



DECISION ON ADMISSIBILITY AND MERITS

Case nos. CH/02/8677, CH/02/10495, and CH/02/12332

Vesna ŠEHOVAC, B.Ž., and Nada SAMARDŽIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

Case nos. CH/03/15110, CH/03/15111, and CH/03/15112
Ljubica GOJKOVIĆ, Svetlana KNEŽEVIĆ, and Nenad GOJKOVIĆ

against

BOSNIA AND HERZEGOVINA

and

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, sitting in plenary session on 3 November 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 applications 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 Articles VIII(2) and XI of the Agreement, Articles 5 and 9 of the 2003 Agreement, and Rules 32, 50, 54, 56, and 57 of the Commission's Rules of Procedure:

I. INTRODUCTION

1. The applications were submitted by the immediate members of family of persons who went missing in Sarajevo, the capital of Bosnia and Herzegovina, in the period from May to July 1992. It appears that all the missing persons are of Serb origin.

2. After the European Community recognized Bosnia and Herzegovina as a sovereign state on 6 April 1992, armed conflict broke out in Sarajevo, starting with barricades and checkpoints carried out by Serbs from Bosnia and Herzegovina ("Bosnian Serbs"). In April 1992, pursuant to a decision by the Presidency of the Republic of Bosnia and Herzegovina, loyal Territorial Defence units, together with paramilitary groups, Bosnian-Croat forces ("HVO"), and Muslim JNA officers, were gradually incorporated into the Army of the Republic of Bosnia and Herzegovina ("RBiH Army"). Forces loyal to the Presidency of Bosnia and Herzegovina controlled most of the neighbourhoods of the town and strategic buildings, while the Bosnian Serbs gradually took control of much of the city's western and northern suburbs¹. During the course of these events, the loved ones named in the present applications went missing, and were never seen again. All the victims mentioned in the present applications have been registered as missing persons either with the State Commission for Tracing Missing Persons ("State Commission") or the International Committee of the Red Cross ("ICRC"), or both. All applicants seek information about the fate and whereabouts of their missing loved ones. None of the applicants have received any such specific information from the competent authorities since the events underlying their applications.

3. The applications raise 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 (the "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 applications 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

4. The applications were submitted to the Chamber between 11 January 2002 and 29 December 2003. The applicant Vesna Šehovac is represented before the Commission by Nada Samardžić.

5. On 24 March 2004 the Commission transmitted the applications to the respondent Party the Federation of Bosnia and Herzegovina for its observations on the admissibility and merits of the applications under Articles 3 and 8 of the Convention, and with regard to discrimination in the enjoyment of these rights under Article II(2)(b) of the Agreement. The applications, which were directed as well against Bosnia and Herzegovina, were not transmitted to it, therefore, throughout this decision the term "respondent Party" in the singular refers to the Federation of Bosnia and Herzegovina.

6. The respondent Party submitted its written observations on the admissibility and merits on 5 May 2004, which were forwarded to the applicants for their reply.

7. The applicants Vesna Šehovac, B.Ž., Nada Samardžić and Svetlana Knežević submitted their written observations between 20 May 2004 and 28 May 2004. The applicants Ljubica Gojković and Nenad Gojković received the observations as evidenced by the signed registered return receipts, but did not submit any comments in response.

¹ This factual background was established by the Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia ("ICTY") in its judgement in case no. IT-98-29-T, *Prosecutor v. Stanislav Galić*. The entire text of the decision is available in English and the national language on the web page of the ICTY at www.un.org/icty/galic/trialc/judgement.

8. On 16 June 2004 the respondent Party submitted additional observations in case no. CH/03/12332 Nada Samardžić. The applicant replied on 7 July 2004.

9. The Commission deliberated on the cases on 10 March 2004, 10 September 2004, and 3 November 2004. Considering the similarity between the facts of the applications and the complaints of the applicants, the Commission decided to join the present applications in accordance with Rule 32 of its Rules of Procedure on 3 November 2004, and on the same date it adopted the present decision.

III. FACTS OF THE INDIVIDUAL APPLICATIONS

10. Below follows a summary of the facts in each case, and where the parties have submitted conflicting information, this is noted.

A. CH/02/8677 Vesna ŠEHOVAC (for Stana ŠEHOVAC)

11. The applicant is the daughter of Stana Šehovac, who is designated in the application as the alleged victim and missing person. The applicant alleges that she and her other sister were with her mother in their apartment in Vojničko polje, Sarajevo, on 14 May 1992 when her mother was taken away by five armed soldiers, allegedly for questioning. She states that the soldiers were members of the Territorial Defence unit of the RBiH Army. Her mother was driven away in a blue "Jugo" car.

12. The applicant alleges that while searching for her mother, she found out the names of persons who took her away, M.K., N.N., E.S., H.H. and M.H. However, neither criminal nor civil proceedings against these persons have been initiated. The applicant states that she has addressed all possible organs in the search for her mother.

13. On 25 December 1995 the ICRC opened a tracing request for Stana Šehovac.

14. On 7 July 2000, the Republika Srpska Commission for Tracing Missing Persons and Prisoners ("RS Commission") issued a certificate confirming that the applicant submitted a tracing request for Stana Šehovac.

15. On 10 July 2000 the State Commission issued a confirmation that Stana Šehovac is registered as a missing person, and that her whereabouts are unknown after 14 May 1992.

B. CH/02/10495 B.Ž. (for Božidar ŽERAJIĆ)

16. The applicant is the spouse of Božidar Žerajić who is designated in the application as the alleged victim and missing person.

17. The applicant recalls that on 24 July 1992, as she was in Belgrade with their two children, she called her husband at 10:45 a.m. to speak with him. When she called later in the day at around 5:00 p.m., she could not reach him, but was able to reach another neighbour in her building. She was informed that her husband had been taken away from their apartment located at Trg nezavisnosti in Sarajevo by five armed, uniformed members of a paramilitary unit, who drove him away in a blue van.

18. The applicant submitted copies of numerous letters submitted to various institutions in the search for her husband, as well as evidence that she and her daughter have submitted a blood sample to the ICRC for DNA analysis. The applicant also submitted evidence of her son's serious mental health problems and her daughter's health problems, which she alleges stems from their father's disappearance.

19. On 16 December 1996 the ICRC opened a tracing request for Božidar Žerajić, noting that his whereabouts are unknown after 25 July 1992.

20. On 22 April 1999 the State Commission issued a confirmation that Božidar Žerajić is registered as a missing person, noting that his whereabouts are unknown since 14 May 1992.

21. Deciding upon the applicant's request in non-contentious judicial proceedings to declare her husband deceased, on 6 September 1999 the Municipal Court II in Sarajevo issued a procedural decision declaring Božidar Žerajić deceased as of 24 July 1992. The Court noted that according to witness statements, Božidar Žerajić was forcibly taken from his apartment on 24 July 1992 by a group of armed men, and never seen or heard from again.

22. On 8 August 2001, the RS Commission issued a certificate confirming that the applicant submitted a tracing request to it for her missing husband Božidar Žerajić.

C. CH/02/12332, Nada SAMARDŽIĆ (for Slobodan SAMARDŽIĆ)

23. The applicant is the spouse of Slobodan Samardžić who is designated in the application as the alleged victim and missing person. The applicant states that in April 1992 she left Sarajevo with their seven-year-old son, and her husband remained in their apartment in Vojničko Polje, Sarajevo. She alleges that her neighbours informed her by phone that on 15 May 1992 two men took her husband away from the apartment. The applicant states that her husband was a musician and radio producer for a children's program, with absolutely no interest or connections to politics

24. The applicant states that she immediately addressed every possible organisation in the search for her husband, including the ICRC Office in Belgrade, and the State Commission in 1993.

25. On 21 June 1996 the ICRC opened a tracing request for Slobodan Samardžić, noting that his whereabouts are unknown after 14 May 1992.

26. On 10 May 1999 the State Commission issued a confirmation that Slobodan Samardžić is registered as a missing person, and that his whereabouts are unknown after 3 May 1992.

27. On 28 July 2000, in a weekly magazine *Dani*, a picture of the body of Slobodan Samardžić was published, in connection with an article entitled "War for the dead". The applicant states that she was also shown this picture in person, and identified her husband from the picture. She states that the RS Commission has the picture presently. She alleges that the police took the photograph during an on-site investigation, but, the case file subsequently disappeared and criminal proceedings have never been initiated.

28. The respondent Party states that the Canton Sarajevo Ministry of Interior ("Cantonal MUP") interviewed the author of the above-mentioned article, and was informed that the author of the article obtained the picture from the RS Commission. The Cantonal MUP also interviewed the then Head of the RS Commission, Slobodan Avlijaš, who stated that he obtained the photo from Nada Samardžić. The applicant never clarified in the proceedings before the Chamber and Commission how, if at all, she obtained the photo in question.

29. The applicant states that she addressed the Cantonal MUP and the Cantonal Prosecutor's Office regarding her husband's disappearance. However, she was informed that they do not possess any file relating to the death of her husband and do not know anything about the event. She also states that she was orally informed by the Cantonal Prosecutor's Office that this event does not come under its competence and that international courts will be competent to deal with the matter. She did not submit any evidence of these requests. The respondent Party states that until the moment of filing her application to the Chamber, the applicant had not addressed the Ministry of Interior or judicial bodies with a complaint regarding the disappearance of her husband.

D. CH/03/15110 Ljubica GOJKOVIĆ and CH/03/15112 Nenad Gojković (for Predrag GOJKOVIĆ)

30. The applicants are the mother and brother of Predrag Gojković, who is designated in the applications as the alleged victim and missing person. The applicants allege that, according to the statements of their neighbours, on 2 July 1992 Predrag and his girlfriend, N.P. were both taken away from their apartment in Skenderija, Sarajevo by two uniformed persons. Since then, they have no information about his fate or whereabouts.

31. The respondent Party states that the disappearances were reported to the Higher Public Prosecutor's Office in Sarajevo in 1992 and case file no. KTN-144/92 was opened. The police investigated, but to date, with no results. The respondent Party attached no evidence showing what actions were taken.

32. On 15 August 1996 the ICRC opened a tracing request for Predrag Gojković, noting that his whereabouts are unknown after 2 July 1992.

33. On 15 December 2003, the RS Office for Missing Persons issued a certificate confirming that Predrag Gojković's disappearance was reported to it.

E. CH/03/15111, Svetlana KNEŽEVIĆ (for Boško KNEŽEVIĆ)

34. The applicant is the wife of Boško Knežević, who is designated in the application as the alleged victim and missing person. The applicant alleges that on 15 June 1992 members of Juka's paramilitary unit took her husband away from their apartment in Sarajevo.² Since then, she has no information about his fate and whereabouts. The applicant attached a newspaper article from *Srpski Oslobođenje* dated 8 June 1995, which states that Boško Knežević was taken from his apartment by M.K. in May 1992.

35. In non-contentious judicial proceedings initiated by Dražen Knežević, the applicant's son, the First Instance Court in Sarajevo on 27 March 1995 issued a procedural decision declaring Boško Knežević deceased as of 15 June 1992. The Court noted that it heard two witnesses, Fikret and Hasnija Halkić, who both confirmed that Boško Knežević died on 15 June 1992. In renewed proceedings, on 16 August 2004 the Municipal Court in Sarajevo issued a procedural decision declaring Boško Knežević deceased as of 22 December 1996 and placed out of force the earlier decision of 27 March 1995. The Court noted that it heard two witnesses, Murat Drašković and Marko Sopić, neighbors of Boško Knežević, who both confirmed that they had seen the victim a few days before his disappearance, and that they heard that he was taken from his apartment and they never saw him again.

36. On 24 July 1995 the ICRC opened a tracing request for Boško Knežević, noting that his whereabouts are unknown after 15 June 1992.

37. On 10 September 2003, the RS Office for Missing Persons issued a certificate confirming that Boško Knežević's disappearance was reported to it.

²At the beginning of the armed conflict Jusuf Juka Prazina established a paramilitary unit, one of the first defending the front lines around Sarajevo, known as "*Juka's wolves*". However, during 1992 the Presidency of Bosnia and Herzegovina officially nominated Juka to the position of commander of the Special Unit in the RBiH Army. Later, Juka joined the HVO in Mostar. He was killed in Liege, Belgium.

IV. RELEVANT LEGISLATION

A. Agreement on Refugees and Displaced Persons

38. 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

39. 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).

40. 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,”

41. 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.”

42. 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.”

43. 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.”

44. 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

45. 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 38 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”.

46. 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. 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.”

47. 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).

48. 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

49. 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

50. 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 (“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.

51. 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 RBiH 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 RBiH 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

52. 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 ("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.

53. The Commission 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

54. 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 ("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 ("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.

55. 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

56. 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

57. 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. 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.

D. National Legislation

58. Articles 60 and 61 of the Law on Non-Contentious Proceedings in the Federation of Bosnia and Herzegovina (*Zakon o vanparničom postupku*, OG FBiH no. 1/98), in force at the time relevant to this decision, provide a manner for missing persons to be declared dead. In order to obtain various rights, or resolve certain legal matters, families of missing persons have often used these provisions. The missing persons Božidar Žerajić (case no. CH/02/10495) and Boško Knežević (case no. CH/03/15111) have been declared dead in such proceedings. These provisions provide as follows:

Article 60

“In the process of declaring missing persons deceased and proving their death, the court shall decide on declaring missing persons deceased and proving of death.”

Article 61

“The following persons shall be declared deceased:

- 1) a person for whom there has been no news of during the last five years, and that person is over sixty years old;
- 2) a person for whom there has been no news of during the last five years, and it is probable that he or she is not alive any more;
- 3) a person who went missing during a shipwreck, traffic accident, fire, flood, earthquake or any other immediate mortal danger, and who has not been heard from during the six month period from the date such danger ceased;
- 4) a person who went missing during the war or in connection with war events, who has not been heard from during the period of one year from the date hostilities were terminated.

“Time-limits mentioned in sub-paragraphs 1 and 2 of paragraph 1 of this Article start to run from the date when, according to the last news, the missing person was indisputably alive, and if that date cannot be precisely established, time-limits start to run with the end of month or year in which the missing person, according to the last news, was alive.”

59. Presently a Law on Missing Persons to be adopted by Bosnia and Herzegovina is under consideration.

V. COMPLAINTS

60. The applicants are all immediate family members of persons who are missing and presumed to have been killed subsequent to their abductions in Sarajevo in the period from May-July 1992. The applicants allege that, as close family members, they are themselves victims of human rights violations resulting from the lack of specific information on the fate and the whereabouts of their loved ones. They complain that the organs of the respondent Party have not taken any concrete actions with an aim to establish the fate and whereabouts of their loved ones. Also, some of the applicants complain that the State Commission and the Federal Commission are “concentrated on tracing missing Bosniaks to the detriment of persons of other national origins³.”

³ Citizens of Bosnia and Herzegovina of Muslim origin and Islamic belief refer to themselves as “Bosniaks”. Bosniaks are also called “Bosnian Muslims” and “Muslims”.

These applicants assert that they have been discriminated against based on their national origin. All of the applicants request the Commission to order the respondent Party to identify the perpetrators, and to find out the truth about their loved ones' fate. Most of the applicants also submit a compensation claim for pecuniary and non-pecuniary damages.

61. The applicant Nada Samardžić specifically requested the Chamber to order the competent Prosecutor's Office in the Federation of Bosnia and Herzegovina to initiate proceedings regarding her husband's disappearance, proceedings which she contends the Public Prosecutor's office was obliged to initiate *ex officio*.

VI. SUBMISSIONS OF THE PARTIES

A. The Federation of Bosnia and Herzegovina

1. As to the facts

62. The respondent Party points out that according to the records of the Ministry of Interior and Police Administrations in Canton Sarajevo there are no registered reports on the disappearance or death of Stana Šehovac, Božidar Žerajić, Slobodan Samardžić, and Boško Knežević.

63. The respondent Party alleges that in case nos. CH/03/15110 Ljubica Gojković and CH/03/15112 Nenad Gojković, at the end of June 1992 a report was filed to the then Higher Public Prosecutor's Office in Sarajevo (presently the Cantonal Public Prosecutor's Office) regarding the disappearance of Predrag Gojković and his girlfriend, N.P. Upon the request of the Public Prosecutor's Office, the police worked on gathering information, but circumstances related to the disappearance of Predrag Gojković and his girlfriend have not been ascertained to date.

64. In case nos. CH/02/10495 B.Ž. (for Božidar Žerajić) and CH/03/15111 Svetlana Knežević (for Boško Knežević) the respondent Party points out that proceedings were conducted to declare the missing persons deceased before the First Instance Court in Sarajevo. The respondent Party alleges that during these proceedings a notice was published in the Official Gazette of the Federation of Bosnia and Herzegovina inviting persons who had any information about the missing persons to contact the court within three months from the date the notice was published. The respondent Party points out that no one responded to this public request.

2. As to the admissibility and merits

65. Generally, the respondent Party states that it is undisputed that all of the applications concern persons who have been documented as missing from the wartime period in Sarajevo. The respondent Party does not dispute that the applicants have addressed the relevant organizations in the search for their loved one.

66. The respondent Party points out that it has taken actions on behalf of Predrag Gojković to reveal the circumstances of his disappearance, actions that, unfortunately, have not given the expected results.

67. With regard to the applications of Vesna Šehovac, Svetlana Knežević, B.Ž. and Ljubica and Nenad Gojković, the respondent Party observes that the applicants have not initiated proceedings before the Prosecutor's Office to establish the facts in relation to their loved ones' disappearance or to report the possible perpetrators of the crime. The respondent Party points out that if the applicants have any information at their disposal regarding their loved ones disappearance, they should report it to the Federal or Cantonal Ministry of Interior.

68. The respondent Party highlights that all of the applications concern so-called “war disappearances” (*ratni nestanci*) i.e., disappearances that occurred before the Dayton Peace Agreement was signed. The respondent Party states that it is not clear from the allegations whether organs of the respondent Party are considered responsible for the alleged disappearances, or individuals or groups that acted outside its authority. In any case, the respondent Party asserts that there is no evidence that its organs were involved in, or responsible for the disappearance of the applicants’ loved ones.

69. The respondent Party asserts that its organs have not treated the applicants in a way that might be understood as inhuman or humiliating and therefore it cannot be considered that it has violated the applicants’ rights protected under Article 3 of the Convention. Furthermore, the respondent Party points out that it does not have in its possession any information that would indicate its involvement in the disappearances in question, nor does it possess information that it has not provided to the applicants.

70. As to the violation of Article 8 of the Convention, the respondent Party alleges that the applicants failed to offer the organs of the respondent Party meaningful information that would elucidate circumstances of the disappearances, and because of that, it was not able to completely carry out the necessary proceedings in their cases. Therefore, the respondent Party holds that the applicants have not met the burden of evidence that would invoke the respondent Party’s positive obligation in connection with Article 8 of the Convention.

71. The respondent Party finds absolutely incorrect the applicants’ allegations that the Federal Commission for Tracing Missing Persons “is concentrated on tracing missing Bosniaks to the detriment of persons of other national origin”. The respondent Party considers that the Federal Commission for Tracing Missing Persons as well as the State Commission, in their work to date, have provided information on the fate of thousands of missing persons, regardless of their national origin. In support of this, the respondent Party points out numerous international and national recognitions awarded to representatives of these Commissions for being active in the promotion of human rights and advancement of democratic relationships. The respondent Party asserts that it has not violated the applicants’ rights as guaranteed under Article II(2)(b) of the Agreement.

72. The respondent Party proposes that the applications be declared inadmissible as manifestly ill-founded in accordance with provisions of Article VIII(3)(c) of the Agreement.

73. On 16 June 2004 the respondent Party submitted additional information in case no. CH/02/12332 Nada Samardžić. The respondent Party alleges that the photo as published in Dani magazine does not prove that its organs took the photo, or that any official case file existed. In fact, the Cantonal MUP interviewed the author of the article, who said he obtained the photo from the RS Commission. The Cantonal MUP also interviewed the head of the RS Commission, Slobodan Avlijaš, who stated that he obtained the photo from Nada Samardžić. Also, the respondent Party states that the applicant, at the time of submitting her application to the Chamber, had not initiated any proceedings before the Ministry of Interior or the Public Prosecutor’s Office.

B. The applicants

74. The applicants who submitted their responses to the observations of the respondent Party maintain their complaints as presented in the applications in their entirety and dispute the allegations of the respondent Party with regard to the admissibility and merits of the applications.

75. In case no. CH/02/8677 Vesna Šehovac, the applicant finds the respondent Party’s observations unacceptable and unsubstantiated. She points out that the respondent Party is obliged to provide information and to elucidate all circumstances concerning the tragic events of disappearances in 1992. Furthermore, the applicant alleges that on the same day when her mother was taken away she addressed M.K., who was the head of the Office for Public Safety in

Novo Sarajevo at that time, and she addressed him on several other occasions. However, she has not received any official information as to whether any kind of investigation was undertaken.

76. In case no. CH/02/12332 Nada Samardžić, the applicant holds that the respondent Party possesses relevant information about her husband, but refuses to make it available and to prosecute the perpetrators. She considers that the respondent Party's organs conducted an investigation, made a photo of her husband's body and that the body was removed and the case file destroyed. She complains that she addressed the State Commission several times, but it has not taken any concrete actions, nor has any relevant body of the Federation of Bosnia and Herzegovina. The applicant considers that she has exhausted all available domestic remedies within the meaning of Article VIII(2)(a) of the Agreement.

77. In case no. CH/03/15111 Svetlana Knežević, the applicant holds that her husband was taken away by "Juka's Unit". She points out that Juka's Unit were not outside the authorities' institutions, because he was appointed to the rank of general by the Presidency of the Republic of Bosnia and Herzegovina. Also, as evidenced by the newspaper article she attached, there is evidence that her husband was taken away from his apartment by M.K., and she asserts that the respondent Party has an obligation to investigate this event, to find the truth and to discover her husband's body.

VII. OPINION OF THE COMMISSION

A. Admissibility

78. The Commission recalls that the applications were introduced to the Human Rights Chamber under the Agreement. As the Chamber had not decided the applications by 31 December 2003, in accordance with Article 5 of the 2003 Agreement, the Commission is now competent to decide on the applications. 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 cases, from those of the Chamber, except for the composition of the Commission.

1. Admissibility as against Bosnia and Herzegovina

79. 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."

80. The Commission notes that the application nos. CH/03/15110 Ljubica Gojković, CH/03/15111 Svetlana Knežević and CH/03/15112 Nenad Gojković are directed against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina. The Commission notes that the disappearances in question occurred in Sarajevo, on territory controlled by the RBiH Army. Subsequently, the RBiH Army was succeeded by the Army of the Federation of Bosnia and Herzegovina. It does not appear to the Commission that Bosnia and Herzegovina is responsible for the actions the applicants complain of. In particular, it is the authorities of the Federation of Bosnia and Herzegovina who are responsible for investigating and informing the applicants of the fate and whereabouts of their loved ones. These applications are therefore incompatible *ratione personae* with the provisions of the Agreement insofar as they are directed against Bosnia and Herzegovina.

2. Exhaustion of effective remedies

81. 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”

82. 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.

83. The respondent Party asserts that the applicants Vesna Šehovac, B.Ž., Nada Samardžić and Svetlana Knežević have not addressed the competent Prosecutor’s Office, nor the Ministry of Interior to investigate the disappearances.

84. 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.”

85. Furthermore, the Commission recalls that under the *Process for tracing persons unaccounted for* (see paragraphs 45-48 above), as well as in Article V of Annex 7 quoted above, the State of Bosnia and Herzegovina and the Entities, including the Federation of BiH, 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 Federation of BiH on it; see paragraph 46 above). As can be seen above, it is indisputable that tracing requests for all of the named missing persons in the present applications were filed with the ICRC in 1995 and 1996, and all of the applicants except Ljubica and Nenad Gojković have also directly addressed the State Commission. 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 Federation of Bosnia and Herzegovina through the Working Group, the Commission considers that the relevant authorities of the respondent Party were made aware of the applicants’ requests for information about the fate and whereabouts of their missing loved ones through the *Process for tracing persons unaccounted for*. 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.

86. In relation to the respondent Party’s objection to the admissibility of the applications on the grounds that the applicants Vesna Šehovac, B.Ž., Nada Samardžić and Svetlana Knežević failed to address the Ministry of Interior or the competent Prosecutor’s Office, the Commission notes that the applicants Vesna Šehovac and Nada Samardžić allege that they have addressed the competent Prosecutor’s Office and/or the Ministry of Interior, but no action has been taken. In any case, the Commission recalls that the applicants are not obliged to address these organs 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 applications inadmissible.

3. *Ratione temporis*

87. 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.”

88. The respondent Party also objects to the applications arguing that these applications concern so called “war disappearances” i.e., disappearances that occurred before the Dayton Peace Agreement was signed.

89. 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 declared 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).

90. 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).

91. 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))).

92. The Commission recalls that the applicants registered their family members as missing persons with the ICRC, the State Commission, and in some cases, the RS Office for Missing Persons, and they have taken numerous steps to determine the fate of their loved ones. Nevertheless, more than twelve years after the events in question, and almost nine years after the Agreement entered into force, the applicants have never been officially informed about the fate and whereabouts of their missing relatives, by the authorities of the Federation of Bosnia and Herzegovina. Therefore, the allegations contained in the applications concern violations of the applicants’ human rights by the respondent Party, which continue to the present date. As such, the

applications fall within the Commission's competence *ratione temporis*, within the meaning of Article VIII(2)(c) of the Agreement, and in that respect, are admissible.

4. Conclusion as to admissibility

93. The Commission declares admissible the complaints in relation to the applicants' allegations of violation of their 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 Commission also declares the applications in case nos. CH/03/15110 Ljubica Gojković, CH/03/15112 Nenad Gojković, and CH/03/15111 Svetlana Knežević as directed against Bosnia and Herzegovina incompatible *ratione personae* with the Agreement.

B. Merits

94. 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)

95. 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."

96. In its 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; 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, Decisions January–June 2003; 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*, judgement of 24 September 2002).

97. In the present applications, the applicants' family members were taken away from their homes by uniformed persons, either paramilitary forces or soldiers of the RBiH Army. The applicants Vesna Šehovac, Ljubica Gojković, and Nenad Gojković state that their loved ones were taken away for "questioning", never to be seen or heard from again. Some of the applicants

witnessed the abduction of their loved ones. Other applicants found out about the abductions from their neighbors. All applicants have taken numerous steps to uncover the fate of their missing loved one, including opening a tracing request with the ICRC registering their family members as missing persons.

98. Based on the applicants' eye-witness accounts, or statements of witnesses who observed the missing persons being taken away by uniformed armed men, it is clear that members of the RBiH Army or paramilitary forces, who controlled the neighborhoods at the time where the abductions occurred, were responsible for these events. 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 applicants' missing family members. In any event, the possibility that information and evidence pertaining to these events were 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 Federation of Bosnia and Herzegovina have failed to take sufficient action to locate, discover, or disclose information sought by the applicants about their missing loved ones.

99. The Commission recalls that the respondent Party submitted that it had taken certain investigative actions to uncover the disappearance of Predrag Gojković (related to application nos. CH/03/15110 Ljubica Gojković and CH/03/15112 Nenad Gojković). The respondent Party did not specify in any manner what actions were taken in the case of Predrag Gojković. The Commission finds that the respondent Party's efforts in this case superficial, at best.

100. With regard to all of the applications, the Commission recalls there is no evidence, for example, that the authorities of the Federation of Bosnia and Herzegovina interviewed any of the members of its armed forces who were involved in the events in Sarajevo 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 families of the missing victims. This despite the fact that some of the applicants even recall the full names of the persons who were directly involved in the abductions. Such inaction or passivity is a breach of the respondent Party's responsibilities due under Annex 7 to the General Framework Agreement and the *Process for tracing persons unaccounted for*.

101. The Commission therefore concludes that the respondent Party has breached its positive obligation to secure respect for the applicants' rights protected by Article 8 of the Convention by failing to make accessible and disclose information about the applicants' missing family members.

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

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

103. In its 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, Decisions January–June 2003; 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”

104. Moreover, the essential characteristic of the family members' 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).

105. Applying the above factors to the present cases, the Commission observes that all of the applicants were close family members of the missing persons. The applicants have taken many steps to uncover the fate and whereabouts of their missing loved ones. The applicants specifically state that they and their children, or other close relatives, have suffered intense psychological trauma as a result of the events. The applicant B.Ž. attached evidence of her sons's deteriorated mental state and suicide attempts. That the applicants, their children and other close relatives have suffered as a result of these abductions and the resultant loss of their loved ones is indisputable. Such emotional suffering inflicted on the applicants and their next of kin, 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.

106. Applying the above factors to the respondent Party, the Commission observes that it can not be seen that the authorities of the Federation of Bosnia and Herzegovina have done anything meaningful to clarify the fate and whereabouts of the missing victims. The Commission also notes that two of the applicants allege that M.K., the then Head of the Office for Public Safety in Novo Sarajevo, responsible for the abductions of their loved ones. The respondent Party has not investigated the facts concerning the abduction of persons of Serb origin in the period from May-July 1992, despite having received the tracing requests 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 operations, 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 underlying these applications. Moreover, the Commission must note that the authorities of the Federation of Bosnia and Herzegovina were directly involved in the disappearances that occurred, in that time, on territory controlled by the RBiH Army. None the less, the applicants have waited for more than twelve years for clarification of the fate and whereabouts of their family members by the competent authorities. As no meaningful information has been forthcoming, the reaction of the authorities of the Federation of Bosnia and Herzegovina can only be described as “complacency” or indifference, which aggravates an already tragic situation.

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

3. Discrimination

108. The applications were also transmitted in connection with discrimination under Article II(2)(b) of the Agreement, which provides as follows:

“The Human Rights [Commission] shall consider ... alleged or apparent discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status arising in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to this Annex, where such violation is alleged or appears to have been committed by the Parties, including any official or organ of the Parties, Cantons, Municipalities, or any individual acting under the authority or such official or organ.”

109. In light of its finding above of a violation of Articles 3 and 8 of the Convention, the Commission considers it unnecessary to also examine the applications under Article II(2)(b) of the Agreement with respect to the alleged discrimination.

4. Conclusion as to the merits

110. In summary, the Commission concludes that the respondent Party’s failure to make accessible and disclose information requested by the applicants about their missing family members constitutes a violation of its positive obligations to secure respect for their rights to private and family life, as guaranteed by Article 8 of the Convention. In addition, the respondent Party’s failure to inform the applicants about the truth of the fate and whereabouts of their missing loved ones, including conducting a meaningful and full investigation into these abductions, violates their 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 applicants were discriminated against in the enjoyment of these rights.

VIII. REMEDIES

111. 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.

112. The Commission recalls that the applicants seek to know the truth about their missing family members. The applicants also seek compensation for their 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.

113. In accordance with the Chamber's 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, Decisions January-June 2003) the Commission will order the respondent Party, as a matter of urgency, to release all information presently within its possession, control, and knowledge with respect to the fate and whereabouts of missing persons, including information on the circumstances of their disappearances and in particular, whether they were killed, and if so, the circumstances of their death and the location of their mortal remains.

114. The Commission will further order the respondent Party to conduct a thorough investigation to uncover all the facts related to the missing persons' fate from the day when they were taken away from their apartments, both with a view to making such information known to the applicants and with a view to bringing the perpetrators to justice. The Federation of Bosnia and Herzegovina shall disclose the results of this investigation to the applicants, the International Committee of the Red Cross, 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.

115. 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 applicants in recognition of their mental suffering. Accordingly, the Commission will order the respondent Party to pay to each applicant the sum of 5,000 Convertible Marks (*Konvertibilnih Maraka*) in recognition of their mental suffering resulting from the respondent Party's failure to obtain and provide them with information about the fate of their missing relatives. This payment shall be made within two months from the date of receipt of the present decision.

116. The Commission will further award simple interest at an annual rate of 10% as of two months 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.

117. The Commission will also order the respondent Party to report to it, or its successor institution, 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

118. For the above reasons, the Commission decides,

1. unanimously, that the applicant' 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 applications are inadmissible;
3. unanimously, that the failure of the Federation of Bosnia and Herzegovina to make accessible and disclose information requested by the applicants about their missing relatives violates its positive obligations to secure respect for their right to private and family life, as guaranteed by Article 8 of the European Convention on Human Rights, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;
4. unanimously, that the failure of the Federation of Bosnia and Herzegovina to inform the applicants about the truth of the fate and whereabouts of their missing family members, including conducting a meaningful and effective investigation, violates their right to be free from inhuman and degrading treatment, as guaranteed by Article 3 of the European Convention on Human Rights, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;
5. unanimously, that it is not necessary to separately examine the applications with respect to discrimination;
6. unanimously, to order the Federation of Bosnia and Herzegovina, as a matter of urgency, to release to the applicants all information presently within its possession, control, and knowledge with respect to the fate and whereabouts of the applicants' missing family members including information on the circumstances of their disappearances, and in particular whether they were killed, and if so, the circumstances of their death and the location of their mortal remains;
7. unanimously, to order the Federation of Bosnia and Herzegovina 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 the applicants' missing family members. Such investigation should also be conducted with a view to making such information known to the applicants and with a view to bringing the perpetrators of any crimes committed against victims to justice before the competent domestic or international criminal courts. The Federation of Bosnia and Herzegovina shall disclose the results of this investigation to the applicants, the International Committee of the Red Cross, 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 Federation of Bosnia and Herzegovina to pay to each applicant, no later than two months from the date of receipt of the present decision, the sum of 5,000 (five thousand) Convertible Marks ("*Konvertibilnih Maraka*") by way of compensation for their mental suffering;
9. unanimously, to order the Federation of Bosnia and Herzegovina 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 two-month period until the date of settlement in full; and,

10. unanimously, to order the Federation of Bosnia and Herzegovina to report to the Commission, or its successor institution, 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.

A handwritten signature in black ink, appearing to read 'Jakob Möller', written in a cursive style.

(signed)
J. David YEAGER
Registrar of the Commission

(signed)
Jakob MÖLLER
President of the Commission