



## **DECISION ON ADMISSIBILITY AND MERITS**

**Case nos. CH/02/8708, CH/02/12428, CH/02/12450, and CH/02/12451**

**Samka ZUBAN, Jasmin HAMIDOVIĆ, and R.Š.**

**against**

**THE REPUBLIKA SRPSKA**

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 Article 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 introduced by the closest members of families of persons who went missing during 1992 in the region of Ilidža and Grbavica, neighbourhoods in Sarajevo. The applicants indicated the Republika Srpska as the respondent Party because these two residential areas were under its control at the time.

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 suburbs. On 22 May 1992 Bosnia and Herzegovina was admitted as a member state of the United Nations. The Security Council called for the withdrawal of foreign forces, including the JNA, from the territory of Bosnia and Herzegovina. That same day, General Mladić ordered the formation of the Sarajevo-Romanija Corps ("SRK"), one of the five constituent Corps of the Army of the Republika Srpska (*Vojska Republike Srpske*). The main SRK forces were positioned around what was colloquially called the inner ring of Sarajevo, in particular in the area of Ilidža, Neđarići and Grbavica.<sup>1</sup> Following these events, in June and July 1992, 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 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 ("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

4. The applications were introduced on 21 January 2002, 12 November 2002 and 19 November 2002.

5. On 20 October 2003 the Commission transmitted the application of Samka Zuban to the respondent Party for its observations on the admissibility and merits under Articles 3, 8 and 13 of the Convention. On 15 December 2003 the respondent Party submitted its observations on the admissibility and merits. On 6 January 2004 the Commission transmitted to the respondent Party the applicant's response of 5 January 2004.

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<sup>1</sup> 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](http://www.un.org/icty/galic/trialc/judgement)

6. On 25 March 2004 the Commission transmitted the applications of Jasmin Hamidović and R.Š. to the respondent Party for its observations on the admissibility and merits under Articles 3, 8, and 13 of the Convention and Article II(2)(b) of the Agreement.

7. By its submission of 29 March 2004 the respondent Party requested the applicant Jasmin Hamidović to supplement his application with regard to the facts, which he did by his submission of 5 April 2004. On 6 April 2004 the Commission forwarded the applicant's submission to the respondent Party.

8. On 21 April 2004, 26 April 2004, and 14 May 2004 the respondent Party submitted to the Commission written observations on the admissibility and merits in the above mentioned cases.

9. On 7 June 2004 the applicant Jasmin Hamidović submitted to the Commission his response to the observations of the respondent Party, and the applicant R.Š. submitted his responses on 13 and 28 May 2004.

10. On 9 October 2003 the Chamber deliberated on the admissibility and merits of the application of Samka Zuban, and on 12 March 2004 the Commission considered the admissibility and merits of the application. On 12 March 2004 and 8 July 2004 the Commission deliberated on the admissibility and merits of the applications of Jasmin Hamidović and R.Š. On 3 November 2004 the Commission considered together all four cases and on the same day it adopted the present decision. Considering the similarity between the facts of the cases and the applicants' complaints, the Commission decided to join these applications in accordance with Rule 32 of the Commission's Rules of Procedure on the same day it adopted the present decision.

### **III. FACTS OF THE INDIVIDUAL CASES**

#### **A. Case No. CH/02/8708, Samka Zuban (for Fikret Zuban)**

11. The applicant is the spouse of Mr. Fikret Zuban, a citizen of Bosnia and Herzegovina of Bosniak origin, who is designated in the application form as the alleged victim and missing person.

12. On 9 June 1992, the applicant's husband was on duty as a member of the Territorial Defence in Ilidža. There, he was arrested by Bosnian Serb armed forces and taken away. The applicant states that since that time, all traces of her husband are lost. The applicant also notes that her husband's brother, Asim Zuban, and other male neighbours were also taken away at the same time.

13. The applicant submitted a tracing request for her husband to the ICRC on 29 August 1995. On 15 July 1997, the State Commission issued a certificate according to which the applicant's husband is registered as a missing person as of 9 June 1992.

14. On the basis of the applicant's request of 18 December 1996, on 6 April 1998, the Municipal Court II in Sarajevo issued a procedural decision declaring Fikret Zuban dead as of 9 June 1992. The Court took into account the testimonies of three witnesses who stated that on 9 June 1992, Fikret Zuban was captured by members of the Bosnian Serb armed forces in Kasindolska Street and taken in the direction of Kula, but was later returned and locked together with other male neighbours in one garage and it was assumed that he was later burned in that garage, but it appears that there are no eyewitnesses to that act.

15. The applicant also states that M.J. and K.M. were the members of the Bosnian Serb armed forces who were responsible for taking her husband, and she reported the crime to the Public Prosecutor in Sarajevo, but she has obtained no response, e.g., no proceedings have been initiated in this regard.

**B. Case No. CH/02/12428, Jasmin Hamidović (for Nedžib Hamidović)**

16. The applicant is the son of Nedžib Hamidović, a citizen of Bosnia and Herzegovina, of Bosniak origin, who is indicated in the application as the alleged victim and missing person. The applicant alleges that on 3 June 1992 his father was taken away from his apartment in Ilidža by persons wearing uniforms of the former Yugoslav National Army. The applicant further alleges that a day after his father had been taken away, he found out from his next door neighbour that his father was being held in the "Topola" building in Ilidža, and that he sent him cigarettes through his friend D.M. until 13 June 1992, when the same friend informed him that his father was no longer being held there. The applicant further alleges that during the period from 3 June 1992 until 13 June 1992 he lived at his sister's in the Sarajevo residential area Švrakino selo, where a person phoned him representing himself as a "captain" and informing him that his father was captured for a routine questioning and that he would be released if his son, i.e., the applicant, was not connected to the Green Berets (*Zelene beretke*).<sup>2</sup>

17. According to the certificate the State Commission submitted to the Commission on 19 March 2004, the applicant's father was reported missing on 13 November 1992, and 3 June 1992 was indicated as the date of disappearance.

18. On 5 September 2002 the Municipal Court II in Sarajevo published an announcement inviting all persons having any information about Nedžib Hamidović to contact the Municipal Court. It is said in the same announcement that the Court will issue a procedural decision after expiration of three months upon a request in order to declare the person deceased. The applicant has not informed the Commission whether the stated procedural decision has been issued.

**C. Case No. CH/02/12450, R.Š. (for Fahrudin Šeremet) and Case No. CH/02/12451 R.Š. (for Zijada Šeremet)**

19. The applicant is the son of Fahrudin and Zijada Šeremet, citizens of Bosnia and Herzegovina, of Bosniak origin, who are indicated in the applications as the alleged victims and missing persons. The applicant alleges that his parents were "on the evacuation list" of the Republika Srpska, and that in Grbavica, where they lived, they were abused, taken to interrogations, and forced to sign statements surrendering their property for the benefit of the Republika Srpska. The applicant alleges that on 9 July 1992 members of the Republika Srpska Army took away his parents from their apartment in Grbavica that was under the control of the Republika Srpska Army at the time.

20. The applicant attached to the application the statements of witnesses N.V. and K.V. given to establish his parents' death before the Municipal Court II in Sarajevo. According to these statements, the applicant's parents were taken away from their apartment by unknown persons dressed in uniforms. The witnesses stated that they watched through their apartment window how one of them pulled out a pistol and shot them both. The witnesses stated that they put the bodies into the trunk of the car type "Golf" and drove away in an unknown direction.

21. On 9 February 1994 the Red Cross of Bosnia and Herzegovina, Tracing Department, issued a certificate that the disappearance of the applicant's parents was reported to this Department on 8 February 1993.

22. According to the certificate that the State Commission submitted to the Commission on 19 March 2004, the applicant's parents were reported to this Commission on 12 July 1992, and as the date of disappearance 9 July 1992 was indicated.

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<sup>2</sup> A military unit within the Army of Bosnia and Herzegovina.

23. On 14 October 2002 the Municipal Court II in Sarajevo issued, in extra-judicial proceedings, a procedural decision declaring the applicant's parents deceased. The date of 9 July 1992 was determined as the date of their death.

#### **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 authorized 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, 53<sup>rd</sup> 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 (“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 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**

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 ("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 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**

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 ("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.

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. 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**

44. Articles 60 and 61 of the Law on Non-Contentious Proceedings in the Federation of Bosnia and Herzegovina (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.

#### 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.”

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

46. Article 139, paragraphs 1 and 6 of the Law on Criminal Proceedings of the Federation of Bosnia and Herzegovina (OG FBiH, no. 43/98) that was in force at the time relevant for this decision, provides for participation of the injured party who “is the person whose personal or property right has been violated or endangered by a criminal offense”.

## V. COMPLAINTS

47. The applicants seek to know the truth about what happened to their loved ones after they went missing during 1992. The applicants allege violations of Article 3 (right not to be subject to torture or inhuman and or degrading punishment) and Article 8 (right to respect for private and family life) of the Convention and discrimination on national grounds. The applicant Samka Zuban also appears to assert a violation of the right to be heard in criminal proceedings. The applicant R.Š, with regard to his parents, also alleges violations of their right to freedom and personal security, their right to freedom of movement, and their right not to be kept in slavery.

48. The applicants claimed compensation for pecuniary and non-pecuniary damages. The applicant R.Š. requested the total amount of 200,000 Convertible Marks ("KM") by way of compensation for pecuniary damages, and 40,000 KM by way of compensation for costs of the proceedings. The applicants Samka Zuban and Jasmin Hamidović have not specified their compensation claim.

## VI. SUBMISSIONS OF THE PARTIES

### A. The Respondent Party

#### 1. As to the facts

49. The respondent Party alleges in its position on the facts in the case of Samka Zuban that the application is incomplete, unclear and that it has little information of relevance to any action that should be taken by the respondent Party. Also, the respondent Party asserts that the factual background presented in the application is contradictory to the facts established in the decision declaring the death of the missing person of the Municipal Court II in Sarajevo of 6 April 1998.

50. In its position on the facts in the application of Jasmin Hamidović the respondent Party considers the facts incomplete and unsubstantiated. The respondent Party considers it illogical that the applicant does not know the name of the "next door neighbour" who informed him about his father's disappearance. The respondent Party further holds disputable the fact that "the Captain" phoned the applicant at his sister's house and asks how did "the Captain" have at all the phone number.

51. The respondent Party considers disputable the facts in the applications submitted by R.Š. The respondent Party stresses that the applicant has not substantiated his statement that his parents were taken for interrogations and forced to sign the statement on voluntary abandonment of their property for the benefit of the Republika Srpska. The respondent Party further alleges that it is illogical that the applicant's parents were on the exchange list if, according to the witnesses' statement, they were killed prior to that.

#### 2. As to the admissibility

52. The respondent Party suggests that the application of Samka Zuban should be declared inadmissible in its entirety, for a variety of reasons. Firstly, the respondent Party states that no tracing requests pertaining to the present application were lodged by either the applicant or transmitted to it by the Working Group, (see paragraph 32 above) so it did not know about the applicant's complaints and for that reason could not conduct any investigation. For the stated reasons the respondent Party argues that the application is inadmissible *ratione personae*. Secondly as the underlying events occurred before the entry into force of the Agreement, it is asserted that the Commission lacks jurisdiction *ratione temporis* to consider the cases (see, case no. CH/02/9752 *Zukanović and others v. The Republika Srpska* decision on admissibility of 4 September 2003, paragraphs 45 and 46). Thirdly, as the tracing process with the State Commission and the ICRC has never been officially terminated, the respondent Party proposes

that the applications should, alternatively, be declared inadmissible on grounds of *lis alibi pendens*, pursuant to Article VIII(2)(d) of the Agreement.

53. The respondent Party considers the applications of Jasmin Hamidović and R.Š. inadmissible for non-exhaustion of domestic remedies, as well as on the grounds of *ratione temporis* and *ratione personae*.

54. In connection with these four applications, the respondent Party points out that the applicants have failed to address the authorities of the respondent Party or the Federal Commission for Tracing Missing Persons. The respondent Party further states that the disappearance of the applicant's father Nedžib Hamidović was reported to the State Commission only in September 2002. With regard to the applications of R.Š., the respondent Party states that the applicant's parents were reported missing to the State Commission only in April 2002, at which time the respondent Party was informed about the tracing request through the Working Group (see paragraph 32 above) and that prior to that, it did know about the applicant's request, so it could have not investigated. The respondent Party further stresses that the applicants' parents were not reported missing to the International Committee of the Red Cross.

55. Finally, the respondent Party asserts that the applications of Jasmin Hamidović and R.Š. are inadmissible *ratione temporis*, and that it cannot be held responsible for actions and failures that occurred before the Agreement entered into force and therefore the Chamber's jurisprudence cannot be applied in these cases.

### **3. As to the merits**

56. On the merits, the respondent Party proposes that the applications should be dismissed as ill founded.

57. The respondent Party argues that the application of Samka Zuban is ill-founded because the applicant was not subject to any treatment that falls within the scope of Article 3 of the Convention as the respondent Party did not intentionally cause the suffering of the applicant. It also argues that there was no interference with the applicant's rights under Article 8 of the Convention as such violation can occur only when the respondent Party possesses information, or it is under its control, and arbitrarily and without reasonable justification refuses to reveal it to the members of the family upon their request to the competent organ of the respondent Party. The respondent Party alleges that this has not been the case in the present application. Therefore, the applicant's rights under the Convention have not been violated.

58. In relation to the applications of Jasmin Hamidović and R.Š. the respondent Party states that it did not have any intention to wilfully keep to itself any information about the missing persons' fate, but that it was not able to provide such information because the Republika Srpska Commission for Missing Persons did not receive information necessary to investigate the claims raised in the applications. The respondent Party refers to the case *Unković v. Bosnia and Herzegovina* and asserts that the Chamber held the position in that case that a violation of Article 8 of the Convention may be found only when it is established that the respondent Party has wilfully kept the mortal remains and failed to reveal information regarding the fate of the missing person.

59. In connection with discrimination, the respondent Party stresses that it has not discriminated against the applicants in their rights and freedoms provided for in the Convention.

#### **4. As to the compensation**

60. In the opinion of the respondent Party, in these cases, there has been no violation of the rights and freedoms provided for in the Convention, and therefore it considers the compensation claims ill-founded.

#### **B. The applicants**

61. The applicant Samka Zuban maintains all her complaints raised in her application. The applicant complains that she and her two children are left in uncertainty as to whether their loved one is dead or alive, as no one witnessed his death. The applicant alleges that her children are patients at the Neuropsychiatry Unit at Koševo Hospital because they have been suffering from epilepsy as the result of traumas.

62. The applicant alleges violation of her husband's right to life, her own right to find out the truth and the right to a fair hearing in criminal proceedings. She claims compensation in an unspecified amount.

63. The applicant Jasmin Hamidović submits the names of witnesses (B.R., V.P. and D.M.) that may, according to him, testify to the facts related to his father's disappearance and also states that among them is his next-door neighbour. According to the applicant's allegations V.P. was captured together with his father. In relation to the question of the respondent Party about the phone call of the "Captain", the applicant alleges that the "Captain" obtained his sister's phone number from their captured father. The applicant further denies the allegations of the respondent Party that the disappearance was not reported to the ICRC and that it was reported to the State Commission only in September 2002. The applicant further alleges that his father's disappearance was reported both to the State Commission and the ICRC immediately after 13 June 1992.

64. The applicant R.Š. contests the statement of the respondent Party that the disappearance of his parents was reported to the State Commission only in April 2002, by pointing out that according to the certificate of the State Commission of 6 May 2004 his parents were reported missing on 12 July 1992 (see paragraph 22 above). The applicant alleges that the Commission for Tracing Missing Persons of the Republika Srpska was informed about the disappearance of his parents already during the war because he addressed this organ through the Red Cross, but never obtained any information. The applicant further alleges that after the war he wrote on several occasions to the Republika Srpska Government and the RS Commission but he has never received any response. As evidence, he submitted registered return receipts addressed to the Republika Srpska Government and the RS Commission. The applicant further alleges that the respondent Party has never conducted a meaningful and complete investigation to establish the fate of the approximately 180 missing and 200 killed persons from the territory of the Sarajevo residential areas Grbavica and Vraca.

### **VII. OPINION OF THE COMMISSION**

#### **A. Admissibility**

65. 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 applicants' cases, from those of the Chamber, except for the composition of the Commission.

## 1. Exhaustion of effective remedies

66. 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 ....”

67. 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.

68. The respondent Party argues that the applicants have failed to sufficiently exhaust effective domestic remedies. The respondent Party asserts that at issue is a process and established mechanism that the applicants have not availed themselves of.

69. The respondent Party argues that in cases Jasmin Hamidović and R.Š. the disappearances of their loved ones was reported to the State Commission only in September 2002. The Commission notes that these allegations of the respondent Party are not in accordance with the information the Commission has transmitted to the respondent Party. Namely, according to the information the Commission received from the State Commission, the applicants reported the disappearance of their loved ones to the State Commission in 1992 (see paragraphs 17 and 22 above). It appears that the respondent Party considered the dates of issuance of certificates by the State Commission as the dates when the applicants registered their family members as missing persons. With regard to the application of Samka Zuban, the respondent Party asserts that the application is premature. Namely, the respondent Party alleges that the applicant filed criminal charges before the Public Prosecutor, but that the proceedings are still pending. The Commission recalls that the applicant filed criminal charges against M.J. and K.M., but that no proceedings have been initiated.

70. 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.”

71. Furthermore, the Commission recalls that under the *Process for tracing persons unaccounted for* (see paragraphs 31 *et seq.* 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). All the applicants have addressed the State Commission and opened tracing requests for their missing loved ones. These requests were opened in 1992, with the exception of Samka ZUBAN who opened a tracing request with the ICRC in August 1995. The Commission concludes that the applicants have exhausted the remedy provided for in Annex 7 within the meaning of Article VIII(2)(a) of the Agreement. The Commission therefore rejects this ground for declaring the applications inadmissible.

## 2. *Ratione temporis*

72. 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.”

73. The respondent Party also objects that all of the present applications are incompatible *ratione temporis* with the Agreement, arguing that it cannot be held responsible, under the Agreement, for actions or failures that occurred before it came into force, on 14 December 1995. The respondent Party refers to case no. CH/98/522 *Čabak v. The Federation of Bosnia and Herzegovina*, stating that it would be responsible only if the evidence existed “including the evidence on the basis of indication or presumptions that indicate that [actions] have been continued after the Agreement entered into force ... taking into account the war and disunion that prevailed at the time”. In the case of Samka Zuban the respondent Party asserts that there is no evidence that the alleged victim, Fikret Zuban, was alive after 14 December 1995.

74. 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) are 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).

75. 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 Fikret Zuban are incompatible *ratione temporis* with the Agreement. Therefore, the Commission decides to declare those claims inadmissible.

76. 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. The Republika Srpska* (application no. 7/96, Report of the Ombudsperson of 30 September 1998)).

77. Although the Commission does not have concrete information on whether all applicants have filed tracing requests for their loved ones with the ICRC, the Commission recalls that the applicants, Jasmin Hamidović and R.Š. registered their loved ones with the State Commission in 1992, and the applicant Samka Zuban registered her husband as a missing person with the ICRC and have taken numerous steps to obtain information about the fate of their loved ones. Nevertheless, more than twelve years after the event in question, more than nine years after the Agreement entered into force, and some nine to twelve years after the tracing requests were lodged, the applicants have never been officially informed about the fate and whereabouts of their missing closest members by the Republika Srpska. Therefore, the allegations contained in the application concern a violation of the applicants' human rights by the respondent Party, which continues 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.

### **3. Competence *ratione materiae***

78. As stated above, in accordance with Article VIII(2)(c) of the Agreement, the Commission shall dismiss any application that is incompatible with the Agreement.

79. The Commission interprets one of Samka Zuban's claims to be that the respondent Party violated her right to participate in criminal proceedings, because the Public Prosecutor in Sarajevo did not initiate criminal proceedings against two members of the Bosnian Serbs armed forces that were allegedly responsible for the abduction of Fikret Zuban, despite the fact that she reported the offense. The only Article under which this claim could fall is Article 6 of the Convention which protects the right of everyone to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" and guarantees to everyone charged with a criminal offense certain minimum rights.

80. However, the Commission recognizes that the exact text of Article 6 does not indicate that the applicant, as the relative of a crime victim, has a viable claim under that Article. The applicant has not been charged with a criminal offence nor has she sought to have her civil rights and obligations determined in any tribunal. Domestic law provides the applicant with the right to participate in criminal proceedings as an injured party because he is "a person injured or threatened in some personal or property right or by a crime" (Article 139(1)(6) of the Code of Criminal Procedure of the Federation of Bosnia and Herzegovina OG FBiH no. 43/98) (see paragraph 46 above). However, this right under domestic law is not guaranteed by Article 6. It follows that the applicant's claim under Article 6 is incompatible *ratione materiae* with the Agreement, and the Commission, therefore, declares it inadmissible.

### **4. Conclusion as to admissibility**

81. The Commission declares admissible the complaints in relation to the applicants' allegations of violation of their own 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 declares the remainder of the applicants' complaints on their own behalf inadmissible in accordance with Article VIII(2)(c) of the Agreement. The Commission also declares the application of Samka Zuban, in the part in which she complains that that the Public Prosecutor in Sarajevo did not initiate criminal proceedings, incompatible *ratione materiae* with the Agreement.

### **B. Merits**

82. 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 recognized 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)**

83. 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.”

84. In its previous case law, the Chamber recognized 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; 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*, judgment of 24 September 2002).

85. In the present applications, the applicants’ loved ones were taken away by soldiers of the RS Army or Serb paramilitary forces from the territory of Grbavica and Ilidža. The applicants opened tracing requests with the State Commission, and the applicant Samka Zuban also opened a tracing request with the ICRC as well, registering their loved ones as missing persons, but, they have never received any official information on the fate and whereabouts of their missing loved ones.

86. Based on witnesses who observed the abduction of members of the applicants’ loved ones, it is clear that members of the RS Army or Serb paramilitary forces were responsible for their disappearance. 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’ loved ones. 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 applicants about their missing loved ones. 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*.

87. 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)**

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

89. 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; 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”

(case no. CH/99/2150, *Unković*, decision on review of 6 May 2002, paragraph 114, Decisions January—June 2002).

90. 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).

91. Applying the above factors to the present cases, the Commission observes that the applicants have taken many steps to uncover the fate and whereabouts of their beloved ones. The applicant Samka Zuban specifically states that their two children have suffered intense psychological trauma as a result of these events. It is indisputable that all applicants have suffered because of the disappearances that occurred in Grbavica and Ilidža in 1992. 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, 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.

92. Applying the above factors to the respondent Party, the Commission observes that the authorities of the Republika Srpska have done nothing to help the applicants to clarify the fate and whereabouts of their beloved ones. Moreover, the Commission must note that the authorities of the Republika Srpska were directly involved in the disappearances in Ilidža and Grbavica. Nonetheless, the applicants have waited for more than twelve years for clarification of the fate and whereabouts of their beloved ones. 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.

93. 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 beloved ones.

### **3. Discrimination**

94. 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.”

95. 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

96. In summary, the Commission concludes that the respondent Party's failure to make accessible and disclose information requested by the applicants about their loved ones 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, 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

97. 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.

98. The Commission recalls that the applicant seeks to know the truth about their loved ones as well as compensation for their sufferings. 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.

99. In accordance with 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) 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 persons on behalf of whom the applicants filed the applications, including information on the circumstances of their abduction and detention, and in particular, whether they were killed or have died, and if so, the location of their mortal remains.

100. The Commission will further order the respondent Party to conduct a thorough investigation to uncover all the facts related to the fate of the missing members of the applicant's families from the day they were forcibly taken away by members of the RS Army, or Serb paramilitary forces both with a view to making such information known to the applicants and with a view to bringing the perpetrators to justice. The Republika Srpska 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 Organization 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.

101. 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 of the three applicants the total 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 beloved ones. This payment shall be made within one month from the date of receipt of the present decision.

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

103. 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**

104. For the above reasons, the Commission decides,

1. unanimously, that the applicants' 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 Republika Srpska to make accessible and disclose information requested by the applicants about their closest family members violates its positive obligations to secure respect for the applicants' 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 applicants about the truth of the fate and whereabouts of their closest family members, including conducting a meaningful and full investigation into their abduction, violates their 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 applications with respect to discrimination;

6. unanimously, to order the Republika Srpska, 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 applicant's missing family members including information on the circumstances of their abduction and detention, and in particular whether they were killed or have died, and if so, the circumstances of their death and the location of their 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 the applicants' closest family members. Such investigation should also be conducted with a view to bringing the perpetrators of any crimes committed against their loved ones to justice before the competent domestic or international criminal courts. The Republika Srpska 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 Republika Srpska to pay to the applicant Samka Zuban, no later than one month after the date of receipt of the present decision, the total sum of 5,000 (five thousand) Convertible Marks by way of compensation for her mental suffering;

9. unanimously, to order the Republika Srpska to pay to the applicant Jasmin Hamidović, no later than one month after the date of receipt of the present decision, the total sum of 5,000 (five thousand) Convertible Marks by way of compensation for his mental suffering;

10. unanimously, to order the Republika Srpska to pay to the applicant R.Š., no later than one month after the date of receipt of the present decision, the total sum of 5,000 (five thousand) Convertible Marks by way of compensation for his mental suffering;

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

12. unanimously, to order the Republika Srpska to report to the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, 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.

(signed)  
J. David YEAGER  
Registrar of the Commission



(signed)  
Jakob MÖLLER  
President of the Commission