DECISION ON ADMISSIBILITY AND MERITS

(delivered on 7 November 2003)

Case no. CH/02/10074

Ljiljana, Anka, Lazar and Nataša POPOVIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 7 October 2003 with the following members present:

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

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Antonia DE MEO, Deputy Registrar

Having considered the aforementioned application introduced pursuant to Article VIII(1) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

Adopts the following decision pursuant to Article VIII(2) and XI of the Agreement and Rules 52, 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The applicants are the wife, Ljiljana, mother, Anka, and two children, Lazar and Nataša, of Dragoljub Popović (also referred to as Dragan), who was abducted in 1993 in the Travnik area, the Federation of Bosnia and Herzegovina (hereinafter "the Federation of BiH"). Dragoljub Popović was of Croat/Serb origin. The applicants complain that their human rights have been violated by the Federation of BiH in that the authorities have not acted on their numerous requests for information on the disappearance of Dragoljub Popović, including a search for his remains and a criminal investigation into his disappearance. The applicants Nataša and Lazar were ages 8 and 11, respectively, at the time of their father's disappearance.

2. The application raises issues under Article 3 (prohibition of inhuman and degrading treatment), Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy) of the European Convention on Human Rights (hereinafter: "the Convention").

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced and registered on 29 April 2002. The applicants are represented by Branka Praljak, a lawyer from Novi Travnik.

4. The Chamber requested additional information from the applicants on 13 November 2002. The applicants replied on 28 November 2002.

5. The application was transmitted on 9 December 2002 to the respondent Party for its observations on the admissibility and merits of the application under Articles 3, 8 and 13 of the Convention.

6. The respondent Party submitted its observations on the admissibility and merits on 10 February 2003. The respondent Party's observations were transmitted to the applicants on 12 February 2003. The Chamber received the response from the applicants on 19 March 2003.

7. On 24 March 2003, 14 April 2003, 25 April 2003, 19 May 2003, 26 June 2003, 24 and 25 July 2003, the respondent Party submitted additional observations, in response to requests from the Chamber. These observations were also forwarded to the applicants. The applicants submitted additional observations on 12 May 2003.

8. The Chamber considered the admissibility and merits of the application on 6 December 2002, 4 April 2003, 2 July 2003, 4 September 2003, and 7 October 2003 and adopted the present decision on the latter date.

III. ESTABLISHMENT OF THE FACTS

A. Facts regarding the disappearance of Dragoljub Popović and the applicants' search for their loved one

9. Dragoljub Popović, who was of mixed Croat/Serb origin, worked in the Travnik Police Department until June 1993, at which time he requested to be transferred to his former company. His request was granted, and he began working at the company "Lašvansko" in Travnik on 11 July 1993.

10. On the evening of 19 October 1993, the applicant Ljiljana Popović (hereinafter: "Mrs. Popović") was waiting for her husband at a friends' house across the street from their apartment building. As her husband did not come at the set time, she began to try to find out what had happened. She learned that another person had been taken away from their building by the Army of the Republic of Bosnia and Herzegovina ("RBiH Army"). She contacted both the civil police and the military police the same evening. Neither was able to respond with any information regarding whether

her husband had been detained. Several persons promised that they would do everything possible to obtain the release of her husband, if he had been detained.

11. Over the course of the next few months, Mrs. Popović contacted numerous civilian and military local authorities requesting them to provide information regarding the fate of her husband. At several times she believed that her husband would be returned to her based on the promises of certain persons of authority in Travnik. Among the international actors, she contacted the International Committee of the Red Cross in Zenica, UNPROFOR Zenica, and the Head of the European Monitors in Zenica.

12. Mrs. Popović learned that her husband had been detained along with four other individuals, I.F., I.R., K.P. and D.A., who were all later released by 7 December 1993. The detainees were first taken to barracks in Travnik, and then to a camp in Orašac, near the village of Mehurić, Travnik Municipality.

13. On 20 May 1994, Mrs. Popović gave a detailed account of her husband's disappearance at the local police department in Vitez, then part of the "Croat Republic of Herzeg-Bosna". At this time she stated that she did not know if her husband was still in detention or alive at all.

14. Based on the oral statements of two witnesses to the killing of her husband, I.F. and K.P., Mrs. Popović obtained a sketch of the location of her deceased husband's body. Mrs. Popović did not specify when she learned that her husband had been killed nor when she obtained this sketch.

15. On 6 May 1997, Mrs. Popović approached the Federation Ombudsmen's Office in Zenica. Mrs. Popović provided the Federation Ombudsmen with the sketch of the location of her husband's body and requested that the Federation Ombudsmen take appropriate action to help her find the remains of her husband and initiate criminal proceedings into her husband's disappearance and death.

16. On 16 November 2001, the applicants found out that Dragoljub Popović's death was included in an indictment on the web site of the International Criminal Tribunal for the former Yugoslavia (ICTY). In this way, the applicants learned that Enver Hadžihasanović, Mehmed Alagić, and Amir Kubura are indicted on a number of counts of violations of the laws of war. The applicants refer to the original indictment in their application; however, the Chamber has confirmed that the original and amended indictments include nearly the same charges as to Dragoljub Popović. Specifically, paragraph 63(e) of the amended indictment, dated 11 January 2002 in case number IT-01-47-PT, reads:

> "63. The killings of imprisoned and otherwise detained Bosnian Croats and Bosnian Serbs include, but not limited to…
>
> e) The killing by ritual beheading of the Bosnian Serb detainee Dragan POPOVIĆ, a civilian, by 'Mujahedin' subordinated to the ABiH 3rd Corps OG 'Bosanska Krajina' on 20 October 1993 in the Orašac Camp—Travnik Municipality."

17. The indictment states that both Enver Hadžihasanović, the then Commander of the 3rd Corps of the RBiH Army, and Mehmed Alagić, the then Commander of the 3rd Corps Operational Group "Bosanska Krajina" of the RBiH Army, knew, or had reason to know, of the actions of various RBiH armed forces under their command, and specifically in the "Orasac (sic) Camp, staffed and operated by 'Mujahedin' within the ABiH 3rd Corps OG 'Bosanska Krajina', from about 15 October 1993 to at least 31 October 1993."

B. Facts regarding the investigation and criminal proceedings concerning the disappearance and death of Dragoljub Popović

1. Higher Public Prosecutor's Office Travnik, seat in Vitez

18. The Chamber notes that at the relevant times mentioned in this decision, the Higher Public Prosecutor's Office Travnik, seat in Vitez, and the Higher Court Travnik, seat in Vitez, were bodies of the "Croat Republic of Herzeg-Bosna", and not organs of the current Central-Bosnia Canton of the Federation of BiH. The judicial organs of the "Croat Republic of Herceg-Bosna" existed, at the times relevant to this decision, as a parallel structure to the judicial organs in the Federation of BiH. By referring to these organs, the Chamber does not intend to imply any recognition of the existence of the "Croat Republic of Herceg-Bosna".

19. On 21 November 1995, the Deputy Higher Public Prosecutor Travnik, seat in Vitez, in case nos. KT-547/95 and KT-561/95 against Enver Hadžihasanović, Mehmed Alagić and Esad Spahić, issued a "request to investigate" to the Higher Court Travnik, seat in Vitez. The murder of Dragoljub Popović at the concentration camp in Mehurić is mentioned in this request. The final point of the request calls for the arrest of the mentioned individuals.

20. On 16 August 1996, the same Public Prosecutor issued a "Request to Expand the Investigation" in the criminal proceedings against the suspected Enver Hadžihasanović, Mehmed Alagić, and Enes Sipić[1], to include an additional 29 individuals suspected of various crimes, document no. KT-157/96. The request details the events and crimes that each individual is suspected of committing. The request calls for those 29 individuals to be interviewed as suspects, as well as additional witnesses, whose names are also included. The final point of the request calls for each of the suspected individuals to be arrested. In this request, the death of Dragoljub Popović is not specifically mentioned.

21. The Chamber has not been informed of any further actions taken by the Higher Public Prosecutor's Office Travnik, seat in Vitez, or the Higher Court Travnik, seat in Vitez, with regard to the "request to investigate" issued in 1995, and the "request to expand the investigation" issued in 1996.

2. Zenica-Doboj Cantonal Public Prosecutor's Office

22. The Chamber observes that the judicial organs in Zenica-Doboj Canton were officially re-organised by the Law on the Office of the Public Prosecutor, which came into effect on 15 April 1997 (see paragraph 97 below), and the Law on the Courts of Zenica-Doboj Canton, which also came into effect on 15 April 1997 (see paragraph 95 below). Prior to the entry into force of these laws, the Zenica-Doboj Cantonal Public Prosecutor's Office (hereinafter: Cantonal Public Prosecutor's Office in Zenica) was referred to as the Higher Public Prosecutor in Zenica and the Zenica-Doboj Cantonal Court (hereinafter: Cantonal Court in Zenica) was referred to as the Higher Court in Zenica. The Chamber will use the present-day terms to describe these organs throughout this decision.

23. On 8 May 1997, the Federation Ombudman's Office in Zenica, as per the submission of Mrs. Popović, requested the Cantonal Public Prosecutor's Office in Zenica to undertake appropriate measures, in accordance with the law, to exhume the body of Dragoljub Popović and to instruct the appropriate court to initiate an investigation into his disappearance and death. The letter was addressed to the Cantonal Public Prosecutor in Zenica, as neither the Central-Bosnia Cantonal Court in Travnik (hereinafter: the "Cantonal Court in Travnik"), nor the Central-Bosnia Cantonal Public Prosecutor's Office (hereinafter: the "Cantonal Public Prosecutor's Office in Travnik") had been established yet. The letter was also forwarded to the State Commission for Tracing Missing Persons and the President of the Cantonal Court in Zenica, although the Ombudsmen noted that they believed the responsible body for the exhumation was the Public Prosecutor and the Cantonal Court in Zenica,

[1] The Chamber notes that the original "Request to Investigate" was directed against an Esad Spahić, not Enes Sipić.

and not the State Commission for Tracing Missing Persons. Attached to this letter was the sketch of the location of the body of Dragoljub Popović.

24. On 24 May 1997, the Cantonal Public Prosecutor's Office in Zenica formed file no. KTA 48/97 related to the disappearance and death of Dragoljub Popović.

25. On 7 June 1997, the Cantonal Public Prosecutor's Office in Zenica requested the investigative judge at the Cantonal Court in Zenica to conduct an exhumation in accordance with Article 155 of the Code of Criminal Procedure of the Socialist Federal Republic of Yugoslavi (see paragraph 81 below).

26. In June 1997, the Cantonal Public Prosecutor's Office in Zenica requested the Travnik Police Department to gather necessary information to bring to light the events surrounding the death of Dragoljub Popović, and enclosed in this request was the letter from the Federation Ombudsmen's Office in Zenica to the Cantonal Public Prosecutor's Office in Zenica, dated 8 May 1997, as well as a copy of the sketch of the location of the remains of Dragoljub Popović submitted by Mrs. Popović.

27. On 24 June 1997, the Cantonal Public Prosecutor's Office in Zenica sent a letter to the Federation Ombudsmen's Office in Zenica explaining what had been done thus far in the case, and what remained to be done. First, the Public Prosecutor in Zenica had requested that the Cantonal Court in Zenica retain jurisdiction over the case, in accordance with Article 109 of the Law on Courts of Zenica-Doboj Canton (see paragraph 95 below), as the Cantonal Court in Travnik had not yet been established. The Cantonal Court in Zenica accepted. The Public Prosecutor in Zenica then submitted a proposal to the Travnik Police Department to request them to gather information regarding Mrs. Popovic's allegations and to verify the sketch that Mrs. Popović submitted, in accordance with Article 153, paragraph 2 of the Code of Criminal Procedure of the SFRY (see paragraph 80 below). The Deputy Public Prosecutor concluded by noting that once she receives charges from the Travnik Police Department against an unknown person, her office will initiate a proposal to the investigative judge to conduct an investigation, in accordance with Article 155, paragraph 1, of the Code of Criminal Procedure of the Socialist Federal Republic of Yugoslavia (see paragraph 81 below).

28. On 24 June 1997, the Federation Ombudsmen's Office in Zenica received a letter from the State Commission for Tracing Missing Persons stating that the case did not fall within its responsibility, as the Federation Ombudsmen had indicated in their letter dated 8 May 1997.

29. On 8 July 1997, the Federation Ombudsmen's Office in Zenica sent a letter to Mrs. Popović informing her of the actions taken. In this letter, the Federation Ombudsmen explained that it was known to them that the Higher Public Prosecutor's Office in Travnik, seat in Vitez, had initiated an investigation and the gathering of certain evidence; however, "their ability is limited as the location of the body of her killed husband is on the territory which is under the control of the Army of BiH".

30. On 5 November 1997, Mrs. Popović sent a written request to the Ministry of the Interior, Central-Bosnia Canton, requesting that the exhumation of her deceased husband Dragoljub Popović take place. Mrs. Popović attached the documents she had received from the Federation Ombudsmen's Office in Zenica and noted that to date nothing had been done in the case.

3. Travnik Municipal Public Prosecutor's Office

31. On 16 October 1998, the entire file no. KTA-48/97 from the Cantonal Public Prosecutor's Office in Zenica was transferred to the Travnik Municipal Public Prosecutor's Office, "as the organ with the territorial and subject-matter jurisdiction". The Travnik Municipal Public Prosecutor's Office noted that they received the file on 20 October 1998.

32. On 5 November 1998, the Travnik Municipal Public Prosecutor's Office requested the Travnik Police Department to gather the appropriate information related to the investigation into the death of Dragoljub Popović, including taking the statements from the suggested witnesses, the same request that the Cantonal Public Prosecutor's Office in Zenica had earlier made (see paragraph 27 above).

33. On 14 April 1999, the Travnik Municipal Public Prosecutor's Office issued a "proposal to undertake investigative actions", in accordance with Article 147 of the Code of Criminal Procedure of

the Federation of BiH (see paragraph 86 below), to the investigative judge of the Travnik Municipal Court requesting the following actions: obtain the statement of Mrs. Ljiljana Popović, the witness I.F., and other persons mentioned in I.F.'s statement, and conduct an exhumation and autopsy of the body of Dragoljub Popović. In the explanation it is noted that the Travnik Police Department did not respond to either the request of the Cantonal Public Prosecutor's Office in Zenica, nor to the request of the Travnik Municipal Public Prosecutor's Office of 5 November 1998 regarding gathering the appropriate information related to the death of Dragoljub Popović.

34. On 27 May 1999, the investigative judge of the Travnik Municipal Court, in act no. Kri: 30/99, obtained the statement from I.F. related to being taken to the concentration camp Orašac, and the torture and mistreatment of Dragoljub Popović. In this eleven-page, typewritten statement, I.F. describes witnessing the beheading of Dragoljub Popović on 20 October 1993, and burying his body. He provides many details surrounding the murder of Dragoljub Popović, and all other events which occurred during his detention. For example, as to the murder, he describes that a certain person called "Hasan" was ordered to ax the victim's head, but as he passed out, another individual in military uniform continued. He referred to the person in charge of the execution as an "Arab". Two other abducted persons also witnessed the execution, D.A. and K.P.

35. On 16 September 1999, the investigative judge of the Travnik Municipal Court took a statement, act no. Kri. 50/99, from Miloš Popović, the victim's brother, related to the circumstances in which Dragoljub Popović was taken to the concentration camp and related to information he has obtained related to his brother's torture.

36. On 31 May 1999, the Travnik Municipal Court investigative judge issued a procedural decision, act no. Kri-50/99, on the basis of Article 247 of the Code of Criminal Procedure of the Federation of BiH (see paragraph 87 below), whereby he ordered the exhumation of the body of Dragoljub Popović in Orašac, Travnik Municipality. The procedural decision notes that the Travnik Municipal Public Prosecutor's Office, according to the act dated 14 April 1999, initiated an investigation. The exhumation of the body was specifically mentioned as integral to the mentioned investigation. The exhumation was scheduled for 3 June 1999, and a number of experts and witnesses were to be present.

37. On 3 June 1999, the investigative judge of the Municipal Court in Travnik, in case no. Kri-50/99, made an official note for the file recording his phone conversation with representatives from the Office of the High Representative (hereinafter: "the OHR"). Namely, on 2 June 1999, representatives from the OHR warned that, as the body is of Serb origin, the exhumation should not take place without the presence of representatives from the Commission for Tracing Missing and Detained Persons of the Republika Srpska, who had not even been informed of the exhumation. In consultation with the Travnik Municipal Public Prosecutor's Office, the investigative judge of the Travnik Municipal Court decided to indefinitely postpone the exhumation.

38. On 10 June 1999, the Federal Commission for Missing Persons—Croat side, addressed a letter to the Cantonal Court in Travnik, stating that the exhumation of a number of individuals, including Dragoljub Popović, would take place on 16 June 1999.

39. On 16 June 1999, under the jurisdiction of the Cantonal Court in Travnik, the attempted exhumation of a number of individuals, including Dragoljub Popović, took place. The Cantonal Court in Travnik, in act no. Kri-6/99, took minutes of the attempted exhumation, dated 18 June 1999. Twenty experts participated, including representatives from the Federal Commission for Missing Persons, Croat and Bosniak sides. The location of the attempted exhumation of Dragoljub Popović was determined upon the instruction of Mrs. Popović, who was also present. Mrs. Popović stated for the record that her husband was killed on 19 October 1993 by *mujahedin* and that more details of his abduction and murder can be obtained from Zlatko Šuman, as well as from statements from other witnesses given to "the Commission for Exchange of War Prisoners functioning at that time". The minutes show that, as no remains were found on 16 June 1999, the search continued on 17 June 1999, with the use of machines. This search also did not reveal any human remains.

40. On 11 January 2000, the investigative judge of the Travnik Municipal Court gave the file no. Kri. 50/99 to the Travnik Municipal Public Prosecutor's Office for their opinion as to which court had

appropriate jurisdiction. After reviewing the case, the Travnik Municipal Public Prosecutor's Office determined that the territorial and subject-matter jurisdiction lies with the Cantonal Public Prosecutor's Office in Travnik.

4. Cantonal Public Prosecutor's Office in Travnik

41. On 17 April 1999, the Cantonal Public Prosecutor's Office in Travnik received the case nos. KT-547/95 and 561/95 from the Higher Public Prosecutor's Office in Travnik, seat in Vitez. The contents of these files are described in paragraphs 19 and 20 above. Upon receiving these two files, the Cantonal Public Prosecutor's Office in Travnik stated that they formed a new case file, no. KT-56/99-RZ, to join these two above-mentioned cases.

42. On 15 November 1999, the Cantonal Prosecutor's Office in Travnik directly handed to the authorised representative of the ICTY a copy of the file no. KT-56/99-RZ for their opinion on the case file. This hand-over took place in the Cantonal Public Prosecutor's Office in Travnik. The ICTY asked for a short summary of the case file to be prepared and translated into English, and thus the case file was not officially considered to be delivered to the ICTY at this time.

43. On 25 January 2000, the Travnik Municipal Public Prosecutor's Office transferred the entire file in the case of the disappearance and murder of Dragoljub Popović to the Cantonal Public Prosecutor's Office in Travnik as the court with the territorial and subject-matter jurisdiction. This transfer included both file no. KTA: 122/98, the file of the Travnik Municipal Public Prosecutor's Office, and file no. Kri: 50/99, the file from the Travnik Municipal Court.

44. On 26 January 2000, the Cantonal Public Prosecutor's Office in Travnik received the files and recorded the file as no. KTA 11/2000 in their records, in which the facts were to be established in relation to the criminal offence committed against the injured party Dragoljub Popović in 1993 by an unknown perpetrator.

45. Upon the request of the ICTY as to which cases should be considered as priority for the ICTY to review, the Cantonal Public Prosecutor's Office in Travnik, in a letter dated 31 January 2000, identified file no. KT-56/99-RZ as a priority.

46. As per the instructions of the ICTY, the Cantonal Prosecutor's Office in Travnik prepared a summary of the file no. KT-56/99-RZ and translated it into English, and handed over this document to the authorised representative of the ICTY on 7 April 2000, which is considered the official date of the delivery of the case file no. KT-56/99-RZ to the ICTY. In this cover letter addressed to the ICTY, the Cantonal Public Prosecutor notes that a copy of the case file no. KT-56/99-RZ was handed over to the ICTY on 15 November 1999, in accordance with the Rules of the Road of 18 February 1996, and that the present summary has been prepared as per the request of the ICTY. The cover letter describes the following: the particulars about the proceedings to date in the case, biographical information of the 32 suspected individuals, circumstances under which the crime occurred, and a summary of the available evidence.

47. The respondent Party states that the delivery of the case file no. KT-56/99-RZ to the ICTY was done in accordance with the Rules of the Road of 18 February 1996, and that the wife of the victim, Dragoljub Popović, was not informed of this, as the Law on Criminal Procedure of the Federation of BiH does not prescribe that it is necessary to do so.

48. The Chamber observes that the respondent Party has submitted conflicting information as to whether the files received on 26 January 2000 were added to the case no. KT-56/99-RZ, which was submitted to the ICTY. Upon reviewing the cover letter sent to the ICTY summarising the case file, it would appear to the Chamber that the files which contained the statements from the witnesses I.F. and Miloš Popović were not transferred to the ICTY, that is, the case no. KTA 11/2000 was not included in the case file no. KT-56/99-RZ, which was sent to the ICTY for its review.

49. On 9 May 2000, the Cantonal Public Prosecutor's Office in Travnik issued a "proposal to undertake investigative actions", act no. KTA 11/2000, requesting the Cantonal Court in Travnik to obtain the statement from the witness R.H. The proposal to undertake investigative actions noted

from the case file that it appears that there could be a potential violation of Article 154, paragraph 1 of the Criminal Code of the Federation of BiH, that is, war crimes against civilians, although the perpetrator is unknown. It also appears that there were witnesses to the crime, who could provide reliable information related to the crime and help identify the perpetrator. For these reasons, R.H. was called as a witness.

50. On 29 August 2000, the witness R.H. gave his statement, act no. Kri 13/00, to the investigative judge at the Cantonal Court in Travnik. From his statement, it is apparent that he worked as a cook in the *mujahedin* unit in Orašac for a two-and-a-half-year period, starting on 25 June 1993. The witness R.H. states that he has never heard of Dragoljub Popović, nor was he aware of any murder which took place at the camp. He states that the unit took part in military actions in the area of Novi Travnik and Vitez, but as the cook he did not know any details as to these military actions. As to a person named "Hasan", who may have taken part in the beheading of Dragoljub Popović, he states that a Hasan A. aged 69 or 70, was present in the unit but that he was disabled and primarily lay in bed as he was unable even to go to the bathroom unassisted. He states that he did not see Hasan A. participate in any murder. He believes Hasan A. is now in a home for the elderly in Travnik. As to the leadership, R.H. stated that there was one commander named "Abulharis", who was killed in Žepče, and one named "Abumali", who was Algerian and who he believes left the country. On 30 August 2000, this statement was delivered to the Cantonal Public Prosecutor's Office in Travnik.

51. On 12 September 2000, the Cantonal Public Prosecutor's Office in Travnik issued a decision, on the basis of Article 41, paragraph 3, of the Law on Criminal Procedure of the Federation of BiH, that the entire case file no. KTA 11/2000, which regards war crimes against the civilian population by an unknown perpetrator against Dragoljub Popović, in accordance with Article 126 of the Criminal Code of the Federation of BiH, "be placed in the archives until the perpetrator is found" (see paragraphs 83 and 91 below).

52. On 10 October 2000, the Cantonal Public Prosecutor in Travnik made an official note for the file that file no. KTN-3/2000 (formerly file no. KTA 11/2000) must be filed in case no. KT-56/99-RZ and the case will, from this date forward, be conducted under the file no. KT-56/99-RZ.

53. In its submission dated 25 April 2003, the respondent Party stated that the Cantonal Public Prosecutor's Office in Travnik "has not received a final decision from the ICTY in the case". The respondent Party highlights that it cannot influence the speed by which the ICTY "decides in any case, nor in this case in particular".

54. The Chamber is aware that the ICTY has issued its opinion in the case no. KT-56/99-RZ in May 2003. However, the respondent Party informed the Chamber on 19 August 2003, that the Cantonal Public Prosecutor's Office in Travnik has not received the opinion of the ICTY.

55. As of 4 February 2003, the International Committee of the Red Cross had no record of Dragoljub Popović being reported as a missing person.

IV. LEGAL FRAMEWORK

A. Legal framework regarding co-operation with the International Criminal Tribunal for the former Yugoslavia

1. Statute of the International Criminal Tribunal for the former Yugoslavia

56. The Statute of the ICTY provides for the concurrent jurisdiction of the ICTY and the national courts. Article 9, paragraphs 1 and 2, states:

"1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991."

2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal."

57. Article 29 of the Statute provides that:

"1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(a) the identification and location of persons;
(b) the taking of testimony and the production of evidence;
(c) the service of documents;
(d) the arrest or detention of persons;
(e) the surrender or the transfer of the accused to the International Tribunal."

58. The expressions "International Tribunal" and "Tribunal" refer to the ICTY, which has its seat in The Hague.

59. The Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution No. 808 (1993) was presented to the UN Security Council on 3 May 1993 (S/25704). In Section 64 it explains the principle of the concurrent jurisdiction of the ICTY and the national courts, as follows:

"In establishing an international tribunal for the prosecution of persons responsible for serious violations committed in the territory of the former Yugoslavia since 1991, it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to such acts. Indeed national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures."

2. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia

60. Rule 8 entitled "Request for Information", provides that:

"Where it appears to the Prosecutor that a crime within the jurisdiction of the Tribunal is or has been the subject of investigations or criminal proceedings instituted in the courts of any State, the Prosecutor may request the State to forward all relevant information in that respect, and the State shall transmit such information to the Prosecutor forthwith in accordance with Article 29 of the Statute."

61. Rule 9 regarding the Prosecutor's request for deferral provides as follows:

"Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:

(i) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime;

(ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or

(iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal,

the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such court defer to the competence of the Tribunal."

62. Rule 10 regarding the formal request for deferral provides as follows:

"(A) If it appears to the Trial Chamber seised of a proposal for deferral that, on any of the grounds specified in Rule 9, deferral is appropriate, the Trial Chamber may issue a formal request to the State concerned that its court defer to the competence of the Tribunal.

(B) A request for deferral shall include a request that the results of the investigation and a copy of the court's records and the judgement, if already delivered, be forwarded to the Tribunal.

(C) Where deferral to the Tribunal has been requested by a Trial Chamber, any subsequent trial shall be held before another Trial Chamber."

3. The Constitution of Bosnia and Herzegovina

63. The Constitution of Bosnia and Herzegovina entered into force "upon signature of the General Framework Agreement", which occurred on 14 December 1995. Article II, sub-point 8 entitled "Co-operation", sets forth that, "All competent authorities in Bosnia and Herzegovina shall co-operate with and provide unrestricted access to: .... the International Tribunal for the Former Yugoslavia (and in particular shall comply with orders issued pursuant to Article 29 of the Statue of the Tribunal); ...." In Article III, it sets forth the relations and responsibilities between Bosnia and Herzegovina and the Entities, including the Federation of Bosnia and Herzegovina. Article III, Section 1 provides that, among other things, the institutions of Bosnia and Herzegovina have primary responsibility for "international and inter-entity criminal law enforcement...." Article III, Section 3(a) provides that, "All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities." Thus, matters of criminal law that do not have an international or inter-entity component lie in the competency of the Entities.

4. Law on Extradition at the Request of the International Tribunal

64. On 6 April 1995, the Presidency of the Republic of Bosnia and Herzegovina signed the Decree with Force of Law on Extradition at the Request of the International Tribunal (Official Gazette of the Republic of Bosnia and Herzegovina—hereinafter "OG RBiH" – no. 12/95). This decree became effective on the date of its publication in the Official Gazette, 10 April 1995. On 1 September 1995, this decree was adopted as law (OG RBiH no. 33/95). As its title reflects, this law only provides a legal framework regarding extradition procedures, and it does not provide for any legal framework to implement the other Rules of Procedure of the ICTY, such as deferral of cases to the ICTY, nor does it provide any regulation of other circumstances in which a war-time event (crime) may be the subject of investigation and prosecution both in Bosnia and Herzegovina and before the ICTY.

5. The Rome Agreement of 18 February 1996

65. On 18 February 1996, the signatories to the General Framework Agreement for Peace in Bosnia and Herzegovina, meeting in Rome, agreed on certain measures to strengthen and advance the peace process. The second sub-paragraph of paragraph 5, entitled "Co-operation on War Crimes and Respect for Human Rights", reads as follows:

"Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal. Procedures will be developed for expeditious decision by the Tribunal and will be effective immediately upon such action."

66. The above-quoted provision will be referred to in this decision as the Rules of the Road.

67. On 10 September 1996, the ICTY Prosecutor sent a document entitled "Procedures and Guidelines for Parties for the Submission of Cases to the International Criminal Tribunal for the Former Yugoslavia Under the Agreed Measures of 18 February 1996" (hereinafter: "the Procedures and Guidelines") to the Prime Minister of Bosnia and Herzegovina, the Ministries of Justice of the Federation of Bosnia and Herzegovina and of the Republika Srpska, and the Ministries of Foreign Affairs of the Federal Republic of Yugoslavia and of the Republic of Croatia. This document provides for the procedure to submit cases to the Office of the Prosecutor of the ICTY, for the contents of the request, and of the response of the ICTY Prosecutor.

68. The Procedures and Guidelines state that the purpose of submitting cases for the review by the Office of the Prosecutor is to advise the parties as to whether "the evidence is sufficient by international standards to justify either the arrest or indictment of a suspect...." The reports submitted to the Office of the Prosecutor must contain the particulars of an identifiable individual person to whom the allegations relate. As to the Prosecutor's response, the Procedures and Guidelines clarify that the Prosecutor is acting in an advisory capacity only, and does not take decisions and that, "Responsibility and control of the cases will remain at all times with the authorities of the party concerned, and the cases will be subject to the law of the territory concerned." As to deferral to the ICTY, the Procedures and Guidelines state that if the Prosecutor considers that the case should be prosecuted before the ICTY, "the Prosecutor will inform the party of the intention to seek deferral according to the procedures set out in the Tribunal's rules." As to other types of communication with the ICTY, the Procedures and Guidelines state that the Prosecutor is not acting as an investigator or judge, and will not hear witnesses or issue reasoned opinions. If proceedings are continued before a national court in a case which has been reviewed by the Prosecutor, the party who submitted the case for review shall inform the Prosecutor as soon as a date for a trial is set, or other disposal of the case.

69. At the public hearing before the Chamber in case nos. CH/96/21 *Čegar*, CH/97/41 *Marčeta* and CH/97/45 *Hermas*, the Agent of the Federation of BiH stated, in relation to the legal status of the Rome Agreement, as follows:

> "Legally, the Rome Agreement, The Rules of the Road, dated 18 February 1996, for the Federation of Bosnia and Herzegovina, has an obligatory character. The Federal Ministry of Justice in Sarajevo has delivered the text of this Agreement promptly on time to all courts within the Federation of Bosnia and Herzegovina in order to comply with it. The courts within the Federation were informed on time of its content and it is in force and legally binding because the Parties who signed the Agreement of 18 February 1996 in Rome agreed about the procedure and instructions to the Parties in the event of prosecution for war crimes against the civilian population and other crimes against humanity under international law" (case no. CH/97/45, *Hermas*, decision on admissibility and merits delivered on 18 February 1998, paragraph 18, Decisions and Reports 1998).

6. Law on the Extradition of Suspected Individuals at the Request of the ICTY

70. On 28 June 1996, the Federation of BiH adopted the Law on the Extradition of Suspected Individuals at the Request of the ICTY (Official Gazette of the Federation of Bosnia and Herzegovina — hereinafter "OG FBiH"— no. 9/96), which came into effect on the day of its publication in the Official Gazette, 30 June 1996. This law is almost identical to the law of the Republic of Bosnia and Herzegovina, (see paragraph 64 above) that is to say that this law also does not address numerous aspects of co-operation with the ICTY.

7. Law on the Court of Bosnia and Herzegovina

71. The Law on the Court of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina— hereinafter "OG BiH"— nos. 29/00, 16/02, 24/02 and 3/03), which established the Court of Bosnia and Herzegovina, entered into force on 28 November 2000. In accordance with Article 13, the Court shall have jurisdiction to decide any issue related to international and inter-entity

law enforcement, including "decisions on the transfer of convicted persons, and on the extradition and surrender of persons, requested from any authority in the territory of Bosnia and Herzegovina, by foreign states, or international courts or tribunals."

B. Legal framework related to the duty to investigate and prosecute

1. International law

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

72. 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).

73. 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, …."

Although the Declaration, as such, may not be binding in international law, it gives clear guidance, based upon international human rights law, as to what constitutes a violation of such law, and the responsibilities of the State in terms of investigation and prosecution into the crime.

74. 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."

75. 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."

76. 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."

77. 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. Domestic legal framework

78. The Chamber notes that during the times relevant to this decision, that is from 1995 until the present, there have been three different Codes of Criminal Procedure and Criminal Codes in force in the Federation of BiH. The Code of Criminal Procedure of the Socialist Federal Republic of Yugoslavia and the Criminal Code of the Socialist Federal Republic of Yugoslavia were applicable until the entry into force of the Code of Criminal Procedure and the Criminal Code of the Federation of BiH on 28 November 1998. The most recent Code of Criminal Procedure and Criminal Code entered into force on 1 August 2003. This decision will not make use of the provisions of the 2003 Code of Criminal Procedure and 2003 Criminal Code, as the Chamber is examining the activities of the authorities of the Federation of BiH from the period of December 1995 until the date of the adoption of this decision. All references to the provisions of the Criminal Code and Code of Criminal Procedure of the Federation of BiH refer to the 1998 Codes, unless otherwise stated.

a. Code of Criminal Procedure of the Socialist Federal Republic of Yugoslavia

79. The Code of Criminal Procedure of the Socialist Federal Republic of Yugoslavia was adopted as the Republic of Bosnia and Herzegovina's law by the Decree with the Force of Law of the Presidency of the Republic of Bosnia and Herzegovina on 2 June 1992, and continued as the law applicable within the territory of Bosnia and Herzegovina under paragraph 2 ("Continuation of Laws") of Annex II ("Transitional Arrangements") to Annex 4 ("Constitution of Bosnia and Herzegovina") of the General Framework Agreement for Peace in Bosnia and Herzegovina (Official Gazette of the Socialist Federal Republic of Yugoslavia— hereinafter "OG SFRY"— nos. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90 and 45/90; OG RBiH — nos. 2/92, 8/92, 10/92, 16/92 and 13/94).

80. Article 153 corresponds to Article 145 of the 1998 Code of Criminal Procedure of the Federation of BiH (see paragraph 85 below). Article 153, paragraph 2, provided that:

"If from the charge itself the competent prosecutor is unable to judge whether the allegation contained in the charge is probable or if the data in the charge does not furnish sufficient basis for a decision as to whether the conduct of an inquiry is required, or if the competent prosecutor has only heard a rumor that a crime was committed, and especially if the perpetrator is unknown, the competent prosecutor, if not able to on his own, or through another organ, shall request that the organs of the Ministry of Interior gather the necessary information and take other steps to discover the crime and perpetrator (Articles 151 and 152). The public prosecutor can at any moment request the Ministry of Interior to inform it of the actions taken."

81. Article 155 corresponds to Article 147 of the 1998 Code of Criminal Procedure of the Federation of BiH (see paragraph 86 below). Article 155, paragraph 1, provided that:

> "When the perpetrator of a crime is unknown, the competent prosecutor may request that certain investigative actions be taken by the investigative judge, given the circumstances of the case, and if it would be meaningful to do that even before the investigation is formally initiated. If the competent prosecutor believes that any individual investigative actions should be taken by the investigative judge, or if it an autopsy or exhumation of a corpse should be done, he shall propose the taking of that action to the investigative judge. If the investigative judge does not agree with that proposal, he shall ask the panel of judges to decide on the issue (Article 23, paragraph 6)."

b. Code of Criminal Procedure of the Federation of Bosnia and Herzegovina

82. The Code of Criminal Procedure of the Federation of BiH (OG FBiH nos. 43/98, 23/99, 50/01 and 27/02) entered into force on 28 November 1998. As mentioned above, the present decision will not refer to the provisions of the most recent Code of Criminal Procedure of the Federation of BiH (OG FBiH no. 35/03), which became applicable on the territory of the Federation of BiH only on 1 August 2003.

83. The decision of the Cantonal Public Prosecutor's Office in Travnik to place the file no. KTA-11/2000 in the archives was taken in accordance with paragraph 3 of Article 41. Articles 41-47, generally describe the competencies of the competent prosecutor. Article 41, paragraph 3, states: "The competent prosecutor also undertakes other actions as prescribed in this law."

84. Paragraph 1 of Article 143, provides the following related to the involvement of the law enforcement agencies in investigating and prosecuting a crime:

> "If there are grounds to suspect that a crime which is *ex officio* prosecuted has been committed, law enforcement agencies must take the steps necessary to locate the perpetrator of the crime, to prevent the perpetrator or accomplice from hiding or fleeing, to detect and secure the clues to the crime and articles which might serve as evidence, and to gather all information which might be of use to effectively conduct the criminal proceedings."

85. The applicants consider that the organs of the respondent Party have violated their duty to investigate prescribed in paragraph 2 of Article 145, which provides that:

> "If from the charge itself the competent prosecutor is unable to judge whether the allegation contained in the charge is probable or if the data in the charge does not furnish sufficient basis for a decision as to whether an inquiry is required, or if the competent prosecutor has only heard a rumour that a crime was committed, and especially if the perpetrator is unknown, the competent prosecutor, shall demand that law enforcement agencies gather the necessary information and take other steps to discover the crime and perpetrator (Articles 143 and 144), and these agencies have a duty to extend the requested assistance. The law enforcement agencies have a duty to immediately report to the competent prosecutor on the measures they have undertaken, and if they are not able to undertake them, they shall report to the competent prosecutor immediately the reasons for their inability to undertake such measures."

86. On 14 April 1999, the Travnik Municipal Public Prosecutor's Office issued a proposal to undertake investigative actions in accordance with Article 147. On 9 May 2000, the Cantonal Public Prosecutor's Office in Travnik issued a second such proposal, also in accordance with Article 147. Paragraphs 1 and 2 of Article 147 state:

> "1. When the perpetrator of a crime is unknown, the competent prosecutor may request that certain investigative actions be taken by the investigative judge, or if an autopsy or exhumation of a corpse should be done, he shall propose the taking of that action to the

investigative judge. If the investigative judge does not agree with that proposal, he shall ask the panel of judges to decide on the issue (Article 21, paragraph 6).

2. Records of investigative actions which have been taken shall be furnished to the competent prosecutor. "

87. The procedural decision no. Kri-50/99 issued by the Municipal Public Prosecutor's Office in Travnik ordering the exhumation of Dragoljub Popović was issued on the basis of paragraph 1 of Article 247, which reads as follows:

"The examination and autopsy of a corpse shall be always performed if in the case of death there is a suspicion or it is evident that the death is caused by a criminal offence or in relation to a criminal offence. If a corpse is already buried, the exhumation shall be determined for the examination and autopsy of it."

88. As to the joining of the case nos. KT-56/99-RZ and KTA 11/2000, the respondent Party states that this was done in accordance with Article 28, paragraph 8, which provides that the competent court for conducting the unified proceedings decides on the joining of cases. Appeals against decisions on the joining of cases are not permitted.

c. Criminal Code of the Socialist Federal Republic of Yugoslavia

89. The Criminal Code of the Socialist Federal Republic of Yugoslavia was adopted as the Law of the Republic of Bosnia and Herzegovina by the Decree with the Force of Law of the Presidency of the Republic of Bosnia and Herzegovina on 2 June 1992 and continued as the law applicable within the territory of Bosnia and Herzegovina under paragraph 2 ("Continuation of Laws") of Annex II ("Transitional Arrangements") to Annex 4 ("Constitution of Bosnia and Herzegovina") of the General Framework Agreement for Peace in Bosnia and Herzegovina (OG SFRY nos. 44/76, 36/77, 56/77, 34/84, 74/87, 57/89, 3/90, 38/90 and 45/90; OG RBiH nos. 2/92, 8/92, 10/92 and 13/94). The Higher Public Prosecutor's Office in Travnik, seat in Vitez, referred to the following articles in relation to the suspects Enver Hadžihasanović, Mehmed Alagić, and Esad Spahić: Article 141 concerning the crime of genocide; Article 142 concerning war crimes against the civilian population; Article 143 concerning war crimes against the injured and ill; Article 144 concerning war crimes against prisoners of war; and, Article 151, paragraph 1 concerning the destruction of cultural and historical objects and monuments. The request to expand the investigation against another 29 individuals cited that the persons were suspected of having violated Articles 142, 144, and 143 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (see paragraphs 19 and 20 above).

d. Criminal Code of the Federation of Bosnia and Herzegovina

90. As stated above, the most recent Criminal Code of the Federation of BiH (OG FBiH no. 36/03) entered into force on 1 August 2003. However, this decision will rely on the provisions of the 1998 Criminal Code of the Federation of BiH (OG FBiH nos. 43/98, 2/99, 15/99, 29/00 and 59/02).

91. The respondent Party states that the decision by the Cantonal Public Prosecutor's Office in Travnik to place the file no. KTA 11/2000 in the archives until the perpetrator is found was taken in accordance with Article 126, which prescribes that genocide and war crimes are offenses that are not subject to the statute of limitations.

92. The Cantonal Public Prosecutor's Office in Travnik noted that there is a potential violation of Article 154, paragraph 1 in the case of the disappearance and death of Dragoljub Popović. This article concerns war crimes against civilians and provides that a person found guilty shall be punished with a sentence of imprisonment for not less than five years or long term imprisonment.

C. The relevant laws related to the allocation of jurisdiction within the Federation of Bosnia and Herzegovina

1. Constitution of the Federation of Bosnia and Herzegovina

93. The Constitution of the Federation of BiH entered into force on 30 March 1994 at midnight. It provides, in Article 1, as amended on 5 June 1996, for the establishment of the Federation of BiH:

> "(1) Bosniacs and Croats as constituent peoples, along with Others, and citizens of Bosnia and Herzegovina from the territories of the Federation of Bosnia and Herzegovina, in the exercise of their sovereign rights, transform the internal structure of the Federation territories, ... so the Federation of Bosnia and Herzegovina is now composed of federal units with equal rights and responsibilities.
>
> 2) The Federation of Bosnia and Herzegovina is one of two entities composing the state of Bosnia and Herzegovina, and has all power, competence and responsibilities which are not within, according to the Constitution of Bosnia and Herzegovina, the exclusive competence of the institutions of Bosnia and Herzegovina."

2. Agreement on Implementation of the Federation of Bosnia and Herzegovina

94. The Agreement on Implementation of the Federation of BiH was concluded at Dayton and signed on 9 November 1995 by representatives of the Republic of Bosnia and Herzegovina, the Federation of BiH, and the Republic of Croatia (OG FBiH 8/95). This Agreement, which was a side agreement to the General Framework Agreement for Peace in Bosnia and Herzegovina which entered into force on 14 December 1995, clarified, among other things, the competencies of the State of Bosnia and Herzegovina and the Federation of BiH. Chapter II, Section 5 states that the Federation of BiH is responsible for "justice".

3. Law on the Courts of Zenica-Doboj Canton

95. The Deputy Cantonal Public Prosecutor in Zenica called upon Article 109 of the Law on the Courts of Zenica-Doboj Canton (Official Gazette of Zenica-Doboj Canton no. 4/97), which entered into force on 15 April 1997, in determining that the the Cantonal Court in Zenica shall have jurisdiction over the submission of the applicant Ljiljana Popović. Article 109 reads:

> "Until the formation and actual working of the competent cantonal courts in the territory of the Federation of BiH, the Cantonal Court will conduct the proceedings for which the Higher Court in Zenica was previously the competent court."

4. Law on the Courts of Central-Bosnia Canton

96. According to Article 33 of the Law on the Courts of Central-Bosnia Canton (Official Gazette of Central-Bosnia Canton no. 9/97, 8/98, 1/00, 15/01, 2/02, 10/02 and 16/02), the municipal courts shall have jurisdiction for any crime for which the sentence is a monetary fine or a prison sentence of a maximum of 15 years imprisonment. This law also established the location and territorial competencies of the municipal courts. This law was published on 18 December 1997 and came into force eight days later.

5. Law on the Office of the Public Prosecutor of Zenica-Doboj Canton

97. The Law on the Office of the Public Prosecutor of Zenica-Doboj Canton (Official Gazette of Zenica Doboj Canton no. 4/97) came into force on 15 April 1997. Article 64 provides that the Cantonal Public Prosecutor's Office and the municipal public prosecutors' offices shall start working within 3 months of the date the law enters into force. This law provides that the Cantonal Public Prosecutor's Office and the municipal public prosecutors' offices shall be competent for cases which were formerly pending before the Higher Public Prosecutor's Office and the basic public prosecutors' offices.

6. Law on the Office of the Public Prosecutor of Central-Bosnia Canton

98. The Law on the Office of the Public Prosecutor of Central-Bosnia Canton (Official Gazette of

Central-Bosnia Canton nos. 7/97 and 15/01) came into force on 8 November 1997. This law was replaced by a new Law on the Office of the Public Prosecutor imposed by the High Representative on 21 August 2002 (Official Gazette of Central-Bosnia Canton no. 12/02 and 14/02). The Law on the Office of the Public Prosecutors issued in 1997 provided that Cantonal Public Prosecutor's Office in Travnik and the municipal public prosecutors' offices shall be competent for cases which were formerly pending before the Higher Public Prosecutor's Office and the basic public prosecutors' offices.

7. Criminal Code of the Republic of Bosnia and Herzegovina

99. The respondent Party asserts that the case of Dragoljub Popović fell under the Municipal Court's jurisdiction initially because in question was the criminal act of murder under Article 36 paragraph 1 of the Criminal Code of the Republic of Bosnia and Herzegovina (OG RBiH nos. 2/92, 8/92, 10/92 and 13/94). This provision states that murder is defined as the taking of another person's life, and the sentence is a minimum of five years.

8. Law on Establishment of Criteria for Determining First Instance Jurisdiction of Municipal and Cantonal Courts and the Office of the Prosecutors in criminal cases in the Federation of Bosnia and Herzegovina

100. According to Article 2 of this Law (OG FBiH no. 32/01), municipal courts have jurisdiction over crimes punishable by pecuniary fines or where the prison sentence is up to 10 years. According to Article 3, cantonal courts are competent over cases where the sentence is defined as prison over 10 years or long-term imprisonment. The respondent Party asserts that according to this Law, which came into force on 1 August 2001, the jurisdiction for the crime of murder was transferred to the cantonal courts.

D. National Activities regarding Missing Persons

101. During the armed conflict in Bosnia and Herzegovina, various commissions existed or were established for the primary purpose of exchanging prisoners of war. One commission represented the interests of Bosniaks, another represented the interests of Croats, and a third represented the interests of Serbs. After the armed conflict, these commissions also represented the interests of their respective ethnic/religious group with respect to the great problem of the missing persons (*see* Report of the Independent Expert, UN Commission, 53rd Session, U.N. Doc. E/CN.4/1997/55 (15 January 1997)). Under the General Framework Agreement for Peace in Bosnia and Herzegovina, 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

102. 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 (OG RBiH no. 10/92). 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). This Decision on Amendments entered into force on 9 November 1992.

103. 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), 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). 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

104. On 3 July 1997, the Government of the Federation of BiH enacted the Decree on Establishment of the Federal Commission for Missing Persons (OG FBiH no. 15/97). The Decree entered into force on 15 July 1997. Article 1 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 2 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 4 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 BiH. Article 10 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.

105. The Chamber notes that both the State Commission and the Federal Commission presently exist *de jure* because a decree enacted on the Federation of BiH 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. Commission for Tracing Missing and Detained Persons of the Republika Srpska

106. According to the Republika Srpska, the Commission for Tracing Missing and Detained Persons of the Republika Srpska operates on the basis of the Banja Luka Agreement of 25 June 1996 and its mandate follows from that Agreement. This Commission conducts special 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

107. 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).

V. ALLEGED VIOLATIONS

108. The applicants claim that organs of the Federation of BiH have violated their right to be free from inhuman or degrading treatment (Article 3 of the Convention), their right to respect for private and family life (Article 8 of the Convention), and their right to an effective remedy (Article 13 of the Convention). The applicants believe that the actions of the respondent Party reveal a general frame of obstruction in investigating their loved one's death, which has prevented them from obtaining his mortal remains and bringing the perpetrators of the crime to justice.

VI. SUBMISSIONS BY THE PARTIES

A. The respondent Party

109. The Federation of BiH has provided many submissions pertaining to the facts and the admissibility and merits of the application. The following is a chronological summary of those submissions, and any inconsistencies in these submissions will be noted as necessary.

110. On 10 February 2003, the Federation of BiH submitted its observations on the admissibility and merits of the application. The statement of the facts largely corresponds to the facts as outlined in paragraphs 9-55 above. However, the Federation of BiH states that the case file no. KTA 11/2000 was included in the case file no. KT-56/99-RZ, which was submitted to the ICTY for its review under the Rules of the Road. The Chamber observes that this conflicts with subsequently obtained information. The Federation of BiH also notes that the applicants did not submit any requests for urgency to the competent courts during the course of the proceedings.

111. As to the admissibility, the Federation of BiH submits that the Chamber is not competent *ratione temporis*, as the events which are the subject of the application occurred before 14 December 1995, the date the Agreement entered into force. Furthermore, the applicants have not submitted any evidence that Dragolub Popović was alive after 14 December 1995. From the facts of the case, it appears that Dragoljub Popović was last seen in 1993, according to the eye-witness

testimony of I.F., and the location where the attempted exhumation occurred, and where Dragoljub Popović was allegedly buried, revealed no human remains. For these reasons, the Federation of BiH submits that there has been no ongoing human rights violation that occurred after 14 December 1995. The Federation of BiH requests that the application be declared inadmissible *ratione temporis*, as in *Čabak v. the Federation of Bosnia and Herzegovina*, (case no. CH/98/522, decision on admissibility of 15 October 1998, Decisions and Reports 1998).

112. As to the merits of the application in connection with Article 3 of the Convention, the Federation of BiH concedes that the applicants are close family members of the deceased Dragoljub Popović. However, the judicial organs have acted in accordance with the law in the investigation into the death of Dragoljub Popović. Furthermore, in order to find a violation of Article 3 of the Convention there must be a certain minimum level of cruelty, and the Federation of BiH has "not exercised a minimum level of cruelty towards the applicants." Therefore, there is no violation of Article 3 of the Convention.

113. As to the merits of the application in connection with Article 8 of the Convention, the Federation of BiH states that the family members of a missing person can raise a claim of a violation of Article 8 of the Convention only if they can show that the respondent Party knows, or has reason to know, of the location of the deceased person's body. As it is undisputed that the organs of the Federation of BiH attempted an exhumation of the body, and have not kept information from the applicants, there has been no violation of Article 8 of the Convention.

114. As to the merits of the application in connection with Article 13 of the Convention, the Federation of BiH holds that, as there is no violation of Article 3 of the Convention, it follows that there is no violation of Article 13 of the Convention.

115. As to the applicants' compensation claim for non-pecuniary damages, as Dragoljub Popović as a missing person has not been declared dead, the Federation of BiH asserts that the applicants may only seek compensation after evidence is obtained that he has been declared dead.

116. On 24 March 2003, the Federation of BiH submitted several letters that they had received from the relevant domestic judicial organs summarising what each institution had done in the case of Dragoljub Popović. The Chamber here notes that in a letter dated 5 February 2003 from the Cantonal Public Prosecutor's Office in Travnik, the Public Prosecutor describes that their case file no. KTA-11/2000 was joined to file no. KT-56/99-RZ, and transmitted to the ICTY in accordance with the Rules of the Road. The Chamber again observes that this letter contradicts subsequent information submitted by the respondent Party. The Chamber has concluded that file no. KTA-11/2000 was not in fact transmitted together with file no. KT-56/99-RZ to the ICTY.

117. On 14 April 2003, the Federation of BiH submitted observations on the applicants' submission of 19 March 2003. Firstly, the Federation of BiH, in response to the applicants' statement that the Travnik Police Department has not responded to the requests to gather information in the case of Dragoljub Popović, states that the Travnik Police Department worked, and continues to work, on obtaining information in case no. KTA 122/98, in co-operation with the Central-Bosnia Canton Ministry of the Interior, and with the Cantonal Public Prosecutor's Office in Travnik. Secondly, the Federation of BiH submits that the judicial organs, in particular the Cantonal Public Prosecutor's Office in Travnik, have acted in accordance with the law and have undertaken all measures provided for in the law in order to determine the manner and cause of death of Dragoljub Popović, as well as to determine the identity of the perpetrators of the crime. The Federation of BiH recalls that the case file no. KT-56/99-RZ was submitted to the ICTY in accordance with the Rules of the Road, and states that, upon receiving the opinion of the ICTY, the competent organ will determine the further investigative actions needed in the case to uncover the facts related to the crime committed against Dragoljub Popović. The Federation of BiH states that the Cantonal Public Prosecutor's Office in Travnik continues to investigate the crime in question, actions which will intensify upon obtaining the approval of the ICTY.

118. On 25 April 2003, the Federation of BiH submitted additional observations. As to the jurisdictional issues regarding the case of Dragoljub Popović, the Federation of BiH points out that the Cantonal Public Prosecutor's Office and Cantonal Court in Travnik were constituted by the Law on

the Office of the Public Prosecutor and the Law on the Courts of Central-Bosnia Canton (see paragraphs 96 and 98 above). According to the respondent Party, these bodies began working on 31 March 1998. The Higher Public Prosecutors' Offices and the Higher Courts in both Vitez and Zenica performed the functions of the judicial organs in Central-Bosnia Canton until they became operational. The Municipal Court in Travnik received the case of Dragoljub Popović because at first it was thought that at issue was the crime of murder as defined in Article 36, paragraph 1 of the Criminal Code of the Republic of BiH, for which the Municipal Court was competent, in accordance with Article 33 of the Law on the Courts of the Central-Bosnia Canton (see paragraphs 96 and 99 above). Later, through the Law on Establishment of Criteria for Determining First Instance Jurisdiction of Municipal and Cantonal Courts and the Office of the Prosecutor's in criminal cases in the Federation of BiH (see paragraph 100 above), which entered into force on 1 August 2001, the jurisdiction for the prosecution of murder was transferred to the Cantonal Public Prosecutor's Office and Cantonal Court.

119. As to the facts and chronology of events related to the fate of the case file nos. KTA-11/2000 and KT-56/99-RZ, the Federation of BiH, in the same letter of 25 April 2003, provides the following explanations. On 12 September 2000, the Cantonal Public Prosecutor's Office in Travnik issued the decision to place the case file no. KTN 3/00 (formerly file no. KTA-11/2000) in the archives until the perpetrator is found because there was not sufficient evidence in the case file for the Public Prosecutor to issue any other decision. At that moment, the Cantonal Public Prosecutor was not aware that the crime against Dragoljub Popović was also mentioned in the case from the Higher Public Prosecutor's Office Travnik, seat in Vitez, that is case file no. KT-56/99-RZ, even though the Cantonal Public Prosecutor's Office had received the case file from the Higher Public Prosecutor's Office Travnik, seat in Vitez, on 17 April 1999. By the decision issued 10 October 2000, the case file no. KTA-11/2000 was joined to the file no. KT-56/99-RZ, and ceased to exist independently[2]. In reviewing the evidence contained in these two cases, it was concluded that the persons mentioned in the statement of I.F., namely Z.K., T.P. and K.P., already gave their statements in the file no. KT-56/99-RZ, and from these statements no reliable information can be obtained regarding the disappearance and death of Dragoljub Popović. Again, the Federation of BiH states that these files (nos. KTA-11/00 and KT-56/99-RZ) were only joined six months after the case file no. KT-56/99-RZ was sent to the ICTY because it was not known that the case files referred to the same event. The case file no. KTN-3/00 (previously no. KTA-11/2000), which only contains the statements of I.F. and Miloš Popović, was never transmitted to the ICTY, as from these statements the identity of the perpetrator of the crime against Dragoljub Popović cannot be determined, and the gathered evidence submitted to the ICTY in case file no. KT-56/99-RZ is sufficient for the ICTY to issue its opinion. The opinion of the ICTY in this case will determine the further course of action in the case, and the Federation of BiH reminds the Chamber that it cannot influence the speed by which the ICTY issues its opinion.

B. The applicants

120. On 19 March 2003, the applicants submitted their response to the observations from the respondent Party. The applicants underline that the entire investigation into the disappearance and death of Dragoljub Popović was initiated only due to their intervention with the Federation Ombudsmen's Office in Zenica. The applicants then highlight the failures by the competent organs to conduct the investigation in a meaningful manner and in accordance with the law. Firstly, the applicants point out that the Travnik Police Department did not respond to the requests of the Cantonal Public Prosecutor's Office in Zenica regarding the gathering of relevant information related to the crime. The Travnik Municipal Public Prosecutor's Office submitted another request to the Travnik Police Department, on 5 November 1998, which shows that the Police Department did nothing for more than one year related to this request. Moreover, it is not clear from the observations on the admissibility and merits submitted by the respondent Party whether the Travnik Police Department ever took any action in response to the repeated requests, which is a violation of the Law on Criminal Procedure of the Federation of BiH.

[2] The Chamber notes that the act of 10 October 2000 is actually an official note for the file, not a decision. The decision joining the two case files was issued on 12 September 2000, see paragraphs 51 and 52 above.

121. Secondly, as to the investigation initiated by the Travnik Municipal Public Prosecutor's Office, via the "proposal to undertake investigative actions" issued on 14 April 1999, the investigative judge at the Municipal Court in Travnik was specifically requested to interview the injured party, Mrs. Ljiljana Popović, as well as the other persons mentioned in the statement of I.F. Specifically, I.F. mentions I.R., K.P., and D.A., as witnesses to the detention and murder of Mr. Popović, and also mentioned are Salko Beba, Fikret Cuskić and Mehmed Alagić, as persons who had to have been aware that Mr. Popović had been detained. Also, as is apparent from the official note from the Police Department in Vitez, dated 20 May 1994, Mrs. Popović had been in contact with many persons who appeared to have had information about the abduction of her husband, and even persons who knew of the perpetrator of the "ritual murder" of Dragoljub Popović. The applicants point out that interviews with all of the above-mentioned persons have never been conducted, despite being specifically mentioned in the proposal from the Travnik Municipal Public Prosecutor. Furthermore, the Travnik Municipal Public Prosecutor could have again submitted the request to the competent investigative judge to obtain the statement from a specific person, but failed to do so. Instead, the Travnik Municipal Public Prosecutor transferred file no. KTA 122/98 to the Cantonal Public Prosecutor's Office in Travnik.

122. The Cantonal Public Prosecutor's Office in Travnik, in the newly formed file no. KTA 11/2000, submitted a request to the competent court to obtain the statement from R.H. After this, on 12 September 2000, the Cantonal Public Prosecutor's Office in Travnik put the entire file in the archives until the perpetrator is found.

123. The applicants point out that according to Article 145 of the Law on Criminal Procedure of the Federation of BiH (see paragraph 85 above), the competent organs have not met their obligation to demand the competent law enforcement agencies to gather the necessary documentation to discover the crime and the perpetrator. These agencies are under a duty to respond to such requests, and if they are not able to do so, they must inform the public prosecutor as to the reasons. The applicants underline that since initiating the proceedings by addressing the Federation Ombudsmen's Office in Zenica in 1997, the file has been transferred from one body to the other, but only three investigative actions have been taken to date, *e.g.* the statements from I.F., Miloš Popović and R.H.

124. As to the information obtained from the International Committee of the Red Cross that Dragoljub Popović was not reported as a missing person, the applicant Mrs. Popović states that in November 1993 she personally talked to a representative of the International Committee of the Red Cross, Ms. Mary Yu, who informed her that she was engaged in the search for her husband, but so far, without any success.

125. As to the statement from the respondent Party that the applicants have not addressed any requests for urgency to the competent court, the applicants point out that the entire proceedings were initiated upon their request, and the unsuccessful exhumation was also the fruit of their private investigations.

126. The applicants allege that the manner in which the respondent Party has acted in this case is indicative of a general frame of obstruction in disclosing the perpetrator of the crime and in disclosing the location of his remains. In conclusion, the applicants underline that the authorities' failure to conduct a complete investigation into the murder of Dragoljub Popović, which has prevented identification of a perpetrator and identification of his remains, constitutes a violation of their human rights.

VII. OPINION OF THE CHAMBER

A. Admissibility

127. Before considering the merits of the application the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. Pursuant to Article VIII(2)(c), the Chamber shall dismiss any application, which it considers incompatible with the Agreement *ratione temporis*.

128. The Federation of BiH objects to the admissibility of the application on the grounds that the application is incompatible *ratione temporis* with the Agreement, as the events which are the subject of the application occurred before 14 December 1995, the date the Agreement entered into force, and the applicants have not submitted any evidence that Dragoljub Popović was alive after 14 December 1995.

129. In accordance with 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 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).

130. Thus, the Chamber 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 Chamber 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).

131. 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" *(Unković* at paragraph 88 (quoting *Demirović, Berbić, and Berbić v. Republika Srpska* (application no. 7/96, Report of the Ombudsperson of 30 September 1998)).

132. In the present case, the applicants have obtained no official information about the fate and whereabouts of their loved one, despite their repeated requests to the authorities of the respondent Party. Therefore, the allegations contained in the applications concern a continuing violation of the human rights of the applicants by the respondent Party, which commenced on 14 December 1995 and continues to the present date. As such, the application falls within the Chamber's competence *ratione temporis*, within the meaning of Article VIII(2)(c) of the Agreement, and it is admissible.

133. As no other grounds for declaring the application inadmissible have been raised or appear from the application, the Chamber declares the application admissible in its entirety with respect to claims arising or continuing after 14 December 1995 under Articles 3, 8, and 13 of the Convention.

B. Merits

134. Under Article XI of the Agreement, the Chamber 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 3 of the Convention (Prohibition of Inhuman or Degrading Treatment)

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

136. The Chamber recalls that according to the European Court of Human Rights (hereinafter: "the Court"), ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects, and, in some instances, the sex, age and state of health of the victim (Eur. Court HR, *Cruz Varas and Others v. Sweden*, judgment of 20 March 1991, Series A no. 201, p. 31, paragraph 83; Eur. Court HR, *Kurt v. Turkey*, judgment of 25 May 1998, Reports of Judgments and Decisions 1998-III, p. 1187, paragraph 133). The Court has not, however, established "any general principle that a family member of a 'disappeared person' is thereby a victim of treatment contrary to Article 3". The Court explained as follows:

> "Whether a family member is such a victim will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie— in that context, a certain weight will attach to the parent-child bond–, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court would further emphasise that the essence of such a violation does not so much lie in the fact of the 'disappearance' of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct." (Eur. Court HR, *Çakici v. Turkey*, judgment of 8 July 1999, paragraph 98, Judgments and Decisions 1999-IV, *see also* Eur. Court HR, *Cyprus v. Turkey*, judgment of 10 May 2001, Reports of Judgments and Decisions 2001-IV, paragraphs 154-158).

137. One of the leading cases applying Article 3 of the Convention to protect the family members of missing persons from inhuman treatment as a result of the failure of the authorities to provide information on the fate and whereabouts of their missing loved ones is *Cyprus v. Turkey* (Eur. Court HR, judgment of 10 May 2001, Reports of Judgments and Decisions 2001-IV, paragraphs 154-158). The case of *Cyprus v. Turkey* arose out of Turkish military operations in northern Cyprus in July and August 1974 and Turkey's continued occupation of that area. Nearly 1500 Greek-Cypriots remain missing twenty years after the cessation of hostilities. These missing persons were last seen alive in Turkish custody, but Turkey has never accounted for their whereabouts or fate. Among numerous complaints at issue in the case, the Court considered alleged violations of the rights of Greek-Cypriot missing persons and their relatives. The Court expressly limited "its inquiry to ascertaining the extent, if any, to which the authorities of the respondent State have clarified the fate or whereabouts of the missing persons" (*Cyprus v. Turkey* at paragraph 121).

138. 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 no. CH/99/2150, *Unković*, decision on review of 6 May 2002, paragraphs 101-119, Decisions January—June 2002; *see also* case no. CH/01/8365, *Selimović,* decision on admissibility and merits of 7 March 2003, to be published; 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" (*Unković at* paragraph 114).

139. Moreover, "the essential characteristic of the family member's claim under Article 3 is 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" (*Unković* at paragraph 115).

140. Applying the above factors to the applicants, the Chamber observes that the applicants are the wife, two young children, and elderly mother of the victim. Although the applicants did not witness the death of their loved one, Mrs. Popović was waiting for her husband to pick her up from the neighbour's house at the time of his disappearance. By his not arriving on time, she immediately began to investigate as to his whereabouts. The Chamber also observes that although there was generally a state of war in the area, Dragoljub Popović was not an active participant in the war at the time of his disappearance. The applicants, particularly Mrs. Popović, have undertaken enormous efforts to obtain reliable information about the fate and whereabouts of their loved one. The Chamber is also aware that Mrs. Popović carried out a relentless investigation while the Travnik area remained in a state of war, thereby making her efforts more difficult and potentially endangering her own life. In their application, the applicants state that they could not further investigate due to their limited financial means. Clearly, the applicants have suffered immeasurable stress and trauma as a result of the disappearance of their husband, father and son. At some point between his disappearance and 1997, the applicants have also obtained information based on eye-witness testimony that their loved one was killed on 20 October 1993. As a result, the applicants have some knowledge of the fate of their loved one; nevertheless, they still do not have his mortal remains and they have not been able to bury him in accordance with their tradition and beliefs.

141. The Chamber will next apply the relevant factors mentioned above to the actions of the respondent Party.

a. Response, reactions and attitude of respondent Party

142. The Chamber observes that Mrs. Popović, immediately following her husband's disappearance, addressed numerous institutions and officials regarding the disappearance, including giving a formal statement at the Vitez Police Department in 1994. However, in accordance with its competence *ratione temporis*, the Chamber will limit its examination of the actions of the respondent Party to the time period from 14 December 1995, the date of entry into force of the Agreement, to the present. The applicants have not alleged that they have been intimidated or in any way mistreated by the authorities of the Federation of BiH due to their search to discover the truth as to the fate of Dragoljub Popović. Rather, the applicants' complaints stem from the complacency and lack of action on the part of the authorities in response to their requests relating to uncovering the truth as to the fate of their loved one. For example, Mrs. Popović initiated the investigation with the domestic authorities in May 1997, and specifically requested that the exhumation of Dragoljub Popović take place. On 5 November 1997, Mrs. Popović sent a written request to the Ministry of the Interior of the Central-Bosnia Canton again requesting the exhumation of her deceased husband. The requested exhumation was not carried out until June 1999, over two years later. In reviewing the other actions/inaction of the respondent Party since the applicants addressed the respondent Party until the present, which are detailed below in paragraphs 143–152 the Chamber finds a pattern that is indicative of indifference and complacency towards the applicants.

b. Meaningful and full investigation into the disappearance and death

i. investigative actions taken

143. The Chamber will next address the extent to which the authorities conducted a meaningful and full investigation by looking at the investigative actions taken to date in the case of Dragoljub Popović. The applicants make two assertions, firstly, that the respondent Party has failed to even abide by the minimum requirements set forth in the Law on Criminal Procedure of the Federation of BiH in the course of the proceedings. Secondly, the applicants assert that the respondent Party has not undertaken a thorough investigation, as since the time that the Cantonal Public Prosecutor in Zenica opened a file in the case of the unknown crime against Dragoljub Popović, only three investigative actions have been taken to date. The Chamber will examine each of these assertions in turn.

144. As to the investigation, the respondent Party asserts that the actions taken to date in the case of Dragoljub Popović are entirely satisfactory and have been in accordance with the Law on Criminal Procedure of the Federation of BiH. However, the applicants specifically assert that the Travnik Police Department, despite being first requested in June 1997 by the Cantonal Public Prosecutor's Office in Zenica to gather information related to the crime, have never done so. The respondent Party, in its submission dated 14 April 1999, asserts that the Travnik Police Department gathered the necessary information and continues to work on gathering information in the case no. KTA-122/98, together with the Ministry of Interior of the Central-Bosnia Canton and the Cantonal Public Prosecutor's Office in Travnik, although no evidence or details of this were submitted.

145. The Chamber notes that after requesting the Travnik Police Department to gather the necessary information in June 1997, the Cantonal Public Prosecutor's Office in Zenica sent a letter to the Federation Ombudsmen's Office in Zenica stating that as soon as her office obtains the charges from the Travnik Police Department, an investigation will ensue. The Travnik Municipal Public Prosecutor's Office again requested the Travnik Police Department on 5 November 1998 to gather the relevant information related to the crime against Dragoljub Popović. Next, the "proposal to undertake investigative actions" of 14 April 1999 issued by the Travnik Municipal Public Prosecutor specifically mentions that the Travnik Police Department has not responded to the requests regarding the gathering of information in the case of Dragoljub Popović. Thus, it is clear that no action was taken by the Travnik Police Department between June 1997 and April 1999. It is also apparent that the initial work of the Travnik Police Department to gather information and determine the crime in question would have been instrumental in further investigating and prosecuting the case, and provided for by law in Article 145 of the Law on Criminal Procedure of the Federation of BiH. The

Chamber observes that at some point in the course of the investigation, it was determined that in question is a possible violation of Article 154, paragraph 1 of the Criminal Code of the Federation of BiH, war crimes against the civilian population, committed by an unknown perpetrator. However, it does not appear that the Travnik Police Department ever assisted in the investigative process or in determining the charges to be brought. Absent evidence indicating that the Travnik Police Department has ever gathered information regarding the crime committed against Dragoljub Popović and transmitted it to the competent public prosecutor, the Chamber can only conclude that the Travnik Police Department has not carried out its duties as prescribed by the Law on Criminal Procedure of the Federation of BiH.

146. As to the applicant's assertion that the respondent Party has not conducted a thorough investigation, the respondent Party contends that the allegations of the applicants are unfounded as the competent bodies have undertaken all legally provided for actions to uncover the cause of death of Dragoljub Popović and the perpetrator of the crime. The Chamber will next examine each of the investigative actions taken. The "proposal to undertake investigative actions", issued by the Travnik Municipal Public Prosecutor's Office on 14 April 1999, among other things, requests that Mrs. Ljiljana Popović be intereviewed, as well as I.F. and other persons from his statement. It is undisputed that Mrs. Popović has never been interviewed in the course of the investigation. The Travnik Municipal Court obtained the statement of I.F. on 27 May 1999. As stated above in paragraph 34, this is an extensive statement of the facts surrounding I.F.'s abduction and his detention, and includes an eye-witness account of the killing of Dragoljub Popović, which also reveals that two other Croat detainees also witnessed the murder. However, other persons from I.F.'s statement have never been interviewed in the course of this investigation. The Chamber notes that in another case, no. KT-56/99-RZ, which was transferred to the ICTY, K.P., an eye-witness mentioned in I.F.'s statement, was interviewed regarding the events which took place at the time of his abduction. However, this appears to be a cursory interview, at best, and was anyway not a part of the investigative proceedings initiated by the applicants. It is undisputed that the other eye-witness to the killing of Dragoljub Popović, D.A., has never been interviewed in the course of the investigation, nor have the numerous other persons named in I.F.'s statement.

147. The respondent Party asserts that the Travnik Municipal Court obtained the statement of Miloš Popović in accordance with the "proposal to undertake investigative actions" issued by the Travnik Municipal Public Prosecutor's Office. However, Miloš Popović is neither mentioned in I.F.'s statement, nor did the Municipal Public Prosecutor propose that he be interviewed. In reviewing Miloš Popović's statement, it is clear that he has some knowledge of the events surrounding his brother's abduction; however, it is equally clear that Mrs. Popović had even greater first-hand knowledge regarding his abduction and subsequent search for her husband. The Chamber can only conclude that the fact that an effort was made to obtain the statement of Miloš Popović, and not of Mrs. Popović, is indicative of a deliberate attempt to not conduct a thorough investigation.

148. Next, the Chamber observes that an unsuccessful exhumation was conducted on 16 and 17 June 1999. The location of the exhumation was determined as per the sketch that Mrs. Popović had submitted to the authorities. As noted above, the exhumation was conducted two years after Mrs. Popović had first requested that an exhumation of her husband be carried out. Nothing in the case file indicates that the authorities independently did their own investigation as to the possible location of the remains of Dragoljub Popović. It appears from the documents submitted to the Chamber that the authorities in whole relied on the sketch of Mrs. Popović in determining the exhumation site. The Chamber also observes that although the exhumation was conducted by the Cantonal Court in Travnik, the case file was with the Travnik Municipal Public Prosecutor's Office at that time. The case file was not transferred to the Cantonal Public Prosecutor's Office in Travnik until 25 January 2000, a full seven months after the unsuccessful exhumation.

149. The Chamber also recalls that on 21 November 1995, the Higher Public Prosecutor's Office Travnik, seat in Vitez, initiated an investigation which included the disappearance and death of Dragoljub Popović as one of the many crimes allegedly committed. On 16 August 1996, the Higher Public Prosecutor's Office Travnik, seat in Vitez, issued a request to expand the investigation against other suspects. No further action appears to have been taken by the Higher Public Prosecutor's Office Travnik, seat in Vitez, or by the investigative judge at the Higher Court in Travnik, seat in Vitez, until the case files were transferred to the Cantonal Public Prosecutor's Office in Travnik on 17 April

1999 and transformed into file no. KT-56/99-RZ. The respondent Party did not provide any explanation as to this inactivity.

150. The third investigative action the applicants refer to is the statement obtained of R.H., which was obtained in accordance with the "proposal to undertake investigative actions" issued on 9 May 2000 by the Cantonal Public Prosecutor's Office in Travnik. In the explanation, the Cantonal Public Prosecutor states, "By receiving the documentation, it is clear that there exist witnesses who were present during the crime committed against the victim who could provide reliable information and evidence on which it could be determined the identity of the perpetrator of the crime." For this reason, R.H. was called to testify. The Cantonal Court in Travnik obtained the statement of R.H. on 29 August 2000. The Chamber, while not wishing to second-guess the decisions of the Cantonal Public Prosecutor in Travnik, sees no indication in the case file that R.H. was among the "witnesses" to the crime against Dragoljub Popović, or who would fall among the persons who had some special knowledge about his fate. Certainly the Cantonal Public Prosecutor had every right to request that R.H. submit a statement to the Cantonal Court in Travnik. However, it is puzzling that he alone was called to testify, while none of the other actual witnesses to the killing of Dragoljub Popović have been called to testify. The Chamber also observes that this is the only investigative action taken by the Cantonal Public Prosecutor's Office in Travnik, before closing the case file on 12 September 2000.

151. Finally, as to the closing of the case file no. KTA 11/2000 on 12 September 2000, the Chamber finds that, the decision issued which states that the case be placed in the files until the perpetrator is found, in accordance with Article 126 of the Code of Criminal Procedure of the Federation of BiH, (which provides that genocide and war crimes are not subject to the statute of limitations), is one of profound passivity and wrongful, in light of the preceeding paltry investigation. The Chamber also recalls that the United Nations Declaration on the Proctection of All Persons from Enforced Disappearances of 18 December 1992 which states, in Article 13, that an investigation should be conducted for as long as the fate of the victim remains unclarified (see paragraph 77 above).

152. In reviewing the investigative actions taken, along with the eventual closing of the case file in September 2000, the Chamber has discussed the numerous oversights and flaws during the course of the investigation of the disappearance and death of Dragoljub Popović. While none taken in isolation might appear particularly egregious, on the whole, they are indicative of a pattern of obstruction attributable to the respondent Party.

ii. jurisdictional issues

153. The Chamber observes that the confusion surrounding the appropriate jurisdiction of the case also appears to have prevented a meaningful and full investigation into the killing of Dragoljub Popović, and for this reason the Chamber will next examine this aspect of the investigation. The Chamber recalls that the administrative running of a legal system is the responsibility of the respondent Party and any delays caused as a result will be directly attributable to the respondent Party (see, *e.g.*, Eur. Court HR, *Ledonne (No. 2) v. Italy*, judgment on the merits of 12 May 1999, paragraph 23). Additionally, the Chamber has held that the respondent Party must organise its judicial system in such a way as to ensure the reasonable expeditious conduct of individual cases (see case nos. CH/02/11108 and CH/02/11326 *Bašić and Ćosić,* decision on admissibility and merits of 9 May 2003, paragraph 183, to be published). Applying this principle to the facts at hand, the Chamber observes that the legal framework supporting the organisation of a unified and coherent judicial system existed as of April 1994. Upon the formation of the Federation of BiH via the Constitution of the Federation of BiH, which entered into force on 30 March 1994, the Federation of BiH authorities became responsible for the organisation of their court system. The Constitution of Bosnia and Herzegovina, which entered into force on 14 December 1995, gave Bosnia and Herzegovina the responsibility for matters related to inter-entity and international criminal law matters, and left all other criminal matters to the responsibility of the entities. Despite the Federation of BiH and the Constitution of Bosnia and Herzegovina providing a mandate for effectively setting up the judicial system in the Central-Bosnia Canton, the appropriate laws corresponding to establishing unified prosecutorial offices and courts did not enter into force until November 1997 and December 1997, respectively. Furthermore, according to the respondent Party, these organs were

not actually functioning until 31 March 1998.

154. The Chamber also observes that the case as initiated by Mrs. Popović in 1997 spent considerable time lingering at the non-competent body—the Municipal Court. Also, the case initiated by the Higher Public Prosecutor's Office Travnik, seat in Vitez, on 21 December 1995, was not transferred to the Cantonal Public Prosecutor's Office in Travnik until 17 April 1999, 17 months after the Cantonal Public Prosecutor's Office was formally enacted by law, and over a year after the Cantonal Public Prosecutor's Office allegedly became operational. Additionally, partly attributable to the disorganised court system, the case initiated by Mrs. Popović was not discovered to tie to the case initiated by the Higher Public Prosecutor's Office in Travnik, seat in Vitez in 1995, until October 2000. The Chamber concludes that the failure of the respondent Party to organise its judicial bodies in a more efficient manner in the Central-Bosnia Canton has directly contributed to the lack of a thorough and meaningful investigation.

iii. Inactivity while awaiting opinion under the Rules of the Road

155. The Chamber observes that the investigative proceedings into the disappearance and death of Dragoljub Popović appear to have been affected by the respondent Party's perceived obligations under the Rules of the Road. The respondent Party argues that they have submitted the case file no. KT-56/99-RZ to the Office of the Prosecutor of the ICTY in accordance with the Rules of the Road, and are obligated to await the response of the ICTY before intensifying the investigation in that case to determine all of the facts of the case. This has allegedly prevented them from making any progress for close to three years. Consequently, the Chamber will next address whether the Rules of the Road may have hampered the respondent Party's ability to investigate and prosecute the perpetrator of the crime against Dragoljub Popović.

156. The Chamber observes that the Rules of the Road were enacted to ensure that the authorities only arrest or detain suspects based on evidence and proceedings that are consistent with international standards. The Procedures and Guidelines and their acceptance as law by the authorities of the Entities have significantly expanded the purpose of the Rules of the Road, from removing arbitrary arrests as an obstacle to freedom of movement in the aftermath of the war, to a general review of the *prima facie* strength of all criminal prosecutions related to war crimes and crimes against humanity. The Chamber has no reason to dispute the respondent Party's statement that the case no. KT-56/99-RZ was submitted to the ICTY in accordance with the Rules of the Road. However, nowhere in the Rules of the Road, or the accompanying Procedures and Guidelines, does the submission of a case file to the ICTY for their review mean that the domestic authorities must cease all investigation in the case pending the opinion of the ICTY. As the Procedures and Guidelines do not specify any restriction on the domestic authorities as to investigating generally the war crimes that are the subject of the case, or prosecuting persons other than those mentioned in the case transferred, it is only logical that this is permitted. The Chamber finds it commonsensical and appropriate in the interest of justice that the domestic authorities, while awaiting the opinion of the ICTY, are obligated to continue to investigate generally the war crimes in question, and to prosecute persons other than the ones included in the submission to the ICTY.

157. Consequently, the Chamber finds that the respondent Party, in case no. KT-56/99-RZ, has failed in its duty to investigate the war crimes alleged in the case, and has failed to eventually indict and prosecute persons other than the ones who were the subject of the submission to the ICTY on 7 April 2000. This failure has also directly contributed to the lack of a meaningful and full investigation into the disappearance and death of Dragoljub Popović.

iv. Conclusion as to meaningful and full investigation

158. In reviewing the investigative actions and inaction attributable to the respondent Party, including the placing of the case no. KTA-11/2000 in the archives, the jurisdictional problems which plagued the proceedings, and the particular lack of continued investigation while awaiting the response of the ICTY, the Chamber concludes that the respondent Party has flagrantly violated the applicants' right to have a meaningful and full investigation carried out regarding the disappearance and death of their loved one.

c. Credible information provided to the authorities

159. As to whether credible information was provided to the authorities regarding the disappearance and death of Dragoljub Popović, the Chamber notes that the sketch Mrs. Popović submitted to the authorities was based on eye-witness testimony. Although the attempted exhumation of the site was not successful, the Chamber finds that this does not necessarily discredit the submitted information. Rather, it is more significant that the authorities of the respondent Party never of their own initiative attempted to verify the information submitted via Mrs. Popović, that is they never interviewed Mrs. Popović, nor interviewed the others persons mentioned in the statement of I.F., as discussed above in paragraphs 34 and 146. The Chamber concludes that the applicants have made every effort to supply the authorities with reliable and complete information regarding the disappearance and death of their loved one.

d. Duration of lack of information

160. The Chamber next turns to examine the duration of the lack of information. It is clear that the applicants obtained, at some point prior to submitting their claim to the Federation Ombudsmen's Office in Zenica in 1997, knowledge of their loved ones' death, and the potential location of his mortal remains. However, this information was obtained by the fruit of the applicants' own investigative actions, and not via any official source. The applicants have obtained no official information from the respondent Party as to the fate of their loved one. Furthermore, the applicants are seeking the mortal remains of their loved one, which they have not obtained since first addressing the organs of the Federation of BiH in May 1997 to the present date, and which remains of primary importance to bring closure to the trauma and loss that they have experienced.

e. Involvement of the authorities in the disappearance

161. The Chamber recalls that the applicants allege that Dragoljub Popović was abducted and taken by *mujahedin*, who formed a part of the Army of the Republic of BiH, to a concentration camp near the village of Mehurić. The respondent Party does not dispute this in its written observations on the admissibility and merits. Additionally, these facts are affirmed by the eye-witness testimony obtained through the course of the investigation into the disappearance and death of Dragoljub Popović. The Chamber finds that the facts of the disappearance and detention clearly reveal that in question is an enforced disappearance, which implicates the involvement of the authorities.

f. Conclusion as to violation of Article 3 of the Convention

162. Taking all of the applicable factors into account, both with respect to the applicants and the respondent Party, the Chamber 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 particular, the complaceny of the authorities and the failure to conduct a meaningful and full investigation into the disappearance and death of Dragoljub Popović constitutes a serious violation of the applicants' rights under Article 3 of the Convention.

2. Article 8 of the European Convention (Right to Respect for Private and Family Life)

163. 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."

164. In its previous case law, 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 no. CH/99/3196, *Palić v. the Republika Srpska*, decision on admissibility and merits of 9 December 2000, paragraphs 82-84, Decisions January—June 2001; *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).

165. In its *Avdo and Esma Palić* decision, the Chamber considered that the respondent Party had engaged in "arbitrarily withholding from [Mrs. Palić] information, which must be in its possession, concerning the fate of her husband, including information concerning her husband's body, if he is no longer alive. It follows that the respondent Party has violated her right to respect for her family life under Article 8 of the Convention" (case no. CH/99/3196, decision on admissibility and merits delivered on 11 January 2001, paragraph 84, Decisions January-June 2001).

166. Therefore, the Chamber has established a right, derived from Article 8 of the Convention, for the relatives of missing persons to be informed of their fate and whereabouts when the respondent Party or its authorities were involved in their disappearances and when it can be assumed that they had such information within their possession or control after 14 December 1995.

167. The Chamber takes due note of the investigation conducted to date, and of the fact that in question is an enforced disappearance. The eye-witness testimony obtained reveals that Dragojub Popović was killed at the concentration camp in Orašac, which was staffed and operated by *mujahedin.* From these facts the Chamber concludes that the respondent Party either had, or should have had, information within their "possession or control" after 14 December 1995 regarding the fate of Dragoljub Popović. There is no evidence, for example, that the authorities of the Federation of BiH have interviewed any members of the armed forces who were involved directly or indirectly with the functioning of the concentration camp in Orašac, even though such persons have been mentioned in the eye-witness testimony of I.F.

168. Therefore, the Chamber concludes that the respondent Party has breached its positive obligation to secure respect for the applicants' rights protected by Article 8 of the Convention in that is has failed to make accessible and disclose information requested about the applicants' missing loved one after 14 December 1995.

3. Article 13 of the Convention (Right to an Effective Remedy)

169. Article 13 of the Convention provides as follows:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

170. Taking into consideration its conclusions that the respondent Party has violated the applicants' rights protected by Articles 3 and 8 of the Convention, and in particular the finding that the respondent Party has failed to conduct a meaningful and full investigation into the disappearance and death of Dragoljub Popović after 14 December 1995, the Chamber finds it is not necessary separately to examine the application under Article 13 of the Convention.

VIII. REMEDIES

171. Under Article XI(1)(b) of the Agreement, the Chamber 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 Chamber shall consider issuing orders to cease and desist, monetary relief (including pecuniary and non-pecuniary damages), as well as provisional measures.

172. The Chamber observes that the applicants have requested the Chamber to order the respondent Party to inform them as to the location of the mortal remains of Dragoljub Popović. 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 Chamber with broad remedial powers and the Chamber is not limited to the requests of the applicants.

173. In light of the finding of a violation of Articles 3 and 8 of the Convention, the Chamber finds it appropriate to order the Federation of BiH to, without delay, conduct a full, meaningful, thorough, and detailed investigation into the disappearance and death of Dragoljub Popović and provide this information to the applicants. Such investigation should also be conducted with a view to returning the mortal remains of Dragoljub Popović to the applicants and to bringing the perpetrators before the competent domestic criminal courts or to extraditing persons wanted by the ICTY for prosecution for war crimes.

174. The Chamber notes that the applicants seek a sum of 400,000 Convertible Marks ("*Konvertibilnih Maraka"*) in non-pecuniary damages. The respondent Party asserts that the applicants cannot seek damages until they have obtained a death certificate for Dragoljub Popović. The Chamber finds that the lack of a death certificate is not relevant in awarding non-pecuniary damages. In light of the finding of a violation of Articles 3 and 8 of the Convention, the Chamber considers it appropriate to award a sum to the applicants in recognition of their mental suffering. Accordingly, the Chamber will order the respondent Party to pay to the applicants the total sum of 6,000 Convertible Marks ("*Konvertibilnih Maraka"*) within one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure. The Chamber dismisses the remainder of the applicants' compensation claim.

175. The Chamber further awards simple interest at an annual rate of 10% as of one month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure on the sum awarded in the preceding paragraph or any unpaid portion thereof until the date of settlement in full.

176. The Chamber will order the respondent Party to report to the Human Rights Commission within the Constitutional Court, no later than three months from the date this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, on the steps taken to comply with the above orders

IX. CONCLUSIONS

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

1. unanimously, to declare the application admissible in its entirety;

2. by 4 votes to 3, that the failure of the Federation of Bosnia and Herzegovina to inform the applicants about the truth of the fate and whereabouts of their missing loved one, including conducting a meaningful and effective investigation into his disappearance, violates their rights to be free from inhuman and degrading treatment, as guaranteed by Article 3 of the European Convention on Human Rights, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;

3. by 5 votes to 2, that that the failure of the Federation of Bosnia and Herzegovina to make accessible and disclose information requested by the applicants about their missing loved one after 14 December 1995 violates its positive obligation to secure the respect for their rights to private and family life, as guaranteed by Article 8 of the European Convention on Human Rights, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;

4. unanimously, that it is not necessary to consider the application under Article 13 of the European Convention on Human Rights;

5. by 6 votes to 1, to order the Federation of Bosnia and Herzegovina to, without delay, conduct a full, meaningful, thorough and detailed investigation into the disappearance and death of Dragoljub Popović and to disclose this information to the applicants;

6. by 4 votes to 3, to order the Federation of Bosnia and Herzegovina to pay to the applicants, no later than one month after the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the sum of 6,000 (six thousand) Convertible Marks ("*Konvertibilnih Maraka*") by way of compensation for their mental suffering;

7. by 4 votes to 3, to order the Federation of Bosnia and Herzegovina to pay simple interest at the rate of 10 (ten) per cent per annum over the above sum or any unpaid portion thereof from the date of expiry of the above one-month period until the date of settlement in full;

8. unanimously, to dismiss the remaining claims for remedies; and,

9. unanimously, to order the Federation of Bosnia and Herzegovina to report to the Human Rights Commission within the Constitutional Court, no later than three months after the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, on the steps taken by it to comply with the above orders.

Remedy: In accordance with Rule 63 of the Chamber's Rules of Procedure, as amended on 1 September 2003 and entered into force on 7 October 2003, a request for review against this decision to the plenary Chamber can be filed **within fifteen days** starting on the working day following that on which the Panel's reasoned decision was publicly delivered.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Mato TADIĆ
President of the Second Panel