt and apprehension for more than five years. Although she has filed an application with the competent commission of the respondent Party requesting the investigation of her husband's fate she has been left with the anguish of knowing that her husband was detained on 27 July 1995 and that there is a complete absence of official information as to his fate after the Agreement came into force. No steps have been taken by the respondent Party to remedy these matters.

80. Having regard to the circumstances described above as well as to the fact that Ms. Palić is the wife of a victim of serious human rights violations and herself the victim of the authorities' complacency in the face of her anguish and distress, the Chamber finds that the respondent Party is in breach of Article 3 in respect of Ms. Palić.

4. Article 8 of the Convention (right to respect for private and family life) in relation to Ms. Palić

81. The applicant Ms. Palić, moreover, asserts a violation of her right to know about the fate of her husband (and the father of her children). The respondent Party does not address this aspect of the case in particular; it only argues that, as to the merits, the application is ill-founded in general.

82. The Chamber recalls its jurisprudence that cases of disappeared family members can raise an issue under Article 8 of the Convention if the applicant shows that the respondent Party is in possession of the body of the victim and unreasonably refuses to hand it over to the applicant. It has stated that the applicant has to substantiate that the respondent Party is arbitrarily withholding the victim's body from him or her or withholding from him or her information concerning its whereabouts (see case no. CH/00/4820, *Čajević*, decision on admissibility of 12 October 2000, paragraph 9, to be published in Decisions July-December 2000; case no. CH/00/4033, *Simaković*, decision on admissibility of 5 July 2000, paragraph 7, to be published in Decisions July-December 2000).

83. In the case at hand, the applicant Ms. Palić has shown that her husband was arrested by the respondent Party on 27 July 1995 and that he was apparently never released. She has, without any success, filed an application with the competent commission of the respondent Party and taken various other steps to get information from the respondent Party about the whereabouts of her husband. She also has named witnesses to the Chamber who confirmed Ms. Palić's complaints (see paragraphs 55-59 above).

84. The Chamber, therefore, taking into account the evidence before it, finds that Ms. Palić has sufficiently substantiated that the respondent Party is arbitrarily withholding from her information, which must be in its possession, concerning the fate of her husband, including information concerning her husband's body, if he is no longer alive. It follows that the respondent Party has violated her right to respect for her family life under Article 8 of the Convention.

VII. REMEDIES

85. 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.

86. Ms. Palić requests that the respondent Party be ordered to provide her with complete and accurate information on her husband's fate. If he is alive he should be freed, if he is dead his body should be given to his family. She asks for compensation from the Republika Srpska for the period starting from the date on which it became responsible for her husband's fate until the moment of the solution of the case. Moreover, Ms. Palić requests that those responsible for her husband's fate should be brought before the ICTY. She also asks that the responsibility of the UN representatives who were involved in the present case, and especially General Rupert Smith, be examined.

87. As to the different claims mentioned above, the Chamber has found the respondent Party to be in breach of its obligation to ensure to everyone within its jurisdiction the rights guaranteed in the Agreement.

88. The Chamber recalls that in the case of *Matanović* it ordered the respondent Party to take all necessary steps to ascertain the whereabouts or fate of the applicants and to secure their release if still alive (see case no. CH/96/1, *Matanović*, decision on the merits of 11 July 1997, paragraph 64, Decisions on Admissibility and Merits March 1996-December 1997). Furthermore, the Chamber notes that the UN Human Rights Committee, in the case of *Elena Quinteros v. Uruguay*, urged the Government of Uruguay to take immediate and effective steps to establish what has happened to the

victim (i.e. the disappeared person) and to secure her release, to bring to justice any persons found to be responsible for her disappearance and ill-treatment, to pay compensation for the wrongs suffered and to ensure that similar violations did not occur in future (*Elena Quinteros v. Uruguay*, Communication No. 107/1981 of 17 September 1981, Reports of the Human Rights Committee (1983), paragraph 16; see also, *mutatis mutandis*, views on the cases *Celis Laureano v. Peru* of 25 March 1996, Communication No. 540/1993, Reports of the Human Rights Committee (1997), Volume II, paragraph 8.5 and *Katombe L. Tshishimbi v. Zaire* of 25 March 1996, Communication No. 542/1993, Reports of the Human Rights Committee (1997), Volume II, paragraph 7).

89. Thus, the Chamber finds it appropriate, taking into account all the above mentioned facts, to order the respondent Party:

a. to carry out immediately a full investigation capable of exploring all the facts regarding Colonel Palić's fate from the day when he was forcibly taken away with a view to bring the perpetrators to justice;
b. to release Colonel Palić, if still alive, or otherwise, to make available his mortal remains to Ms. Palić; and
c. to make all information and findings relating to the fate and whereabouts of Colonel Palić known to Ms. Palić.

90. Moreover, the Chamber finds it appropriate to order the respondent Party to pay to Ms. Palić KM 15000, by way of compensation for her mental suffering, and in respect of her husband, by way of compensation for non-pecuniary damage, KM 50000, which sum is to be held by her for her husband or his heirs, within one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure.

VIII. CONCLUSIONS

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

1. by 6 votes to 1, to declare the application admissible in so far as it is directed against the Republika Srpska and relates to events after 14 December 1995;

2. by 6 votes to 1, that there has been a violation of Colonel Palić's right to liberty and security of person as guaranteed by Article 5 of the Convention, the respondent Party thereby being in violation of Article I of the Agreement;

3. by 6 votes to 1, that there has been a violation of Colonel Palić's right to life as guaranteed by Article 2 of the Convention since his enforced disappearance constitutes in the circumstances established by the Chamber a grave threat to his right to life, the respondent Party thereby being in violation of Article I of the Agreement;

4. by 6 votes to 1, that the incommunicado detention of Colonel Palić constitutes inhuman and degrading treatment and thus violates Colonel Palić's rights under Article 3 of the Convention, the respondent Party thereby being in breach of Article I of the Agreement;

5. by 6 votes to 1, that the fear and anguish caused to Ms. Palić by the unclarified fate of her husband constitutes inhuman and degrading treatment in relation to Ms. Palić and thus violates her rights under Article 3 of the Convention, the respondent Party thereby being in breach of Article I of the Agreement;

6. by 6 votes to 1, that there has been a violation of Ms. Palić's right to respect for family and private life as guaranteed by Article 8 of the Convention since the respondent Party is arbitrarily withholding from her all relevant information concerning her husband's fate and whereabouts, the respondent Party thereby being in violation of Article I of the Agreement;

7. unanimously, to order the respondent Party to carry out immediately a full investigation capable of exploring all the facts regarding Colonel Palić's fate from the day when he was forcibly taken away with a view to bring the perpetrators to justice;

8. unanimously, to order the respondent Party to release Colonel Palić, if still alive, or otherwise, to make available his mortal remains to Ms. Palić;

9. unanimously, to order the respondent Party to make all information and findings relating to the fate and whereabouts of Colonel Palić known to Ms. Palić;

10. by 6 votes to 1, to order the respondent Party to pay to Ms. Palić KM 15000, by way of compensation for her mental suffering, within one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure;

11. by 6 votes to 1, to order the respondent Party to pay to Ms. Palić in respect of her husband, by way of compensation for non-pecuniary damage, KM 50000, which sum is to be held by her for her husband or his heirs, within one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure;

12. by 6 votes to 1, that simple interest at an annual rate of 4% will be payable over the sums provided for in conclusions nos. 10 and 11 or any unpaid residue thereof from the day of expiry of the above time-limit until the date of settlement in full;

13. unanimously, to order the respondent Party to report to the Chamber within three months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure on the steps taken by it to comply with the above orders.

(signed)

Peter KEMPEES
Registrar of the Chamber

(signed)

Giovanni GRASSO
President of the Second Panel

Annex Dissenting opinion of Mr. Vitomir Popović

ANNEX

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the separate dissenting opinion of Mr. Vitomir Popović:

DISSENTING OPINION OF MR. VITOMIR POPOVIĆ

1. Competence *ratione temporis*

According to the evidence available, the applicant was deprived of his liberty on 27 July 1995 and according to the data of the International Committee of Red Cross he has been, and still is, on the Red Cross list of persons missing in Bosnia and Herzegovina, that is to say that the "corresponding tracing request is still open". In the course of the proceedings before the Human Rights Chamber none of the witnesses heard confirmed that Mr. Avdo Palić was and is in the detention facility Vanekov mlin in Bijeljina or in any other prison of the Republika Srpska. In this context the Chamber should have heard, or in some other way obtained the statement of, Mr. Momčilo Krajišnik in relation to his conversation with Mr. Hasan Muratović, and in order to clarify

these matters, it ought particularly to have heard the Head of the Vanekov mlin Military Prison and inspected the relevant registers of detainees.

Thus, the above-mentioned event relates to the period before the entry into force of the Agreement, that is, 14 December 1995. According to generally accepted principles of law, the Agreement cannot be applied retroactively, which means that the Chamber is not competent to consider events that took place before 14 December 1995, including the arrest of Colonel Palić and his detention until 14 December 1995. Bearing in mind that the applicants have not offered any relevant proof that Colonel Palić was kept in detention after the entry into force of the Agreement, i.e. after 14 December 1995, and that the Chamber did not consider any evidence in that respect that was offered by the respondent Party, the Chamber should, in accordance with the Rule 49 of the Chamber's Rules of Procedure, have declared the application inadmissible under Article VIII paragraph 2 of the Agreement or decided to suspend consideration of, reject or strike out the application as provided for in the last paragraph of Article VIII of the Agreement.

2. Exhaustion of remedies

The Chamber wrongly decided to order the respondent Party to pay to Mrs. Palić, within one month from the date on which this decision becomes final and binding in accordance with the Rule 66 of the Chamber's Rules of Procedure, KM 15,000 by way of compensation for her mental suffering, and in respect of her husband, by way of compensation for non-pecuniary damage, KM 50,000 which sum was to be held by her for her husband or his heirs, as stated in paragraph 90 of the Decision and subparagraphs 10 and 11 of the Conclusions. The applicant did not, in accordance with the relevant legislation of the respondent Party, exhaust the remedies available to her in order to realize her right to "compensation for mental suffering". Moreover, it is not clear from this item what the compensation for non-pecuniary damage in the amount of KM 50,000 relates to, i.e. whether these damages are awarded to the applicant, to her husband, or to his heirs. The question justifiably arises how it would be possible to award compensation for non-pecuniary damage to the missing person, or how his heirs could have realized the right to this kind of compensation before obtaining any evidence that the missing person should be presumed dead. In order to realize the right to damages of this kind, the heirs would have had to establish the presumed date of death in extra-judicial proceedings, that is, to obtain a declaration that the missing person is presumed dead. If the date of his presumed death falls within the period before 14 December 1995, the date of the entry into force of the Agreement, the Chamber ought, in accordance with the *ratione temporis* principle, have rejected this part of the application also, that is, declared it inadmissible.

It follows that, for the reasons stated above, the only course open to the Chamber would have been to reject this application as inadmissible under Article VIII paragraph 2 of the Agreement or to strike it out in accordance with the last paragraph of Article VIII of the Agreement.

(signed)

Mr. Vitomir Popović