



## **DECISION ON REVIEW**

**Case no. CH/01/8568**

**Ismeta BALIĆ**

**against**

**THE REPUBLIKA SRPSKA**

## **DECISION ON ADMISSIBILITY AND MERITS**

**Case no. CH/02/11196**

**Nafa PERVAN**

**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 applicant's request for review of the decision of the Second Panel of the Human Rights Chamber for Bosnia and Herzegovina ("the Chamber") on the admissibility of the application in case no. CH/01/8568;

Having considered the recommendation of the First Panel of the Chamber in case no. CH/01/8568;

Having regard to the Chamber's decision of 4 December 2003 accepting the applicant's request for review in case no. CH/01/8568;

Having considered the applicant's motion to renew the proceedings in case no. CH/02/11196;

Having considered its decision on motion for renewal of proceedings of 10 March 2004 in case no. CH/02/11196;

Noting that 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 X(2) of the Agreement, Articles 5 and 9 of the 2003 Agreement, and Rules 32, 54, 56, 57, and 63 of the Commission's Rules of Procedure:

## I. INTRODUCTION

1. The present applications were filed by the wives of Bosniak<sup>1</sup> men from the Municipality of Foča, who are missing persons. In April 1992, armed conflict broke out in Foča, starting with a military attack carried out by Serbs from Bosnia and Herzegovina (“Bosnian Serbs”) and leading to the eventual take-over of the entire Municipality. A large number of civilians, predominantly of Bosniak origin, were killed or fled the town. Hundreds of Bosniak men were detained in a correctional institution, referred to as *Kazneno-Popravni Dom* (“KP Dom”). During the course of these events, many persons of Bosniak origin went missing and were never seen again. Both presumed victims in the present cases have been registered as missing persons with the State Commission for Tracing Missing Persons (the “State Commission”) and the International Committee for the Red Cross (“ICRC”). Both applicants seek information about the fate and whereabouts of their missing husbands.

2. On 4 September 2003 in case no. CH/01/8568 and on 7 November 2003 in case no. CH/02/11196 the Chamber adopted decisions declaring the applications inadmissible. In both cases however, these earlier decisions were revoked and the applications were restored to the list of cases for further consideration.

3. The applications raise issues under Article 3 (prohibition of torture, 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 connection with these rights under Article II(2)(b) of the Agreement.

## II. SUMMARY OF THE PROCEEDINGS BEFORE THE CHAMBER AND THE COMMISSION

### A. Case no. CH/01/8568, *Ismeta Balić v. The Republika Srpska*

4. The application was filed with the Chamber on 13 December 2001.

5. In its decision of 4 September 2003, the Second Panel of the Chamber declared the application in case no. CH/01/8568, *Ismeta Balić v. The Republika Srpska* (“the second application”) inadmissible pursuant to Article VIII(2)(b) of the Agreement, on the ground that it was essentially the same as a previous application filed by the applicant in case no. CH/97/74, *Džemal Balić v. The Republika Srpska* (“the first application”). On 10 September 1998 the Second Panel had declared the first application inadmissible as being outside the Chamber’s competence *ratione temporis* pursuant to Article VIII(2)(c) of the Agreement, finding that no evidence was available suggesting that Mr. Balić was alive after 14 December 1995, the date when the Agreement entered into force.

6. On 31 October 2003 the Second Panel’s decision of 4 September 2003 was delivered pursuant to Rule 52 of the Chamber’s Rules of Procedures. On 4 November 2003 the applicant submitted a request for review of the decision, arguing that the Chamber had adopted other decisions on admissibility and merits relating to missing persons which were similar to her application, and also arguing that the judgement of Milorad Krnojelac by the International Criminal Tribunal for the Former Yugoslavia also constitutes new facts relevant to her application.

7. On 4 December 2003 the Chamber accepted the request for review, revoked the decision to declare the application inadmissible of 4 September 2003, and restored the application to the list of cases for further consideration. The Chamber found that the applicant, in her second

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<sup>1</sup> Citizens of Bosnia and Herzegovina of Muslim origin and Islamic belief refer to themselves as “Bosniaks”. For the most part throughout the text of this decision, the Commission adopts this terminology. However, in sections where the Commission is referring to other sources, Bosniaks are also called “Bosnian Muslims” and “Muslims”.

application, had raised new complaints that were previously not examined in her first application, in particular, her right to obtain information about the fate of her missing husband. The Chamber also found that the applicant is in a similar position as the applicants in case nos. CH/01/8569, CH/02/9611, CH/02/9613, CH/02/9614, CH/02/11195, and CH/02/11391, *Selima PAŠOVIĆ, S.N., Z.M., H.P., Zada NIKŠIĆ, and Ibrahim BURIĆ v. The Republika Srpska* ("Pašović and Others"), decision on admissibility and merits delivered on 7 November 2003, Decisions July-December 2003, and there was no reason to treat her application differently.

8. On 22 January 2004 the Chamber's decision was communicated to the parties in accordance with Rule 52 of the Chamber's Rules of Procedure, and according to the signed registered return receipt, it was received by the applicant on 24 January 2004.

9. On 22 January 2004 the application was transmitted to the respondent Party in connection with Articles 3 and 8 of the Convention and Article II(2)(b) of the Agreement. The observations of the respondent Party were received on 23 February 2004 and transmitted to the applicant on 2 March 2004.

10. On 29 July 2004, the ICRC responded to the Commission's information request.

11. On 23 August 2004 the Commission transmitted to the respondent Party the documents contained in the case file no. CH/97/74, *Džemal Balić v. The Republika Srpska*, since the applicant mentioned in her application that those documents should be considered as the documents for the second application.

#### **B. Case no. CH/02/11196, Nafa Pervan v. The Republika Srpska**

**12. The application was submitted to the Chamber on 24 June 2002. The application was transmitted to the respondent Party on 8 July 2003, in connection with Articles 3 and 8 of the Convention and Article II(2)(b) of the Agreement. The application was transmitted together with other applications related to persons missing from Foča Municipality as a result of the events in spring 1992. The observations of the respondent Party were received on 4 September 2003 and transmitted to the applicant. Due to a typographical error in mailing these observations to the applicant, the applicant did not receive them, although this was not discovered until later. The respondent Party specifically objected to the admissibility of the application of Nafa Pervan on the grounds that a tracing request for the applicant's husband had only been submitted in 2002.**

13. The Second Panel of the Chamber's decision on admissibility and merits regarding Foča missing person applications in case nos. CH/01/8569, CH/02/9611, CH/02/9613, CH/02/9614, CH/02/11195, and CH/02/11391, *Selima PAŠOVIĆ, S.N., Z.M., H.P., Zada NIKŠIĆ, and Ibrahim BURIĆ v. The Republika Srpska*, excluding the application of Nafa Pervan, was adopted on 5 November 2003 and delivered on 7 November 2003. The Chamber found violations of Articles 3 and 8 of the Convention and ordered the respondent Party to release to the applicants any information within their possession or control regarding the fate of their loved ones, to conduct a thorough investigation into the events in Foča, and to pay to the Missing Persons Institute 100,000 KM within six months.

14. On 7 November 2003 the Second Panel adopted a decision on admissibility declaring the application of Nafa Pervan inadmissible for non-exhaustion of domestic remedies. The Second Panel noted that, according to the evidence before it, the applicant had not approached any domestic or international body concerned with tracing missing persons until 2002, some ten years after the occurrence of the event in question. It also noted that the applicant filed her application with the Chamber almost simultaneously to addressing the ICRC and the State Commission. The

Second Panel therefore found that that the applicant did not, as required, exhaust the domestic remedies, and it decided to declare the application inadmissible. In accordance with the amended Rule 63 of the Chamber's Rules of Procedure, there was no possibility to submit a request for review of a decision on admissibility adopted by a Panel.

15. On 13 January 2004 the Chamber's decision was communicated to the parties in accordance with Rule 52 of the Chamber's Rules of Procedure, and according to the signed registered return receipt, it was received by the applicant on 14 January 2004.

16. On 20 January 2004 the Commission received a letter from the applicant with new information and the documents substantiating the newly submitted information. The applicant requested the Commission to review its decision in light of the newly submitted facts.

17. Because a request for review of the decision on admissibility was not permitted, the Commission considered the 20 January 2004 letter from the applicant as a motion for renewal of the proceedings in her case<sup>2</sup>. On 10 March 2004 the Commission accepted a motion by the applicant to renew the proceedings, revoked the 7 November 2003 decision to declare the application inadmissible, and restored the application to the list of cases for further consideration.

18. On 7 June 2004 the Commission's decision on motion for the renewal of proceedings was communicated to the parties in accordance with Rule 50 of the Commission's Rules of Procedure, and according to the signed registered return receipt, it was received by the applicant on 9 June 2004.

19. On 28 August 2004, the applicant's letter of 20 January 2004 was forwarded to the respondent Party for its comments.

20. On 27 October 2004, in response to the Commission's request, the applicant submitted additional information with a view to explain the exact location of her husband's disappearance.

### **C. JOINT PROCEEDINGS**

21. The Commission considered the admissibility and merits of both applications on 9 September 2004 and 3 November 2004. On the latter date the Commission decided to join the applications in accordance with Rule 32 of the Commission's Rules of Procedure, and on the same date adopted the present decision.

## **III. ESTABLISHMENT OF THE FACTS**

### **A. Historical context as recounted in the ICTY Judgment in *Prosecutor v. Krnojelac***

22. On 15 March 2002, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (the "ICTY") issued its judgment in case no. IT-97-25, *Prosecutor v. Milorad Krnojelac*, in which it found the accused guilty of crimes against humanity and violations of the laws or customs of war<sup>3</sup>. The judgment of the Appeals Chamber, issued on 17 September 2003, confirmed the factual findings of the Trial Chamber insofar as they are relevant for the purposes of the present decision.

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<sup>2</sup> According to the Chamber's amended Rule 63, paragraph 1, which entered into force on 7 October 2003, requests for review could thereafter only be filed against decisions on the merits or on remedies, and not against decisions on admissibility or to strike out.

<sup>3</sup> The entire text of the *Krnojelac* judgment of 15 March 2002 can be found both in English and in the national language on the ICTY's website ([www.un.org/icty](http://www.un.org/icty)).

23. As the *Krnojelac* judgment contains a comprehensive description of the historical context and underlying events taking place in the Foča Municipality in April 1992 and thereafter, established after long adversarial proceedings conducted by a reputable international court, the Commission will utilise this judgment to set forth the historical context and underlying facts important for a full understanding of the applications considered in the present decision.

24. On 8 April 1992, an armed conflict broke out in the town of Foča, mirroring events unfolding in other municipalities. Roadblocks were set up throughout the town. Sometime between 8.30 and 10.00 a.m., the main Serb attack on the town of Foča began, with a combination of infantry fire and shelling from artillery weapons in nearby Kalinovik and Miljevina. Serb forces included local soldiers as well as soldiers from Montenegro and Yugoslavia, and in particular a paramilitary formation known as the White Eagles. Most of the shooting and shelling was directed at predominantly Muslim neighbourhoods, in particular Donje Polje, but the Serbs also attacked mixed Muslim and Serb neighbourhoods such as Čohodor Mahala. Despite Muslim resistance, consisting mostly of infantry concentrated in Donje Polje and Čukovac, Serb forces proceeded to take over Foča area by area, including eventually the hospital and the KP Dom prison facility. The military attack resulted in large numbers of wounded civilians, most of them Muslims (*Krnojelac* judgment at paragraph 20, footnotes omitted).

25. During the conflict, many civilians hid in their houses, apartments, basements of their apartment buildings, or with relatives in other areas of town; others left Foča altogether, thinking they would be safer. Many of the Muslims in hiding gave up their personal weapons so that they could not be accused of participating in the conflict. The attack continued for six or seven days, although the worst shelling and damage took place in the first few days. The town of Foča fell to the Serbs sometime between 15 and 18 April 1992, with many of the Muslims who had remained during the fighting fleeing at that time (*Krnojelac* judgment at paragraph 21, footnotes omitted).

26. Following the successful military take-over of the town of Foča, the attack against the non-Serb civilian population continued. Outside the town, Serb forces carried on their military campaign to take over or destroy Muslim villages in the Foča Municipality (*Krnojelac* judgment at paragraph 22, footnotes omitted).

27. Non-Serbs were arrested throughout the Municipality of Foča. Muslim men were rounded up in the streets, separated from the women and children and from the Serb population. Others were arrested in their apartments or in the houses of friends and relatives, taken away from their workplaces, or dragged from their hospital beds (*Krnojelac* judgment at paragraph 36, footnotes omitted).

28. The illegal arrest and imprisonment of non-Serb civilian males was carried out on a massive scale and in a systematic way. Hundreds of Muslim men, as well as a few other non-Serb civilians, were detained at the KP Dom without being charged with any crime. At all times from the end of the fighting until the end of 1994, up to several hundred Muslim civilian men were thus arbitrarily interned at the KP Dom. They were detained there for periods lasting from four months to more than two and a half years (*Krnojelac* judgment at paragraph 41, footnotes omitted).

29. Apart from a short period at the beginning of their detention at the KP Dom, Muslim detainees were denied any contact with the outside world or with their families, and (for a long time) with the ICRC. The legality of their detention was never reviewed by the Serb authorities (*Krnojelac* judgment at paragraph 42, footnotes omitted).

30. Many non-Serb detainees were taken out of the KP Dom during the period April 1992 to August 1993, allegedly to be exchanged or in order to carry out certain tasks such as picking plums. Many of them did not come back and were never seen again (*Krnojelac* judgment at paragraph 48, footnotes omitted).

31. In exhumations conducted in the Foča area, 375 bodies were identified by the State Commission for Tracing Missing Persons. All but one of these were Muslim. The remaining one was a Montenegrin, who had been married to a Muslim. In late 1994, the last remaining Muslim detainees at the KP Dom were exchanged, marking the end of the attack upon those civilians and the achievement of a Serb region ethnically cleansed of Muslims. By the end of the war in 1995, Foča had become an almost purely Serb town. Foča was renamed "Srbinje" after the conflict, meaning "Serb town" (*Krnojelac* judgment at paragraph 49).

## **B. Facts of the individual applications**

### **1. Case No. CH/01/8568, Ismeta Balić**

32. The application was introduced by Ms. Ismeta Balić, in her own name and on behalf of her husband, Mr. Džemal Balić, who is indicated as the alleged victim. The applicant, her husband, and their two children lived in the town of Foča before the armed conflict.

33. According to the applicant, Džemal Balić was arrested at their home by three Bosnian Serb police officers on 10 May 1992 and taken to the KP Dom prison facility in Foča. The applicant managed to visit her husband on 11 May 1992 in prison. This was the last time she saw her husband, as her further attempts to see or contact her husband were unsuccessful. On 18 September 1992 Mr. Balić was allegedly removed from the KP Dom and since then his whereabouts are unknown.

34. In the period following his abduction, the applicant states that she approached local members of the Serbian Democratic Party to appeal for their help in finding her missing husband, but to no avail. The applicant and other members of her family also approached various persons and institutions of the Republic of Bosnia and Herzegovina to obtain information regarding her husband. When the KP Dom facility was shut down in 1994, the applicant states that her husband was not among those released.

35. The applicant submitted a tracing request for Džemal Balić to the present day State Commission in 1992.

36. On 20 April 1995 a tracing request was opened for Džemal Balić with the ICRC. In its letter received on 29 April 2004, the ICRC further explained that the "case has been submitted to the authorities concerned within the framework of the Working Group on Persons Unaccounted for in Bosnia and Herzegovina", and the tracing request remains open.

37. On 8 July 1996 the Republika Srpska State Commission for Exchange of Prisoners of War and Missing Persons issued a document noting that it has no records establishing Džemal Balić as a prisoner of war. They obtained, however, some indication that Džemal Balić allegedly had been taken to be exchanged somewhere in the direction of the Federal Republic of Yugoslavia.

### **2. Case No. CH/02/11196, Nafa Pervan**

38. The application was submitted by Nafa Pervan on behalf of Zijo Pervan, her husband. The applicant, her husband, and their daughter lived in Jelašac, near Kalinovik, in Foča Municipality before the war. On 18 June 1992 Zijo Pervan disappeared in the area of Husad Mountain, near village Jeleč, Municipality of Foča. The applicant states that she heard from other survivors that he was last seen in a gunpowder warehouse in Jelašac. At the time of his disappearance, his daughter was just four months old.

39. In 1994 the applicant reported her husband missing to the Red Cross of the Republic of Bosnia and Herzegovina.

40. On 9 March 1998 the State Commission issued a certificate registering Zijo Pervan as a

missing person as of 18 June 1992.

41. On 7 June 2002 the Ministry of Defence of the Federation of Bosnia and Herzegovina issued a certificate according to which Zijo Pervan's whereabouts are unknown after 18 June 1992.

42. On 13 June 2002, as per the Commission's request, the ICRC confirmed that the applicant's husband has been missing since 18 June 1992, although it appears that the tracing request with the ICRC was opened in 2002.

### **C. Facts related to the search for missing persons from the Foča area**

43. In order to comply with the *Pašović and Others* decision, as well as other missing persons decisions of the Chamber, the Government of the Republika Srpska established a Working Group on 29 January 2004 to submit a report to the Commission.

44. On 7 June 2004 the Commission received a preliminary report from the Republika Srpska on the steps taken by it to comply with the orders given in the *Pašović and Others* decision (see paragraph 13 above). Although the application of Ismeta Balić was not included in the *Pašović and Others* decision, the respondent Party nevertheless detailed steps taken to respond to the allegations contained in the application of Ismeta Balić. Specifically, the respondent Party investigated the identity of the three persons identified by the applicant as having taken away Džemal Balić: one potential suspect is in a detention facility of the International Tribunal for the former Yugoslavia, one potential suspect died in 2003, and the third potential suspect lives in Serbia. The respondent Party also stated that Džemal Balić is not in the records of having been in the KP Dom. More generally regarding the events in Foča, the respondent Party undertook several informational interviews with persons who were in positions of authority in Foča at the relevant time, but their statements reveal nothing that would be of assistance in ascertaining the fate or whereabouts of any missing persons from the Foča area.

45. On 19 October 2004 the respondent Party submitted its final report to fulfil the Chamber's orders in the *Pašović and Others* decision. In this report, the respondent Party informed the Commission that in August 2004 the Federal Commission for Missing Persons conducted an exhumation of 153 bodies that are believed to have been held in the KP Dom in Foča in the spring of 1992. The bodies have been taken to Tuzla for further identification and analysis.

## **IV. RELEVANT LEGISLATION**

### **A. Agreement on Refugees and Displaced Persons**

46. 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**

47. 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).

48. 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, ....”

49. 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.”

50. 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.”

51. 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.”

52. 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**

53. 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 46 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”.

54. 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.”

55. 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).

56. 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**

57. 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 Bosnian Muslims, 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**

58. 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.

59. 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 (the “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**

60. 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.

61. 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. None the less, the State Commission does continue to serve citizens of Bosniak origin in some capacities; for example, the State Commission, not the Federal Commission, registered the missing loved ones and provided them with evidence of such registration.

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

62. 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; analyzing 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.

63. 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**

64. 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 “*expresse[d]* 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**

65. 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.

## V. COMPLAINTS

66. The applicants are wives of Bosniak men who have disappeared and presumably have been killed following the armed take-over of the Municipality of Foča by Bosnian Serbs in the spring of 1992. They 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 whereabouts of their loved ones last seen in 1992. They seek to know the truth. They also seek compensation for their continuing suffering.

## VI. SUBMISSIONS OF THE PARTIES

### A. The respondent Party

#### 1. With regard to case no. CH/01/8568, Ismeta Balić

67. In its observations of 23 February 2004, the Republika Srpska contests the applicant's allegation that she "received information from the Republika Srpska that Mr. Balić was taken for exchange in the direction of Federal Republic of Yugoslavia".<sup>4</sup> It also states that there is no evidence that the applicant applied to the United Nations Human Rights Committee together with the other applicants, but the respondent Party presumes so. In the remainder of its written observations, it maintains all arguments stated in its observations of 4 September 2003, related to the other Foča cases (see paragraph 70 below). It also expresses its disagreement with the Chamber's 4 December 2003 decision on request for review in this case establishing that the application contains new complaints, which were not previously examined. The Republika Srpska opines that the present application is essentially the same as the first application in case no. CH/97/74, *Džemal Balić v. The Republika Srpska*, which was previously examined by the Chamber.

68. Consequently, the respondent Party also considers the compensation claims submitted by the applicant to be ill-founded.

#### 2. With regard to case no. CH/02/11196, Nafa Pervan

69. On 4 September 2003 the Republika Srpska submitted observations on the admissibility and merits of the application, along with six other similar applications from family members of persons missing from Foča. With regard to all of the applications, including Nafa Pervan's, the Republika Srpska claims that the applications, as regards their factual statements, are incomplete, vague, and of little informative value for the purpose of any action to be taken by the respondent Party. Furthermore, the Republika Srpska expresses doubts as to whether the applicants are seriously pursuing their cases, since a number of them appear to have applied to the State Commission or the ICRC only recently.

70. The respondent Party suggests that the applications should be declared inadmissible in their entirety for a variety of reasons. First, the applicants failed to address any organ of the respondent Party to obtain information on the fate of their missing family members; therefore, they failed to exhaust a domestic remedy available to them. In this context, the respondent Party states that no tracing requests pertaining to the present applications were transmitted to it by the ICRC, presumably because "these requests have been lodged with the ICRC only in 2002". Second, as the underlying events occurred before the entry into force of the Agreement, it is asserted that the Chamber lacks jurisdiction *ratione temporis* to consider the cases. Third, since there had been an

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<sup>4</sup> The Commission notes that the document issued by the State Commission for the Exchange of War prisoners and Missing Persons containing some indications that Mr. Džemal Balić had allegedly been exchanged is contained in the file in case no. CH/97/74, *Džemal Balić v. The Republika Srpska*, and was transmitted to the respondent Party on 28 August 2004, after the receipt of these observations.

“organised visit” by the applicants to the United Nations Human Rights Committee, the respondent Party, proposes the applications should, alternatively, be declared inadmissible on the grounds of *lis alibi pendens*, pursuant to Article VIII(2)(d) of the Agreement.

71. On the merits, the Republika Srpska argues that the applications are ill-founded because the applicants were not subjected to any treatment that falls within the scope of Article 3, and there was no interference with or violation of the applicant’s rights under Article 8 of the Convention. In support, the respondent Party reiterates the arguments on the admissibility of the cases, having regard in particular to the fact that some of the applicants appear to have only in recent times applied to the State Commission and to the ICRC with a view to gaining information about their missing family members. In light of this, no rights of the applicants under the Convention have been violated.

## **B. The applicants**

72. The applicants maintain all their complaints raised in their applications. Both applicants believe that they have exhausted all available domestic remedies in the search for their missing husbands. The applicant Ismeta Balić asserts that the respondent Party held her husband in detention in the KM Dom, and therefore should be able to inform her what happened to him, if he was killed, she wishes to know where they placed his mortal remains.

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

### **A. Admissibility**

73. The Commission recalls that the applications were introduced to the Human Rights Chamber under the Agreement, and, 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**

74. 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...”.

75. 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.

76. The respondent Party argues that the applicants have failed to exhaust effective domestic remedies in that they have not addressed any of its organs with a request to obtain information on

the fate of their missing family members. Although the applicants in the present cases undeniably requested information from the State Commission and the ICRC, it appears that they did not formally directly address organs of the Republika Srpska.

77. 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.”

78. Furthermore, the Commission recalls that under the *Process for tracing persons unaccounted for* (see paragraphs 53 *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 three representatives of the Republika Srpska (see paragraph 54 above). As can be seen above, the applicant Ismeta Balić addressed the State Commission in 1995 or 1996, and Nafa Pervan in 1998. The applicant Ismeta Balić also addressed the ICRC in 1995 and the applicant Nafa Pervan addressed the ICRC in 2002. The Commission further notes that the ICRC has expressly confirmed that the “cases have been submitted to the Authorities concerned within the framework of the Working Group on Persons Unaccounted for in Bosnia and Herzegovina. Since no answer has been provided to these Tracing Requests as of today they still have a status of pending cases.”

79. 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 all tracing requests were provided to representatives of the Republika Srpska through the Working Group, the Commission considers that the relevant authorities of the respondent Party were made aware of the applicants’ requests for information about the fate and whereabouts of their loved ones missing from Foča through the *Process for tracing persons unaccounted for*. In the present cases the respondent Party has had ample time to gather such information, and the authorities have provided no information whatsoever on the fate and whereabouts of the applicants’ missing loved ones.

80. Considering that the applicants have addressed both the State Commission and the ICRC with a tracing request and that they registered their loved ones as missing from Foča, the Commission concludes that the applicants have exhausted the remedy provided for in Annex 7 for the purposes of Article VIII(2)(a) of the Agreement. Therefore, the Commission rejects this ground for declaring the applications inadmissible.

## **2. *Ratione temporis***

81. In accordance with Article VIII(2) of the Agreement, “the [Commission] shall decide which applications to accept.... In so doing, the Chamber 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.”

82. The respondent Party also objects to the applications as incompatible *ratione temporis* with the Agreement.

83. In accordance with the Chamber’s and Commission’s 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 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).

84. Thus, 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).

85. 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)).

86. The Commission recalls that the applicant Ismeta Balić opened a tracing request with the ICRC in 1995. The applicant Nafa Pervan opened a tracing request with the State Commission on 9 March 1998, and also reported her husband missing with the Red Cross of the Republic of Bosnia and Herzegovina in 1994. Yet, more than 12 years after the events in question, and almost nine years after the Agreement entered into force, the applicants have not been officially informed about the fate and whereabouts of their missing loved ones. Therefore, the allegations contained in the applications concern a violation of the human rights of the applicants 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 they are admissible.

### **3. *Lis alibi pendens***

87. As the Chamber explained in the case of *Savka Kovačević v. The Federation of Bosnia and Herzegovina* (case no. CH/98/1066, decision on review delivered on 12 October 2001, Decisions July–December 2001, paragraph 45), the principle of *lis alibi pendens* generally prevents an applicant who has proceedings pending against a respondent Party in one court from having additional proceedings against the same respondent Party in another court on the same subject matter. This principle is reflected in Article VIII(2)(d) of the Agreement, which provides that, “The Chamber may reject or defer further consideration if the application concerns a matter currently pending before any other international human rights body responsible for the adjudication of applications or the decision of cases, or any other Commission established by the Annexes to the General Framework Agreement.”

88. The respondent Party submits that the applications should be declared inadmissible on the ground that the applicants have addressed the United Nations Human Rights Committee in order

to obtain information on the fate of their missing family members. In this context, the Commission notes that the applicants have not made such a statement. The respondent Party, in its observations on the admissibility and merits of the applications of 4 September 2003, submitted that "... it can be assumed that the applicants have initiated proceedings before the Commission of the UN through the law office of Mesud Đonko and colleagues from Mostar, which was authorised to represent applicants from Srebrenica to claim compensation before the United Nations."

89. The Commission notes that the Human Rights Committee of the United Nations was established to monitor the implementation of the International Covenant on Civil and Political Rights and to examine individual petitions under the procedure governed by the Optional Protocol to the Covenant. However, on 27 November 2003, the Chamber has ascertained that the applicants have not addressed the Human Rights Committee of the United Nations in any form and that no case concerning them has been registered for consideration by the Committee under the Optional Protocol. In the circumstances, the Commission will reject the objection to the admissibility of the applications under Article VIII(2)(d) of the Agreement.

#### **4. *Res iudicata***

90. 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: ... (b) The [Commission] shall not address any application which is substantially the same as a matter which has already been examined by the Chamber < [Commission] > or has already been submitted to another procedure of international investigation or settlement."

91. In case no. CH/01/8568 *Ismeta Balić v. The Republika Srpska* the respondent Party submits that the present application is essentially the same as the application in case no. CH/97/74 *Džemal Balić v. The Republika Srpska*, which was previously examined by the Chamber.

92. As the Chamber already explained in *Ismeta Balić v. The Republika Srpska* (case no. CH/01/8568, decision on review of 4 December 2003, paragraph 12, Decisions June-December 2003) the two applications at issue not only differ in name of the applicant, but also, new complaints relating to Ms. Balić's own grievances that were previously not examined are contained in the second application, in particular, her right to information as to the fate of her husband. In these circumstances, the Commission will reject the objection to the admissibility of this application under Article VIII(2)(b) of the Agreement.

#### **5. Conclusion as to admissibility**

93. As explained above, the Commission has rejected the respondent Party's objections to the applications based upon failure to exhaust domestic remedies, incompatibility *ratione temporis* and *lis alibi pendens*, and *res iudicata*. As no other grounds for declaring the applications inadmissible have been raised or appear from the applications, the Commission declares the applications admissible in their entirety with respect to claims arising or continuing after 14 December 1995 under Articles 3 and 8 of the Convention, and discrimination in connection with these rights under Articles II(2)(b) of 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:

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

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

97. In the present applications, it appears that the applicants’ husbands were taken into custody by Bosnian Serb forces during the take-over of the Municipality of Foča in May and June 1992. In case no. CH/01/8568 Ismeta Balić, the applicant’s husband was detained in the KP Dom in Foča, and never seen again. Each applicant has obtained a certificate either from the State Commission, the ICRC, or both, registering their husbands, as a missing person from Foča. The applicants have not received any official information on the fate and whereabouts of her missing loved one.

98. As the Trial Chamber of the ICTY stated in the *Krnjelac* judgment, at the relevant time, Bosniak men in Foča were rounded up in the streets, separated from the women and children and from the Serb population. Hundreds of Bosniak men were detained at the KP Dom without being charged with any crime. Numerous detainees were taken out of the KP Dom, many of whom did not come back and were never seen again (see paragraphs 22 to 31 above).

99. From these underlying facts the Commission concludes that the authorities of the respondent Party had within their “possession or control” information about the Bosniak men from Foča who were detained in the KP Dom or who disappeared without being previously held in custody. In any event, the possibility that information and evidence pertaining to the fate of these persons was lost or destroyed by members of the armed forces of the respondent Party does not relieve the respondent Party of its positive obligations under Article 8 of the Convention. Rather, it appears that the authorities of the Republika Srpska arbitrarily and without justification failed to take any serious action whatsoever to locate, discover, or disclose information sought by the applicants about their missing loved ones.

100. The respondent Party, in connection with the application of Ismeta Balić, submitted that it has taken steps to locate the persons mentioned in the application as responsible for the abduction of her husband, which steps consisted of identifying the three persons named in the application as having taken Džemal Balić and stating their present whereabouts. The respondent

Party also interviewed a few persons who had no substantive information about the events in Foča in spring 1992. On 29 October 2004 the Commission received the final report from the respondent Party in the *Pašović and Others* decision, which also details that in August 2004 in the area of Miljevina, Foča Municipality, the Federal Commission exhumed 153 bodies, which are believed to be persons held in the KP Dom in the spring of 1992. The Commission welcomes the continued search for the missing persons, but also notes that the respondent Party submitted no indication that it had assisted the Federal Commission in identifying the graves where the August 2004 exhumations took place. The efforts detailed in response to the *Pašović and Others* decision can be described at best, as superficial. In no way have the applicants in the present applications been provided with information on the fate of their husbands. Such inaction or passivity is a breach of the Republika Srpska's responsibilities due under Annex 7 to the General Framework Agreement and the *Process for tracing persons unaccounted for*.

101. Therefore, the Commission concludes that the respondent Party has breached its positive obligations to secure respect for the applicants' rights protected by Article 8 of the Convention in that it has failed to make accessible and disclose information requested about the applicants' missing loved ones.

## **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; see also case no. CH/99/3196, *Palić*, decision on admissibility and merits of 9 December 2000, paragraphs 75-80, Decisions January—June 2001). 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).

104. 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).

105. Applying the above factors to the applicants in the present cases, the Commission observes that the applicants are the wives of Bosniak men who have been missing from Foča Municipality since the spring of 1992. The applicants registered the missing persons with the State Commission and the ICRC. That the applicants have suffered as a result of the events taking place in Foča in 1992 and the resultant loss of their loved ones under such conditions is indisputable and apparent from the applications. Such emotional suffering inflicted on the applicants, 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 the authorities of the Republika Srpska have done almost nothing to clarify the fate and whereabouts of the presumed victims of the Foča events or to take any other action to relieve the suffering of their surviving family members. In particular, they have not investigated the facts concerning the illegal detention of hundreds of Bosniak men at the KP Dom or the circumstances of disappearances of Bosniak men occurring in Foča between April and June 1992. They have interviewed only a few of the participating members of its armed forces who took part in the operation and have not contacted the surviving family members. Also they have 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 ICTY) to clarify the events at Foča. Moreover, the Commission must note that the authorities of the Republika Srpska were directly involved in the disappearances at Foča. None the less, the applicants and other survivors of the Foča events of April 1992 and the months thereafter have waited for more than 12 years for clarification of the fate and whereabouts of their missing loved ones by the competent authorities. As no meaningful information has been forthcoming, the reaction of the authorities of the Republika Srpska can only be described as “complacency” or indifference, which aggravates an already tragic situation.

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 rights of

the applicants to be free from “inhuman and degrading treatment”, as guaranteed by Article 3 of the Convention, in that it has failed to inform the applicants about the truth of the fate and whereabouts of their loved ones missing from Foča during the period of May to June 1992.

### **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 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, including conducting a meaningful and effective investigation into the events in Foča in April 1992 and the months thereafter, violates their rights to be free from inhuman and degrading treatment, as guaranteed by Article 3 of the Convention. In the 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 loved ones, who may be presumed victims of the take-over of Foča in 1992 and the events thereafter. 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 case law (see, CH/01/8365 *et al.*, *Selimović and Others v. The Republika Srpska*, decision on admissibility and merits of 3 March 2003, paragraphs 205-210 and CH/01/8569 *et al.*, *Pašović and Others v. The Republika Srpska*, decision on admissibility and merits of 5 November 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 the 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 Republika Srpska to conduct a thorough investigation to uncover all the facts related to missing persons' fate from the day when they were taken from their house or captured, with a view to making known such information 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 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. The Commission recalls that the Chamber in its decision *Pašović and Others* ordered the Republika Srpska to make a lump sum contribution to the Institute for Missing Persons for the collective benefit of all the applicants and the families of the victims of the Foča events in the total amount of one hundred thousand Convertible Marks (100,000 KM), to be used in accordance with the Statute of the Institute for Missing Persons for the purpose of collecting information on the fate and whereabouts of missing persons from the Municipality of Foča. Although the Chamber recognised that the applicants personally suffered pecuniary and non-pecuniary damages, it did not make any individual awards of compensation. The ordered lump sum, used for the collective benefit of all the applicants, in the Chamber's view, provided the best form of reparation for the violations found.

116. The Commission notes that the financial remedy ordered in *Pašović and Others* decision is for the collective benefit not only of the applicants in that decision but also for the families of all victims of the Foča events. In view of this, the Commission will not order any further monetary remedy.

## IX. CONCLUSIONS

117. 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 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 missing loved ones violates its positive obligations to secure respect for their rights to private and family life, as guaranteed by Article 8 of the Convention, 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 missing loved ones, including conducting a meaningful and effective investigation, violates their rights 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 Agreement;
5. unanimously, that it is not necessary to examine whether the applicants were discriminated against in the enjoyment of their rights under Articles 3 and 8 of the European Convention on Human Rights;

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 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 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' 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 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 dismiss any remaining claims for compensation; and

9. unanimously, to order the Republika Srpska to submit to the Commission, or its successor institution, a full report on the steps taken by it to comply with these orders, no later than six months after the date of receipt of the present decision.

(signed)  
J. David YEAGER  
Registrar of the Commission



(signed)  
Jakob MÖLLER  
President of the Commission