



DECISION ON ADMISSIBILITY AND MERITS

Case no. CH/02/8744

Anica VIŠTICA

against

**BOSNIA AND HERZEGOVINA
and
THE REPUBLIKA SRPSKA**

The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, sitting in plenary session on 9 March 2004 with the following members present:

Mr. Jakob MÖLLER, President
Mr. Miodrag PAJIĆ, Vice-President
Mr. Želimir JUKA
Mr. Mehmed DEKOVIĆ
Mr. Andrew GROTRIAN

Mr. J. David YEAGER, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Meagan HRLE, Deputy Registrar

Having considered the aforementioned application introduced to the Human Rights Chamber for Bosnia and Herzegovina 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;

Noting that the Human Rights Chamber for Bosnia and Herzegovina ("the Chamber") ceased to exist on 31 December 2003 and that the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina ("the Commission") has been mandated under the Agreement pursuant to Article XIV of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina entered into on 22 and 25 September 2003 ("the 2003 Agreement") to decide on cases received by the Chamber through 31 December 2003;

Adopts the following decision pursuant to Article VIII(2) and XI of the Agreement, Articles 5 and 9 of the 2003 Agreement and Rules 50, 54, 56 and 67 of the Commission's Rules of Procedure:

I. INTRODUCTION

1. The application concerns the applicant's search for her husband, who disappeared on 2 September 1992 in Bosanska Gradiška.¹ On that day, the applicant, her husband, and two of their four children were on a convoy sponsored by the International Committee of the Red Cross (ICRC) leaving Bosanska Gradiška, when the bus was stopped and her husband was forcibly removed by members of the armed forces of the Republika Srpska (hereinafter "RS Army") or by paramilitary forces. From that date, the applicant has lost all trace of her husband.

2. The application raises issues under Article 3 (prohibition of inhuman and degrading treatment) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights (hereinafter "Convention"), and discrimination in the enjoyment of these rights. Due to the Commission's jurisdiction under the Agreement, discussed in more detail below, the Commission will consider the application exclusively in connection with the rights of family members to be informed about the fate and whereabouts of their missing loved ones.

II. PROCEEDINGS BEFORE THE CHAMBER AND THE COMMISSION

3. The application was submitted to the Chamber and registered on 25 January 2002. The applicant is represented by Mr. Luka Martić, a lawyer practicing in Zagreb, the Republic of Croatia.

4. On 7 July 2003, the application was transmitted to the Republika Srpska under Articles 3, 8 and 13 of the Convention and in connection with Article II(2)(b) of the Agreement for its observations on the admissibility and merits of the application. Although directed against Bosnia and Herzegovina, the application was not transmitted to Bosnia and Herzegovina. Therefore, throughout this decision, "respondent Party" refers only to the Republika Srpska. On 25 August 2003, the Chamber received the respondent Party's written observations related only to the admissibility of the application. On 13 October 2003, the Chamber received a letter from the respondent Party containing further information.

5. On 10 July 2003, the Chamber sent a letter to the applicant asking her to clarify certain key issues and to submit evidence supporting her claims. On 4 August 2003, the applicant submitted her response. On 19 September 2003, the Chamber received a letter of authorisation and a submission from the applicant's lawyer.

6. On 17 July 2003, the Chamber requested the ICRC to inform it whether the applicant's husband is registered with the ICRC as a missing person. On 6 August 2003, the Chamber received the requested information from the ICRC.

7. The Chamber deliberated on the admissibility and merits of the case on 2 July 2003 and the Commission deliberated on the admissibility and merits of the case on 15 January 2004 and 9 March 2004. On the latter date it adopted the present decision.

III. FACTS

8. The applicant states that her husband and the father of their four children, Marijan Vištica, was a very well-known and well-liked person. For many years he was the technical director of RO "Radnik" Bosanska Gradiška. He was also a representative in the Parliament of the Socialistic Republic of Bosnia and Herzegovina (*Skupština Socijalističke Repulike Bosne i Hercegovine*) since 1990, and at the time of his abduction.

¹ The Commission notes that the town of "Bosanska Gradiška" is now referred to as "Gradiška" and is located in the Republika Srpska. However, the town will be referred to using either of these names throughout this decision.

9. The applicant states that, on 1 September 1992, she and her husband received an order from the Republika Srpska authorities that they were required to leave their home in Bosanska Gradiška within 24 hours, without the right to take anything from their home. She alleges that before they were ordered to leave Bosanska Gradiška, her husband had been fired from his position as technical director without any explanation.

10. On 2 September 1992, the applicant, her husband, and two of their daughters left Bosanska Gradiška in transport provided by the ICRC. As the bus left the town, members of the RS Army stopped the bus and forcibly removed the applicant's husband. The applicant states that the local ICRC representatives who were present did not raise any objections. After a short while, he was returned to the bus. Then a few minutes later, members of the RS Army came back onto the bus and ordered that he come to the door of the bus, at which point they forcibly removed him from the bus and took him away in a red mini-van.

11. At the time her husband was abducted, the applicant and her two daughters got off the bus to try to find him, but she was informed that it was too dangerous and, for the safety of her daughters, they needed to stay on the bus until they reached the Republic of Croatia. Her two daughters were ages 7 and 12 at the time they witnessed the abduction of their father, and her other two children were ages xx and xx at that time.

12. On 23 September 1992, the Croatian Red Cross branch in Novo Gradiška (*Hrvatska crveni križ Nova Gradiška Općinski organizacija*) wrote a letter to the ICRC, describing the events of 2 September 1992. This letter states that Marijan Vištica, together with three other civilians, was forcibly removed from the ICRC bus, beaten and taken away in a mini van. The letter also states that eyewitness testimony confirms that S.L. and N.P., from the para-military group "Scorpion", were responsible for the abduction. The Novo Gradiška branch of the Croatian Red Cross requested the support of the ICRC in resolving the disappearance of Marijan Vištica.

13. The brother-in-law of the applicant (and brother of Marijan Vištica), Srečko Vištica, took numerous steps to uncover the fate of Marijan Vištica, which the applicant describes in her application and submissions. On 11 January 1994, Srečko Vištica addressed Mr. Berislav Pušić of the Office for War Victims within the "Croat Republic of Herceg-Bosna" (*Ured vlade HR Herceg Bosna, Ured za žrtava rata*) describing the abduction of his brother. Mr. Vištica also stated in this letter that he had addressed the Office for War Victims in Zagreb.

14. On 10 March 1994, Srečko Vištica addressed a letter to US Ambassador Charles Redman seeking his assistance in finding his missing brother.

15. On 8 March 1995, Srečko Vištica addressed the Commission for Missing Persons within the "Croat Republic of Herceg-Bosna", Mr. Berislav Pušić, again requesting assistance in uncovering the fate of Marijan Vištica, and detailing the names of persons who allegedly were responsible for the abduction, as detailed by the witness Mato Dragić.

16. On 13 February 1996, a friend of Marijan Vištica, Mato Dragić, gave a statement at the Military Police Criminal Department of the Ministry of Defence (*Odsjek Kriminalističke Vojne Policije pri Ministarstvu Odbrane*) in Rijeka, the Republic of Croatia. Mr. Dragić states that he used to live in Bosanska Gradiška and was a long-time friend of Marijan Vištica. He explains that his apartment was located near the bridge going out of town, which also served as a checkpoint for the Serb police. Mr. Dragić stated that from his window he could see the ICRC bus as it was stopped, and he recognised three of the Serb military police, R.P., S.J., and M.T. He saw S.J. and M.T. remove Marijan Vištica from the bus and put him in a car and drive away. Mr. Dragić states that it was rumored that Marijan Vištica was killed and thrown in the Sava River, or that he was killed and his body burned, but no one knows for sure.

17. On 23 June 1996, the applicant's brother, Srečko Vištica, addressed the ICRC requesting assistance in finding Marijan Vištica. Srečko Vištica explained the surroundings of his brother's

disappearance and attached the statement of Mato Dragić of 13 February 1996. Mr. Vištica mentioned the names of the persons allegedly responsible for his brother's abduction, as well as the names of three key Serb leaders in the town of Bosanska Gradiška, who he believes should know about the fate of Marijan Vištica.

18. On an unknown date, Srečko Vištica addressed a woman, Ms. A.Č., residing in Zenica, who he had been told had relatives who were abducted and had spent a period in concentration camps in the area of Bosanska Gradiška. The applicant submitted minutes of Srečko Vištica's phone conversation with Ms. A.Č., who informed him that R.T. and A.T., who both left Bosanska Gradiška on 27 July 1994, confirmed that Marijan Vištica was abducted, and after a few days, killed. Mr. A.T. specified that 5 days after his abduction, Marijan Vištica was found dead by the bridge in Bosanska Gradiška, and then Croats buried him in a Catholic graveyard.

19. On 9 February 1999, the Municipal Court in Ljubuški, in extra-judicial proceedings initiated by the applicant, issued a procedural decision declaring Marijan Vištica dead as of 31 December 1996. In the explanation, the decision notes that the proceedings were initiated upon the request of Anica Vištica on 6 November 1998 in order to realise certain property rights. Anica Vištica informed the court that her husband, Marijan Vištica, was abducted by the RS Army. The court heard two witnesses, Vinko Vištica and Marko Vištica, who confirmed the statements of Anica Vištica. The court published a notice and request for information regarding Marijan Vištica in the Official Gazette of Western-Herzegovina Canton (*Službeno glasilo narodne novine Županije Zapadnohercegovačke*) on 30 November 1998, but no further information was obtained. Therefore, in accordance with Articles 61 and 67 of the Law on Extra-judicial Proceedings of the Federation of Bosnia and Herzegovina, Marijan Vištica was declared dead.

20. On 25 January 2001, the applicant appealed to the Ministry for Labour and the Protection of War Veterans and Invalids of the Republika Srpska (*Ministarstva rada i boračko-invalidske zaštite*), requesting pecuniary compensation for her dismissal from the Medical Center in Bosanska Gradiška, as well as for her husband's dismissal from RO "Radnik" Bosanska Gradiška in the spring of 1992. In this letter, she also mentions that her husband was forcibly taken from an ICRC bus on 2 September 1992 and, according to persons who were present, allegedly tortured and killed that same night. For these reasons, in her appeal to the Ministry, the applicant stated that she has a right to compensation in accordance with Article 152 of the Law on Labour of the Republika Srpska.

21. The applicant also states in her application to the Chamber that she addressed the BiH Presidency on several occasions, as her husband was a representative in the Parliament of the Socialistic Republic of Bosnia and Herzegovina at the time of his abduction. She states that she has received no written or other response to her and her brother-in-law's numerous inquiries.

22. On 6 August 2003, the ICRC informed the Chamber that a tracing request was opened for Marijan Vištica in June 1996, and that this request was submitted to the national authorities through the Working Group on Persons Unaccounted for in Bosnia and Herzegovina. As no answer has been provided, the tracing request is still pending.

23. On 14 August 2003, the Secretariat of the BiH Presidency addressed the respondent Party stating that the Office of the Presidency---Croat member, has a file containing information about all missing persons of Croat national origin. In this file is a list prepared by the "Office for the Exchange of Prisoners and Missing Persons in the Federation of BiH, Croat component" (*Služba za razmjenu zatočenih i nestalih osoba Bosne i Hercegovine, Federacije---hrvatska strana*) dated 2 September 1996, entitled "List of persons of Croat national origin who disappeared in the conflict with Serbs" (*Spisak nestalih osoba hrvatske nacionalnosti u sukobima sa srpskom stranom*), in which Marijan Vištica's name appears on page 14, line 456. This record describes that Marijan Vištica was captured on 2 September 1992 when he was taken from an ICRC bus.

IV. RELEVANT LEGISLATION

A. Agreement on Refugees and Displaced Persons

24. The Agreement on Refugees and Displaced Persons, which is set out in Annex 7 to the General Framework Agreement and entered into force on 14 December 1995, provides in Article V:

“The Parties shall provide information through the tracing mechanisms of the ICRC on all persons unaccounted for. The Parties shall also cooperate fully with the ICRC in its efforts to determine the identities, whereabouts and fate of the unaccounted for.”

B. International Law and Activities regarding Missing Persons

1. United Nations Declaration on the Protection of All Persons from Enforced Disappearances of 18 December 1992

25. On 18 December 1992, the General Assembly of the United Nations adopted the UN Declaration on the Protection of All Persons from Enforced Disappearances (A/RES/47/133).

26. The Preamble proclaims “the present Declaration on the Protection of All Persons from Enforced Disappearance, as a body of principles for all States”. It further provides, in pertinent part:

“Deeply concerned that in many countries, often in a persistent manner, enforced disappearances occur, 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 organised 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 their liberty, which places such persons outside the protection of the law,

“Considering that enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity,”

27. Article 1 provides as follows:

“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.

“2. 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.”

28. Article 2 provides as follows:

“1. No State shall practise, permit or tolerate enforced disappearances.

“2. States shall act at the national and regional levels and in co-operation with the United Nations to contribute by all means to the prevention and eradication of enforced disappearance.”

29. Article 7 provides as follows:

“No circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances.”

30. Article 13 provides, in pertinent part, as follows:

“1. Each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation. ...

“4. The findings of such an investigation shall be made available upon request to all persons concerned, unless doing so would jeopardise an ongoing criminal investigation. ...

“6. An investigation, in accordance with the procedures described above, should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified.”

2. ICRC Process for Tracing and Identifying Unaccounted for Persons

31. Under international humanitarian law, the ICRC is the principal agency authorised to collect information about missing persons, and all parties to armed conflicts are under an obligation to provide all necessary information at their disposal to trace missing persons (both combatants and civilians) and to satisfy the “right of family members to know the fate of their relatives” pursuant to Article 32 of Protocol No. 1 to the Geneva Conventions. This general obligation is also reflected in Article V of Annex 7 to the General Framework Agreement (see paragraph 24 above). In order to implement its responsibilities under the General Framework Agreement (*i.e.*, Article V of Annex 7) and international humanitarian law, the State of Bosnia and Herzegovina and the Entities, as well as the ICRC, established a “Process for tracing persons unaccounted for in connection with the conflict on the territory of Bosnia and Herzegovina and informing the families accordingly”.

32. Under Section 1.1 of the general framework and terms of reference of this Process, “the parties shall take all necessary steps to enable families ... to exercise their right to know the fate of persons unaccounted for, and to this end shall provide all relevant information through the tracing mechanisms of the ICRC and co-operate within a Working Group.” The ICRC will chair the Working Group “comprising representatives of all the parties concerned in order to facilitate the gathering of information for all families not knowing the fate of missing relatives”. Its members include three representatives each for the Republika Srpska, Bosniaks of the Federation of Bosnia and Herzegovina, and Croats of the Federation of Bosnia and Herzegovina, as well as a representative of Bosnia and Herzegovina, the High Representative, and several observers. For the Republika Srpska, the representatives are “a senior official of the Republika Srpska, a civilian adviser to the latter, a senior military commander of the *Vojska Republike Srpske* (VRS)” (Terms of reference of the Process). The ICRC established this Working Group on 30 March 1996. The Parties agreed to respect the Process at the session of the Working Group held on 7 May 1996. In Section 1.2 of the terms of reference of the Process, “the parties recognise that the success of any tracing effort made by ICRC and the Working Group depends entirely on the co-operation of the parties, in particular of the parties which were in control of the area where and when the person sought reportedly disappeared.”

33. The Process is to be implemented by the Federation of Bosnia and Herzegovina, the Republika Srpska, and Bosnia and Herzegovina (Section 1.4.A of the terms of reference of the Process). Each party shall “identify spontaneously any dead person found in an area under its control, and notify those belonging to another party to the ICRC or the Working Group without delay” (*id.*). When approached with a request for information on the whereabouts or fate of an unaccounted for person, the parties “shall make any internal enquiries necessary to obtain the information requested” (*id.*). Each party shall “cooperate with the ICRC and the Working Group to elucidate the fate of persons unaccounted for” (*id.*). “Chaired by the ICRC the Working Group will be the forum through which the parties will provide all required information and take the necessary steps to trace persons unaccounted for and to inform their families accordingly” (Section 1.4.C of the terms of reference of the Process).

34. In accordance with the terms of reference, a copy of all tracing requests shall be provided to the Working Group (Section 2.2 of the terms of reference of the Process). Moreover, “with the aim of clarifying the fate of missing persons, the Members, and, if relevant, Observers of the Working Group will: a) share all factual information relevant to the Process; b) organise, support and, if requested by the Working Group, participate in the implementation of tracing mechanisms at regional or local level” (*id.*). In addition, “should any Member or Observer of the Working Group obtain information on the identity of deceased persons exhumed from places of burial, whether individual or mass, or that might help determine the fate of missing persons, it will make such information available to the Working Group” (*id.* at Section 2.4(a)). “For unresolved cases [of persons unaccounted for], the State and Entity Members of the Working Group undertake to facilitate a rapid and fair settlement of the legal consequences of the situation for their families. To this end, they will encourage adoption of the necessary legislative, administrative and judicial measures” (Section 2.1 of the terms of reference of the Process). “No party may cease to fulfil its obligations aimed at informing families about the fate of relatives unaccounted for on the grounds that mortal remains have not been located or handed over” (*id.* at Section 2.4(b)).

C. National Activities regarding Missing Persons

35. During the armed conflict in Bosnia and Herzegovina, various commissions existed or were established for the primary purpose of exchanging prisoners of war. One commission represented the interests of Bosniaks, another represented the interests of Croats, and a third represented the interests of Serbs. After the armed conflict, these commissions also represented the interests of their respective ethnic/religious group with respect to the great problem of the missing persons (see Report of the Independent Expert, UN Commission, 53rd Session, U.N. Doc. E/CN.4/1997/55 (15 January 1997)). Under the General Framework Agreement, these commissions representing the three ethnic/religious groups were gradually transformed into institutions of the State of Bosnia and Herzegovina and its two Entities, as described below in relevant part.

1. State Commission on Tracing Missing Persons

36. On 16 July 1992, the Government of the Republic of Bosnia and Herzegovina enacted the Decision on Establishment of the State Commission on Exchange of Prisoners-of-War (Official Gazette of the Republic of Bosnia and Herzegovina—hereinafter “OG RBiH”—no. 10/92 of 23 July 1992). This Decision entered into force on 23 July 1992. Paragraph I of this Decision establishes “the State Commission on exchange of prisoners-of-war, persons deprived of liberty and the mortal remains of the killed, and for registering killed, wounded and missing persons on the territory of the Republic of Bosnia and Herzegovina”. On 31 October 1992, the Government of the Republic of Bosnia and Herzegovina enacted the Decision on Amendments to the Decision on Establishment of the State Commission on Exchange of Prisoners-of-War, which concerned, *inter alia*, the establishment of regional commissions (OG RBiH no. 20/92 of 9 November 1992). This Decision on Amendments entered into force on 9 November 1992.

37. On 15 March 1996, the Government of the Republic of Bosnia and Herzegovina enacted the Decision on Establishment of the State Commission on Tracing Missing Persons (OG RBiH no.

9/96 of 24 March 1996), which entered into force on 24 March 1996. Paragraph I of this Decision establishes the State Commission on tracing citizens of the Republic of Bosnia and Herzegovina who disappeared during the aggression on the Republic of Bosnia and Herzegovina (hereinafter "State Commission"). Paragraph II provides that the State Commission shall carry out the following duties: maintain records of citizens of the Republic of Bosnia and Herzegovina who went missing due to the hostilities in the former Yugoslavia; undertake direct activities to trace such persons and to establish the truth on their fate; undertake activities to register, trace, identify, and take-over the mortal remains of killed persons; provide information to authorised institutions; issue certificates to the families of the missing, detained, and killed; and co-operate with specialised national and international agencies and institutions that deal with the issue of missing, detained, and killed persons. Paragraph X states that the State Commission on Tracing Missing Persons shall assume the archives and other documentation of the State Commission and regional commissions described in the preceding paragraph. Paragraph XI renders the Decision on Establishment of the State Commission on Exchange of Prisoners-of-War (OG R BiH nos. 10/92 and 20/92) ineffective upon the entry into force of this Decision. On 10 May 1996, the Government of the Republic of Bosnia and Herzegovina enacted the Decision on Amendments to the Decision on Establishment of the State Commission on Tracing Missing Persons (OG R BiH no. 17/96 of 31 May 1996). The amendments, which mostly concern the establishment of the Expert Team for Locating Mass Graves and Identification of Victims, entered into force on 31 May 1996.

2. Federal Commission for Missing Persons

38. On 3 July 1997, the Government of the Federation of Bosnia and Herzegovina enacted the Decree on Establishment of the Federal Commission for Missing Persons (Official Gazette of the Federation of Bosnia and Herzegovina—hereinafter "OG FBiH"—no. 15/97 of 14 July 1997). The Decree entered into force on 15 July 1997. Article I establishes the Federal Commission for persons who disappeared during the war in Bosnia and Herzegovina (the "Federal Commission") and also regulates the duties and responsibilities of the Federal Commission. Article II prescribes that the Federal Commission shall perform the following duties: registering citizens of Bosnia and Herzegovina who disappeared or were detained during the war activities on the territory of Bosnia and Herzegovina and neighbouring countries; undertaking direct activities to register, locate, identify and take over the mortal remains of the missing, *i.e.* killed persons; collecting information about mass and individual graves; locating and marking graves; participating in digging graves; informing the public about the results of research; issuing adequate certificates to the families of the missing persons; *etc.*,. Article IV stipulates that the Federal Commission shall collaborate with the respective commission for missing, detained and killed persons in the Republika Srpska to undertake certain measures to identify missing persons and to obtain adequate permissions from the respective commission of the Republika Srpska to dig and exhume mass and individual graves on the territory of Republika Srpska by the nearest competent court in the Federation of Bosnia and Herzegovina. Article X provides that on the date of entering into force of this Decree on the territory of Bosnia and Herzegovina, all the commissions, which have been performing the duties falling within the scope of responsibility of the Federal Commission, shall be dissolved. Significantly, the Decree contains no provision explicitly assuming the archives or documentation or continuing the work commenced by the State Commission.

39. The Chamber notes that both the State Commission and the Federal Commission presently exist *de jure* because a decree enacted on the Federation level cannot over-ride a decision enacted by the Republic of Bosnia and Herzegovina, which was then taken over as law in Bosnia and Herzegovina pursuant to Article 2 of Annex II to the Constitution of Bosnia and Herzegovina. Mr. Amor Mašović is the President of the State Commission; he is also a co-President of the Federal Commission, along with his Croat colleague, Mr. Marko Jurišić. However, the State Commission does not receive any money from Bosnia and Herzegovina, and as a practical matter, most of the work presently conducted with respect to the registration, search, exhumation, and identification of missing persons of Bosniak or Croat origin is in fact conducted by the Federal Commission.

3. Office for Tracing Missing and Detained Persons of the Republika Srpska

40. On 22 May 2003, the Government of the Republika Srpska issued a decision on the formation of the Office for Tracing Missing and Detained Persons of the Republika Srpska (hereinafter "RS Office for Missing Persons"). This decision was published in the Official Gazette of the Republika Srpska no. 40/03 on 6 June 2003 and entered into force on the following day. The RS Office for Missing Persons was formed as the successor institution to the Commission for Tracing Missing and Detained Persons of the Republika Srpska (hereinafter "RS Commission"). As set forth in the mentioned decision, the responsibilities of the RS Office for Missing Persons are described as: coordinating all activities related to the search for missing and detained persons from the Republika Srpska; documenting information which may lead to uncovering the fate of missing and detained persons; analysing and checking information obtained from other members of the Working Group, as well as from individuals; tracking all persons who were in concentrations camps from 1991-1995; gathering and maintaining information on individual and mass grave sites and locations where human remains may be found; and cooperating with counterpart institutions in the Federation of Bosnia and Herzegovina, the Republic of Croatia, and Serbia and Montenegro, among other things. The RS Office for Missing Persons was also designated to continue the activities formerly carried out by the RS Commission.

41. The former RS Commission operated on the basis of the Banja Luka Agreement of 25 June 1996 and its mandate followed from that Agreement. The RS Commission undertook activities such as, *inter alia*, research and temporary burial of recovered remains on the territory of the former Yugoslavia; exhumation of remains from individual and mass graves on the territory of the former Yugoslavia; activities in the domain of forensic medicine and criminology; hand over and take over of the remains of deceased persons; identification of deceased persons and unidentified bodies; working with families during the identification process; other activities related to exhumation, identification, burial, etc.,.

4. Resolution on the persons unaccounted for in Bosnia and Herzegovina

42. On 24 October 2001, the House of Representatives of the Parliament of Bosnia and Herzegovina issued a Resolution on the persons unaccounted for in Bosnia and Herzegovina. In that Resolution, the House of Representatives "expressed its great dissatisfaction with the fact that after almost six years after the end of the war in Bosnia and Herzegovina, the fate of 28,000 missing persons still has not been clarified. Therefore, the House of Representatives is of the opinion that the competent state and entity bodies are insufficiently engaged in intensification of activities aimed at solving this painful issue" (Resolution at paragraph 1). The House of Representatives requested the Presidency and Council of Ministers of Bosnia and Herzegovina to "engage themselves actively in elucidating the whereabouts of the missing persons, as well as to contribute to accelerated solution of the missing [persons] issue on the basis of intensive coordination with Entity governments, International Committee of the Red Cross, International Commission on Missing Persons, and other involved actors" (Resolution at paragraph 2). The House of Representatives further requested that competent Entity bodies "provide full support to the delegations of Entity governments in the Working Group for Tracing the Missing Persons in its endeavours to clarify the destiny of the missing persons, and to guarantee full access to all the sources of information and witnesses" (Resolution at paragraph 3). Lastly, the House of Representatives requested that the competent State and Entity bodies "ensure that the Working Group has all the necessary financial and other means for a more efficient implementation of this humanitarian activity in order to put an end to the suffering of the anguished families" (Resolution at paragraph 4).

5. The Institute for Missing Persons

43. The Institute for Missing Persons was formed on 15 June 2000 on the initiative and with the support of all domestic missing person commissions, the International Commission for Missing

Persons, the ICRC, and family associations of missing persons. The Presidency of Bosnia and Herzegovina has expressed its support to be a co-founder of the Missing Persons Institute pursuant to a decision of 11 June 2003. Currently, the Federation of Bosnia and Herzegovina, the Republika Srpska and the District of Brčko, are discussing their participation as co-founders of the Institute for Missing Persons as well. The Missing Persons Institute is a legal entity on the State level registered with the Cantonal Court in Sarajevo, serving the aim of collecting, registering, and storing remains and data about missing persons; exhuming and identifying missing persons from the armed conflict; and advocating for the release of information.

V. COMPLAINTS

44. The applicant states that her human rights, as well as of her four children, have been violated. The applicant wishes to know the truth about what happened to her husband after his abduction from the ICRC bus in September 1992, and she insists that individuals and organs of the respondent Party maintain such information. In addition to violations of Article 3 (right to be free from torture or degrading treatment or punishment) and Article 8 (right to respect for private and family life) of the Convention and discrimination on the basis of national origin, the applicant claims the following violations: the right to freedom and personal security; the right to freedom of thought, conscience and religion; the right to freedom of expression; the right to property; the right to education; and the right to freedom of movement, because she and her family were forced to leave Bosanska Gradiška under threat of force. As to her husband Marijan Vištica, the applicant states that all of his basic human rights have been violated.

VI. SUBMISSIONS OF THE PARTIES

A. Republika Srpska

1. As to the facts

45. The respondent Party states that the facts as described in the application are not disputable. It is clear that the applicant never directly addressed the Republika Srpska authorities to obtain information about her missing husband; therefore, the respondent Party claims that it did not know about the applicant's existence. As support, the respondent Party submits a copy of a letter of the Ministry of Defence of the Republika Srpska, dated 12 August 2003, stating that after reviewing the Defence Security Service (*Služba bezbjednosti odbrane*) files, there is no mention of anyone fulfilling the profile of Marijan Vištica; however, the letter also notes that the files generally contain little information. The respondent Party then states that, "it was only later that the Commission for Missing and Detained Persons of the Republika Srpska received the information, i.e. it received the request through the Working Group for Missing Persons of the International Commission for Missing Persons".

46. The respondent Party also attaches a letter with its observations, dated 13 August 2003, from the RS Office for Missing Persons confirming that the applicant's husband disappeared on 2 September 1992 and that the applicant reported his disappearance to the ICRC on 24 July 1996. The letter states that the RS Office for Missing Persons, together with the Office for Detained and Missing Persons of the Republic of Croatia, and the Commission for Humanitarian Affairs of Serbia and Montenegro, have made an agreement regarding the exhumation of bodies buried in Slavonski Brod, Sremska Mitrovica, and Šabac. In order to establish whether Marijan Vištica's body is in one of those locations, it is necessary for the family to provide a blood sample for eventual DNA analysis.

47. The respondent Party points out that some facts remain unclear or disputable. The respondent Party claims that the case file does not contain any evidence that the applicant addressed the Ministry for Labour and the Protection of War Veterans and Invalids of the

Republika Srpska. Also, in the procedural decision issued by the Municipal Court in Ljubuški on 9 February 1999, it is stated that Marijan Vištica was a member of the military unit of the "Croat Republic of Herceg-Bosna".

48. In additional information received on 13 October 2003, the respondent Party states that it sent a letter to the Ministry for Labour and the Protection of War Veterans and Invalids of the Republika Srpska in order to determine the nature of the applicant's request to this Ministry. The respondent Party attaches a copy of the Ministry's response. The Ministry informs the respondent Party that Article 152 of the Law on Labour of the Republika Srpska provides for a redundancy allowance in case the person was unlawfully discharged between 31 December 1991 and 16 November 2000. The letter does not comment on whether or not the applicant has submitted a claim in this regard.

2. As to the admissibility

49. The respondent Party points out that the applicant did not exhaust all the available domestic remedies, as she could have filed criminal charges against the persons who allegedly participated in the disappearance of Marijan Vištica, in accordance with Articles 148-150 of the Code of Criminal Procedure of the Republika Srpska. Additionally, as an injured party, she could have filed a claim for non-pecuniary damages and the loss of a family member. Because the applicant failed to make use of this remedy provided for in domestic legislation as to her missing husband, the respondent Party asserts that the application is inadmissible for non-exhaustion of domestic remedies.

50. The respondent Party also regards the application inadmissible *ratione temporis* because the events occurred before 14 December 1995 and because there is no evidence that the applicant's husband's detention continued after 14 December 1995. The respondent Party provided no observations on the merits of the application.

B. The applicant

51. The applicant maintains her application in full and does not agree with the respondent Party's assertion that she should have addressed its organs to obtain her rights. She explains that the Republika Srpska is a part of Bosnia and Herzegovina; therefore, having addressed the authorities of Bosnia and Herzegovina was sufficient. Moreover, the letter from the Bosnia and Herzegovina Presidency of 13 August 2003 confirms that the Presidency was aware of the abduction as of 2 June 1996, and therefore, they should have, *ex officio*, initiated criminal proceedings and engaged the responsibility of the authorities of the Republika Srpska in these proceedings.

52. The applicant also claims that she could be not expected to address the institutions of the Republika Srpska, which were the same, or successors to, those that allowed the crime to occur in 1992. The applicant considers it useless to address the organs of the Republika Srpska, and to make this point, she refers to the letter from the Defence Security Service of the Ministry of Defence of the Republika Srpska, where it is stated that there is no mention of Marijan Vištica in their files, although the files generally contain little data which would assist in any effort to locate a missing person. The applicant states that she was driven from her home, left without the family breadwinner, and forced to provide for four children while living as a refugee. The applicant states that she is fearful of initiating criminal proceedings in the Republika Srpska herself, and that she has no funds to hire a lawyer to do so on her behalf. The applicant states that she believes it is her right to know the location of her husband's mortal remains. The applicant also seeks compensation for pecuniary and non-pecuniary damages and compensation for the costs incurred in the course of the proceedings.

VII. OPINION OF THE COMMISSION

A. Admissibility

53. The Commission recalls that the application was introduced to the Human Rights Chamber under the Agreement. As the Chamber had not decided the application by 31 December 2003, in accordance with Article 5 of the 2003 Agreement, the Commission is now competent to decide on the application. In doing so, the Commission shall apply the admissibility requirements set forth in Article VIII(2) of the Agreement. Moreover, the Commission notes that the Rules of Procedure governing its proceedings do not differ, insofar as relevant for the applicant's case, from those of the Chamber, except for the composition of the Commission.

1. Admissibility as against Bosnia and Herzegovina

54. The applicant directs her application against Bosnia and Herzegovina and the Republika Srpska. However, it does not appear to the Commission that Bosnia and Herzegovina is responsible for the actions she complains of. In particular, it is the authorities of the Republika Srpska who are responsible for investigating and informing the applicant of the fate and whereabouts of her husband. The application is therefore incompatible *ratione personae* with the Agreement insofar as it is directed against Bosnia and Herzegovina.

2. Exhaustion of effective remedies

55. In accordance with Article VIII(2) of the Agreement, "the [Commission] shall decide which applications to accept.... In so doing, the [Commission] shall take into account the following criteria: (a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted"

56. According to Article VIII(2)(a) of the Agreement, the Commission must consider whether effective remedies exist and whether the applicants have demonstrated that they have been exhausted. In *Blentić* (case no. CH/96/17, decision on admissibility and merits of 5 November 1997, paragraphs 19-21, Decisions on Admissibility and Merits 1996-1997), the Chamber considered this admissibility criterion in light of the corresponding requirement to exhaust domestic remedies in the former Article 26 of the Convention (now Article 35(1) of the Convention). The European Court of Human Rights has found that such remedies must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. The Court has, moreover, considered that in applying the rule on exhaustion, it is necessary to take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general legal and political context in which they operate, as well as of the personal circumstances of the applicants.

57. The respondent Party argues that the applicant has failed to exhaust effective domestic remedies because she did not file criminal charges against the persons responsible for the abduction of her husband, despite the fact that she included the names of persons who witnessed the event in her supplementary submission to the Chamber on 4 August 2003.

58. The Commission notes that according to Article V of Annex 7 (the Agreement on Refugees and Displaced Persons) to the General Framework Agreement,

"[t]he Parties shall provide information through the tracing mechanisms of the ICRC on all persons unaccounted for. The Parties shall also co-operate fully with the ICRC in its efforts to determine the identities, whereabouts and fate of the unaccounted for."

59. Furthermore, the Commission recalls that under the *Process for tracing persons unaccounted for* (see paragraphs 31-34 above), as well as in Article V of Annex 7 quoted above, the State of Bosnia and Herzegovina and the Entities, including the Republika Srpska, agreed to

co-operate in the effort to trace unaccounted for persons. The *Process for tracing persons unaccounted for* further clarifies that the Parties shall share information, and a copy of all tracing requests are provided to the Working Group, (which has representatives of the Republika Srpska on it (see paragraph 32 above). As can be seen above, it is indisputable that the applicant filed a tracing request with the ICRC in 1996. Taking into account the respondent Party's obligation under Article V of Annex 7 to "cooperate fully with the ICRC in its efforts to determine the identities, whereabouts and fate of the unaccounted for" and the fact that the tracing request was provided to representatives of the Republika Srpska through the Working Group, the Commission considers that the relevant authorities of the respondent Party were made aware of the applicant's requests for information about the fate and whereabouts of her missing husband through the *Process for tracing persons unaccounted for*. Furthermore, it is clear from the letter of the RS Office for Missing Persons of 13 August 2003, that it was aware of the disappearance of Marijan Vištica through the Working Group. Considering this, the Commission concludes that the remedy provided for in Annex 7 has been exhausted for the purposes of Article VIII(2)(a) of the Agreement.

60. As to the respondent Party's objections to the admissibility of the application on the grounds that the applicant failed to file criminal charges against the persons who allegedly participated in the abduction, the Commission recalls that there is no obligation to do so when the persons who committed the crime were acting under the authority of the respondent Party, or its organs. Therefore, the Commission rejects this ground for declaring the application inadmissible.

3. *Ratione temporis*

61. In accordance with Article VIII(2) of the Agreement, "the [Commission] shall decide which applications to accept.... In so doing, the [Commission] shall take into account the following criteria: ... (c) The [Commission] shall also dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded, or an abuse of the right of petition."

62. The respondent Party also objects to the application as incompatible *ratione temporis* with the Agreement, arguing that there is no evidence that Marijan Vištica was alive after 14 December 1995.

63. In the Chamber's previous practice, claims on behalf of missing persons directly related to acts exclusively occurring prior to 14 December 1995 (and in the absence of a continuing violation) were inadmissible as outside the Chamber's competence *ratione temporis*. One leading case on this principle is *Matanović v. the Republika Srpska*, which involved the alleged unlawful detention of a Roman Catholic priest and his parents, commencing prior to 14 December 1995 and continuing thereafter. In describing its competence *ratione temporis*, the Chamber stated as follows:

"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 the alleged victims up to 14 December 1995. However, in so far as it is claimed that the alleged victims have continued to be arbitrarily detained and thus deprived of their liberty after 14 December 1995, the subject matter is compatible with the Agreement and comes within the competence of the Chamber *ratione temporis*" (case no. CH/96/1, *Matanović*, decision on admissibility of 13 September 1996, at section IV, Decisions on Admissibility and Merits March 1996-December 1997).

64. Thus, following the practice of the Chamber, the Commission is not competent *ratione temporis* to consider whether events occurring before the entry into force of the Agreement on 14 December 1995 gave rise to violations of human rights. The Commission may, however, consider relevant evidence of such events as contextual or background information to events occurring after 14 December 1995 (case no. CH/97/67, *Zahirović*, decision on admissibility and merits of 10 June 1999, paragraphs 104-105, Decisions January–July 1999). In this respect, it follows that the claims on behalf of Marijan Vištica are incompatible *ratione temporis* with the

Agreement. Therefore, the Commission decides to declare those claims inadmissible.

65. However, as the Chamber explained in *Unković v. the Federation of Bosnia and Herzegovina* (case no. CH/99/2150, decision on review of 6 May 2002, paragraphs 84-90, Decisions January—June 2002), claims on behalf of family members seeking information about the fate and whereabouts of loved ones who have been missing since the armed conflict raise allegations of a continuing violation of the human rights of the family members by the respondent Party. Both Articles 3 and 8 of the Convention impose a positive obligation on the respondent Party “to investigate thoroughly into allegations of arbitrary deprivations of liberty even in cases where it cannot be established, although it is alleged, that the deprivation of liberty is attributable to the authorities” (*id.* at paragraph 88 (quoting *Demirović, Berbić, and Berbić v. Republika Srpska* (application no. 7/96, Report of the Ombudsperson of 30 September 1998)).

66. The Commission recalls that the applicant registered her husband as a missing person with the ICRC in 1996 and has taken numerous steps to determine the fate of her husband. Nevertheless, more than 11 years after the event in question, more than eight years after the Agreement entered into force, and seven years after the tracing request was lodged, the applicant has never been officially informed about the fate and whereabouts of her husband by the Republika Srpska. Therefore, the allegations contained in the application concern a violation of the applicant's human rights by the respondent Party, which continues to the present date. As such, the application falls within the Commission's competence *ratione temporis*, within the meaning of Article VIII(2)(c) of the Agreement, and in that respect, is admissible.

4. Manifestly ill-founded

67. In accordance with Article VIII(2) of the Agreement, “the [Commission] shall decide which applications to accept.... In so doing, the [Commission] shall take into account the following criteria: ... (c) The [Commission] shall also dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded, or an abuse of the right of petition.”

68. The applicant raises a number of complaints in her application, such as alleged violations of the right to freedom of expression, right to freedom of thought, and right to education, which have not been supported by any evidence, nor is it apparent to the Commission that the application reveals a violation of any of these rights. The applicant also raises other claims, such as violations of her right to freedom and personal security and her right to freedom of movement which appear to stem from her forced displacement from Bosasnka Gradiška in 1992; however these claims are incompatible *ratione temporis* with the Agreement. Therefore, the Commission decides to declare these claims inadmissible in accordance with Article VIII(2)(c) of the Agreement.

5. Conclusion as to admissibility

69. The Commission declares admissible the complaints in relation to the applicant's allegation of violation of her rights arising or continuing after the entry into force of the Agreement on 14 December 1995 under Articles 3 and 8 of the Convention separately, and in connection with discrimination under Article II(2)(b) of the Agreement. The remainder of the applicant's complaints on her own behalf the Commission declares inadmissible in accordance with Article VIII(2)(c) of the Agreement. The Commission declares the complaints made on behalf of Marijan Vištica incompatible *ratione temporis* with the Agreement, and the application as directed against Bosnia and Herzegovina incompatible *ratione personae* with the Agreement.

B. Merits

70. Under Article XI of the Agreement, the Commission must next address the question of whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement. Under Article I of the Agreement, the parties are obliged to “secure to all persons within their jurisdiction the highest level of internationally recognised human rights and

fundamental freedoms,” including the rights and freedoms provided for in the Convention and the other international agreements listed in the Appendix to the Agreement.

1. Article 8 of the Convention (Right to Respect for Private and Family Life – i.e., Right to Access to Information)

71. Article 8 of the Convention provides, in relevant part, as follows:

“(1) Every one has the right to respect for his private and family life....

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

72. In its previous case law, the Chamber recognised the right of family members of missing persons to access to information about their missing loved ones. In *Unković v. the Federation of Bosnia and Herzegovina*, the Chamber considered “that information concerning the fate and whereabouts of a family member falls within the ambit of ‘the right to respect for his private and family life’, protected by Article 8 of the Convention. When such information exists within the possession or control of the respondent Party and the respondent Party arbitrarily and without justification refuses to disclose it to the family member, upon his or her request, properly submitted to a competent organ of the respondent Party or the [ICRC], then the respondent Party has failed to fulfil its positive obligation to secure the family member’s right protected by Article 8” (case no. CH/99/2150, *Unković v. the Federation of Bosnia and Herzegovina*, decision on review of 6 May 2002, paragraph 126, Decisions January—June 2002; accord case nos. CH/99/3196, *Palić v. the Republika Srpska*, decision on admissibility and merits of 9 December 2000, paragraphs 82-84, Decisions January—June 2001; CH/01/8365 *et al.*, *Selimović and Others v. The Republika Srpska*, decision on admissibility and merits of 3 March 2003, paragraphs 173-174; see also Eur. Court HR, *Gaskin v. United Kingdom*, judgment of 7 July 1989, Series A no. 160; Eur. Court HR, *M.G. v. United Kingdom*, judgment of 24 September 2002).

73. In the present application, the applicant’s husband was taken away by soldiers of the RS Army or Serb paramilitary forces during the displacement of persons of Croat and Bosniak origin from Bosanska Gradiška. The applicant, two of her children, and many other persons witnessed the abduction. The applicant opened a tracing request with the ICRC registering her husband as a missing person, but, she has never received any official information on the fate and whereabouts of her missing loved one.

74. Based on numerous witnesses who observed the abduction of Marijan Vištica, it is clear that members of the RS Army or Serb paramilitary forces were responsible for his initial abduction. From these underlying facts, the Commission concludes that the authorities of the respondent Party had within their “possession or control” information about the fate of the applicant’s husband. In any event, the possibility that information and evidence pertaining to Marijan Vištica was lost or destroyed by members of the armed forces or paramilitary forces of the respondent Party does not relieve the respondent Party of its positive obligations under Article 8 of the Convention. Rather, it appears that the authorities of the Republika Srpska arbitrarily and without justification failed to take any action whatsoever to locate, discover, or disclose information sought by the applicant about her missing loved one. There is no evidence, for example, that the authorities of the Republika Srpska have interviewed any of the members of its armed forces who were involved in the events in Bosanska Gradiška in 1992, interviewed any other possible witnesses, or disclosed any physical evidence still in their possession with a view to making the requested information available to the applicant. Such inaction or passivity is a breach of the Republika Srpska’s responsibilities under Annex 7 to the General Framework Agreement and the *Process for tracing persons unaccounted for*.

75. The Commission therefore concludes that the respondent Party has breached its positive obligations to secure respect for the applicant's rights protected by Article 8 of the Convention by failing to make accessible and disclose information about the applicant's missing husband.

2. Article 3 of the Convention (Prohibition of Inhuman or Degrading Treatment — *i.e.*, Right to Know the Truth)

76. Article 3 of the Convention provides that: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

77. In its previous case law, the Chamber has recognised the right of family members of missing persons to know the truth about the fate and whereabouts of their missing loved ones (case nos. CH/99/2150, *Unković*, decision on review of 6 May 2002, paragraphs 101-119, Decisions January—June 2002; CH/01/8365 *et al.*, *Selimović and Others v. The Republika Srpska*, decision on admissibility and merits of 3 March 2003, paragraphs 182-191; *see also* case no. CH/99/3196, *Palić*, decision on admissibility and merits of 9 December 2000, paragraphs 75-80, Decisions January—June 2001). The Commission maintains the same approach. In *Unković v. the Federation of Bosnia and Herzegovina*, the Chamber held that “the special factors considered with respect to the applicant family member claiming an Article 3 violation for inhuman treatment due to lack of official information on the whereabouts of a loved one are the following:

- primary consideration is the dimension and character of the emotional distress caused to the family member, distinct from that which would be inevitable for all relatives of victims of serious human rights violations;
- proximity of the family tie, with weight attached to parent-child relationships;
- particular circumstances of the relationship between the missing person and the family member;
- extent to which the family member witnessed the events resulting in the disappearance—however, the absence of this factor may not deprive the family member of victim status;
- overall context of the disappearance, *i.e.*, state of war, breadth of armed conflict, extent of loss of life;
- amount of anguish and stress caused to the family member as a result of the disappearance;
- involvement of the family member in attempts to obtain information about the missing person—however, the absence of complaints may not necessarily deprive the family member of victim status;
- persistence of the family member in making complaints, seeking information about the whereabouts of the missing person, and substantiating his or her complaints” (case no. CH/99/2150, *Unković*, decision on review of 6 May 2002, paragraph 114, Decisions January—June 2002).

78. Moreover, the essential characteristic of the family member's claim under Article 3 relates to the reaction and attitude of the authorities when the disappearance is brought to their attention. In this respect, the special factors considered as to the respondent Party are the following:

- response, reactions, and attitude of the authorities to the complaints and inquiries for information about the fate of missing person—(complacency, intimidation, and harassment by authorities may be considered aggravating circumstances);
- extent to which the authorities conducted a meaningful and full investigation into the disappearance;
- amount of credible information provided to the authorities to assist in their investigation;
- extent to which the authorities provided a credible, substantiated explanation for a missing person last seen in the custody of the authorities;
- duration of lack of information—a prolonged period of uncertainty for the family member may be an aggravating circumstance;

- involvement of the authorities in the disappearance” (case no. CH/99/2150, *Unković*, decision on review of 6 May 2002, paragraph 115, Decisions January—June 2002).

79. Applying the above factors to the present case, the Commission observes that the applicant is the wife of Marijan Vištica, and that she witnessed his abduction on 2 September 1992. The applicant has taken many steps to uncover the fate and whereabouts of her missing husband. The applicant specifically states that her four children have suffered intense psychological trauma as a result of the events, but to protect their privacy, she did not include them in the application, nor does she wish that their names be mentioned. That the applicant and her children have suffered as a result of the events taking place in Bosanska Gradiška in 1992 and the resultant loss of their loved one is indisputable. Such emotional suffering, in the view of the Commission, is of a dimension and character to constitute “inhuman treatment” within the meaning of Article 3 of the Convention.

80. Applying the above factors to the respondent Party, the Commission observes that the authorities of the Republika Srpska have done nothing to clarify the fate and whereabouts of Marijan Vištica. In particular, they have not investigated the facts concerning the abduction of Marijan Vištica on 2 September 1992, despite having admitted that they received the tracing request through the Working Group. It appears that the respondent Party has not interviewed any of the participating members of its armed forces who took part in the operation, nor contacted any witnesses, and not undertaken action substantively to assist the actions of others (e.g., the ICRC, the State Commission, the International Commission on Missing Persons, or the International Criminal Tribunal for the former Yugoslavia) to clarify the events in Bosanska Gradiška. Moreover, the Commission must note that the authorities of the Republika Srpska were directly involved in the disappearance in Bosanska Gradiška. None the less, the applicant has waited for more than eleven years for clarification of the fate and whereabouts of her husband by the competent authorities. As no meaningful information has been forthcoming, the reaction of the authorities of the Republika Srpska can only be described as “complacency” or indifference, which aggravates an already tragic situation.

81. Taking all of the applicable factors into account, both with respect to the applicant and the respondent Party, the Commission concludes that the respondent Party has violated the right of the applicant to be free from “inhuman and degrading treatment”, as guaranteed by Article 3 of the Convention by failing to inform the applicant about the truth of the fate and whereabouts of her missing husband.

3. Conclusion as to the merits

82. In summary, the Commission concludes that the respondent Party’s failure to make accessible and disclose information requested by the applicant about her missing husband constitutes a violation of its positive obligations to secure respect for her rights to private and family life, as guaranteed by Article 8 of the Convention. In addition, the respondent Party’s failure to inform the applicant about the truth of the fate and whereabouts of her missing loved one, including conducting a meaningful and full investigation into the events in Bosanska Gradiška, violates her right to be free from inhuman and degrading treatment, as guaranteed by Article 3 of the Convention. In light of these findings, the Commission considers that it is not necessary to examine whether the applicant was discriminated against in the enjoyment of these rights.

VIII. REMEDIES

83. Under Article XI(1)(b) of the Agreement, the Commission must next address the question of what steps shall be taken by the respondent Party to remedy the established breaches of the Agreement. In this connection the Commission shall consider issuing orders to cease and desist, monetary relief (including pecuniary and non-pecuniary damages), as well as provisional measures.

84. The Commission recalls that the applicant seeks to know the truth about her missing husband. The applicant also seeks compensation for her suffering. In fashioning a remedy for the established breaches of the Agreement, Article XI(1)(b) provides the Commission with broad remedial powers and the Commission is not limited to the requests of the applicants.

85. In accordance with its previous case law in missing persons cases (see, e.g., case no. CH/01/8365 *et al.*, *Selimović and Others v. The Republika Srpska*, decision on admissibility and merits of 3 March 2003, paragraphs 205-210) the Commission will order the Republika Srpska, as a matter of urgency, to release all information presently within its possession, control, and knowledge with respect to the fate and whereabouts of Marijan Vištica, including information on the circumstances of his abduction and detention, and in particular, whether he was killed or has died, and if so, the circumstances of his death and the location of his mortal remains.

86. The Commission will further order the respondent Party to conduct a thorough investigation to uncover all the facts related to Marijan Vištica's fate from the day he was forcibly removed from the convoy by members of the RS Army, both with a view to making such information known to the applicant and with a view to bringing the perpetrators to justice. The Republika Srpska shall disclose the results of this investigation to the applicant and the Commission, the ICRC, the International Commission on Missing Persons, the State Commission, and the International Criminal Tribunal for the former Yugoslavia, as well as to the Office of the High Representative, the Organisation for Security and Co-operation in Europe Mission to Bosnia and Herzegovina, and the Office of the Council of Europe in Bosnia and Herzegovina, at the latest within six months after the date of receipt of this decision.

87. In light of the finding of a violation of Articles 3 and 8 of the Convention, the Commission considers it appropriate to award a sum to the applicant in recognition of her mental suffering. Accordingly, the Commission will order the respondent Party to pay to the applicant the total sum of 5,000 Convertible Marks (*Konvertibilnih Maraka*) in recognition of her mental suffering resulting from the respondent Party's failure to obtain and provide her with information about Marijan Vištica's fate. This payment shall be made within one month from the date of receipt of the present decision.

88. The Commission further awards simple interest at an annual rate of 10% as of one month from the date of receipt of the present decision on the sum awarded in the preceding paragraph or any unpaid portion thereof until the date of settlement in full.

89. The Commission will also order the respondent Party to report to it no later than six months from the date of receipt of the present decision on the steps taken to comply with the above orders.

IX. CONCLUSIONS

90. For the above reasons, the Commission decides,

1. unanimously, that the applicant's claims arising or continuing after 14 December 1995 under Articles 3 and 8 of the European Convention on Human Rights and with regard to discrimination in the enjoyment of these rights are admissible;

2. unanimously, that any remaining portions of the application are inadmissible;

3. unanimously, that the failure of the Republika Srpska to make accessible and disclose information requested by the applicant about her missing husband violates its positive obligations to secure respect for her right to private and family life, as guaranteed by Article 8 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

4. unanimously, that the failure of the Republika Srpska to inform the applicant about the truth of the fate and whereabouts of her missing husband, including conducting a meaningful and full investigation into his abduction, violates her right to be free from inhuman and degrading treatment, as guaranteed by Article 3 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

5. unanimously, that it is not necessary to separately examine the application with respect to discrimination;

6. unanimously, to order the Republika Srpska, as a matter of urgency, to release to the applicant and the Commission all information presently within its possession, control, and knowledge with respect to the fate and whereabouts of Marijan Vištica including information on the circumstances of his abduction and detention, and in particular whether he was killed or has died, and if so, the circumstances of his death and the location of his mortal remains;

7. unanimously, to order the Republika Srpska to conduct a full, meaningful, thorough, and detailed investigation into the events giving rise to the established human rights violations, with a view to making known the fate and whereabouts of Marijan Vištica. Such investigation should also be conducted with a view to making such information known to the applicant and with a view to bringing the perpetrators of any crimes committed against Marijan Vištica to justice before the competent domestic or international criminal courts. The Republika Srpska shall disclose the results of this investigation to the applicant and the Commission, the ICRC, the International Commission on Missing Persons, the State Commission, and the International Criminal Tribunal for the Former Yugoslavia, as well as to the Office of the High Representative, the Organisation for Security and Co-operation in Europe Mission to Bosnia and Herzegovina, and the Office of the Council of Europe in Bosnia and Herzegovina, within six months from the date of receipt of this decision;

8. unanimously, to order the Republika Srpska to pay to the applicant Anica Vištica, no later than one month after the date of receipt of the present decision, the total sum of five thousand (5,000) Convertible Marks ("*Konvertibilnih Maraka*") by way of compensation for her mental suffering;

9. unanimously, to order the Republika Srpska to pay simple interest at the rate of 10 (ten) per cent per annum over the above sum or any unpaid portion thereof from the date of expiry of the above one-month period until the date of settlement in full; and,

10. unanimously, to order the Republika Srpska to report to it no later than six months after the date of receipt of the present decision, on the steps taken by it to comply with the above orders.

(signed)
J. David YEAGER
Registrar of the Commission

(signed)
Jakob MÖLLER
President of the Commission