DECISION ON ADMISSIBILITY AND MERITS
(delivered on 5 December 2003)

Case nos. CH/02/8879, CH/02/8880, CH/02/8881, CH/02/8882, CH/02/8883, CH/02/9384 and CH/02/9386

Sadija SMAJIĆ, Derva ĆOSIĆ, Zema and Ferid DŽAFIĆ and Nermina DŽAFIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 3 December 2003 with the following members present:

Ms. Michèle PICARD, President
Mr. Mato TADIĆ, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Rona AYBAY
Mr. Želimir JUKA
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Giovanni GRASSO
Mr. Miodrag PAJIĆ
Mr. Manfred NOWAK
Mr. Vitomir POPOVIĆ
Mr. Andrew GROTRIAN

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

Having considered the aforementioned applications 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 ("the General Framework Agreement");

Adopts the following decision pursuant to Article VIII(2) and Article XI of the Agreement and Rules 34, 52, 57 and 58 of its Rules of Procedure:

I. INTRODUCTION

1. The present applications were filed by the immediate family members of persons missing from Višegrad, a small town in the Republika Srpska in eastern Bosnia and Herzegovina. All the missing persons are of Bosniak[1] origin. They disappeared between May and June 1992, allegedly after being taken prisoner by soldiers of the Army of Serbs in Bosnia and Herzegovina (the "RS Army") during the armed conflict in Višegrad. Tracing requests were opened with the International Committee of the Red Cross ("ICRC") for all the missing persons in 1995 or 1996. All the applicants seek information about the fate and whereabouts of their missing loved ones, but none has received any such specific information from the competent authorities since the events underlying their applications.

2. The applications raise issues under Article 3 (prohibition of inhuman and degrading treatment) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights (the "Convention"), and of discrimination in connection with these rights under Articles I(14) and II(2)(b) of the Agreement. Due to the Chamber's jurisdiction under the Agreement, discussed in more detail below, the Chamber will consider these applications exclusively in connection to the rights of family members to be informed about the fate and whereabouts of their missing loved ones.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The applications were introduced to and registered by the Chamber between 14 February and 13 March 2002.

4. On 3 July 2003, the Chamber considered the applications and decided to transmit them to the respondent Party.

5. On 11 July 2003, the applications were transmitted to the respondent Party. Observations of the Republika Srpska on the admissibility and merits of the cases were received on 23 August 2003. The applicants submitted no observations in reply. The respondent Party submitted further observations on 13 November 2003.

6. Pursuant to Rule 29 of the Chamber's Rules of Procedure, on 4 November 2003, the First Panel referred the applications to the plenary Chamber. The Chamber deliberated on the admissibility and merits of the applications on 3 July, 4 and 6 November, and 1 and 3 December 2003. On the latter date, it adopted the present decision.

7. Considering the similarity between the facts of the cases and the complaints of the applicants, the Chamber decided to join the present applications in accordance with Rule 34 of the Chamber's Rules of Procedure on the same day it adopted the present decision.

III. STATEMENT OF FACTS

A. Historical context as recounted in the ICTY judgment in *Prosecutor v. Vasiljević*

8. On 29 November 2002, the Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia (the "ICTY") issued its judgment in case no. IT-98-32-T, *Prosecutor v. Mitar Vasiljević*, in which it found the accused guilty of crimes against humanity and violations of the laws or customs of war[2].

[1] Citizens of Bosnia and Herzegovina of Muslim origin and Islamic belief refer to themselves as "Bosniaks". For the most part throughout the text of this decision, the Chamber adopts this terminology. However, in sections where the Chamber is referring to other sources, Bosniaks are also called "Bosnian Muslims" and "Muslims".

[2] The entire text of the *Vasiljević* judgment of 29 November 2002 can be found both in English and in the national language on the ICTY's website (www.un.org/icty).

9. As the *Vasiljević* judgment contains a comprehensive description of the historical context and underlying events taking place in Višegrad in May and June 1992 and thereafter, established after long adversarial proceedings conducted by a reputable international court, the Chamber will utilise this judgment to set forth the historical context and underlying facts important for a full understanding of the applications considered in the present decision. The following are relevant quotations from the Vasiljević judgment:

> "39. The municipality of Višegrad is located in south-eastern Bosnia and Herzegovina, bordered on its eastern side by the Republic of Serbia. Its main town, Višegrad, is located on the eastern bank of the Drina River. In 1991, about 21,000 people lived in the municipality, about 9,000 in the town of Višegrad. Approximately 63% of the population was of Muslim ethnicity, while about 33% was of Serb ethnicity.
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> "40. In November 1990, multi-party elections were held in this municipality. Two parties, the primarily Muslim SDA (Party for Democratic Action) and the primarily Serb SDS (Serbian Democratic Party), shared the majority of the votes. The results closely matched the ethnic composition of the municipality, with 27 of the 50 seats that composed the municipal assembly being allocated to the SDA and 13 to the SDS. Serb politicians were dissatisfied with the distribution of power, feeling that they were under-represented in positions of authority. Ethnic tensions soon flared up.
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> "41. From early 1992, Muslim citizens were disarmed or requested to surrender their weapons. In the meantime, Serbs started arming themselves and organised military training. Muslims also attempted to organise themselves, although they were much less successful in doing so.
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> "42. From 4 April 1992, Serb politicians repeatedly requested that the police be divided along ethnic lines. Soon thereafter, both of the opposing groups raised barricades around Višegrad, which was followed by random acts of violence including shooting and shelling. In the course of one such incident, mortars were fired at Muslim neighbourhoods. As a result, many civilians fearing for their lives fled from their villages. In early April 1992, a Muslim citizen of Višegrad, Murat Sabanović, took control of the local dam and threatened to release water. On about 13 April 1992, Sabanović released some of the water, damaging properties downstream. The following day, the Užice Corps of the Yugoslav National Army ("JNA") intervened, took over the dam and entered Višegrad.
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> "43. Even though many Muslims left Višegrad fearing the arrival of the Užice Corps of the JNA, the actual arrival of the Corps had, at first, a calming effect. After securing the town, JNA officers and Muslim leaders jointly led a media campaign to encourage people to return to their homes. Many actually did so in the later part of April 1992. The JNA also set up negotiations between the two sides to try to defuse ethnic tension. Some Muslims, however, were concerned by the fact that the Užice Corps was composed exclusively of Serbs.
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> "44. Soon thereafter, convoys were organised, emptying many villages of their non-Serb population. On one occasion, thousands of non-Serbs from villages on both sides of the Drina River from the area around the town of Višegrad were taken to the football stadium in Višegrad. There, they were searched for weapons and were addressed by a JNA commander. He told them that the people living on the left side of the Drina River could return to their villages, which had been cleansed of "reactionary forces", whereas the people from the right side of the Drina River were not allowed to go back. As a consequence, many people living on the right side of the Drina River either stayed in the town of Višegrad, went into hiding or fled.
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> "45. On 19 May 1992, the JNA withdrew from Višegrad. Paramilitary units stayed behind, and other paramilitaries arrived as soon as the army had left town. Some local Serbs joined them. The Accused admitted that he knew that some of those paramilitaries killed or robbed Muslim civilians and that they were committing such crimes only because the victims were of Muslim ethnicity.

"46. A particularly violent and feared group of Serb paramilitaries was led by the co-accused Milan Lukić. In the course of a few weeks, this group committed many crimes, ranging from looting to murders. The Accused knew Milan Lukić well. …

"47. Those non-Serbs who remained in the area of Višegrad, or those who returned to their homes, found themselves trapped, disarmed and at the mercy of paramilitaries which operated with the complicity, or at least with the acquiescence, of the Serb authorities, in particular by the then Serb-only police force.

"48. Sometime in May 1992, the Accused was present when Milan Lukić and his men searched the village of Musići for weapons. During this search, money and other valuables disappeared from some of the houses that had been searched. The Accused stood guard while the search was undertaken.

"49. As early as June 1992, non-Serb civilians were arbitrarily killed. In one such incident, on or about 7 June 1992, Milan Lukić, the Accused and two other men, took seven Muslim men to the bank of the Drina River where they were shot. Five of them were killed. This incident will be referred to as the Drina River Incident.

"50. On 14 June 1992, more than 60 Muslim civilians of all ages fleeing from Koritnik and Sase were locked up in a Muslim house in Pionirska Street, Višegrad, by local Serb paramilitaries, led by Milan Lukić. The house was then set on fire. Those who tried to escape through one of the windows were shot at and all but six were burned alive. This incident will be referred to as the Pionirska Street Incident.

"51. Many other incidents of arbitrary killings of civilians took place in Višegrad during this period. From early April 1992 onwards, non-Serb citizens also began to disappear. For the next few months, hundreds of non-Serbs, mostly Muslim, men and women, children and elderly people, were killed.

"52. Many of those who were killed were simply thrown into the Drina River, where many bodies were found floating. Of all the bodies pulled out of the water, only one appeared to be that of a Serb. Hundreds of other Muslim civilians of all ages and of both sexes were exhumed from mass graves in and around Višegrad municipality.

"53. The number of disappearances peaked in June and July 1992. Sixty-two percent of those who went missing in the municipality of Višegrad in 1992 disappeared during those two months. Most if not all of those who disappeared were civilians. The pattern and intensity of disappearances in Višegrad paralleled that of neighbouring municipalities which now form part of Republika Srpska. Disappearances in those various neighbouring municipalities occurred at approximately the same time.

"54. Non-Serb citizens were subjected to other forms of mistreatment and humiliation, such as rapes or beatings. Many were deprived of their valuables, by Milan Lukić and his men amongst others. Injured or sick non-Serb civilians were denied access to medical treatment. …

"55. Many non-Serb civilians who had not yet fled were systematically expelled in an orderly fashion. Convoys of buses were organised to drive them away, and the police force sometimes escorted them. In the process of their transfer, identification documents and valuables were often taken away. Some of these people were exchanged, whilst others were killed. In one incident, Muslim men who had been told that they would be exchanged were taken off a bus, lined up and executed. Muslim homes were looted and often burnt down. The two mosques located in the town of Višegrad were destroyed.

"56. As a result of this process, by the end of 1992, there were very few non-Serbs left in Višegrad. Hundreds had been killed arbitrarily, while thousands of others had been forcibly expelled or forcibly transferred through violence and fear. Today, most of the people living in Višegrad are of Serb ethnicity. Such dramatic changes in ethnic composition occurred

systematically throughout what is now the Republika Srpska, but proportionally the changes in Višegrad were second only to those which occurred in Srebrenica" (ICTY Trial Chamber II, case no. IT-98-32-T, *Prosecutor v. Mitar Vasiljević*, judgment of 29 November 2002, paragraphs 39-56 (footnotes omitted)).

B. Facts and complaints of the individual applications

1. CH/02/8879 Sadija SMAJIĆ (for Sumbula SMAJIĆ)

10. The application was submitted to the Chamber on 14 February 2002.

11. The applicant is the daughter-in-law of Sumbula Smajić, who is indicated in the application form as the alleged victim and a missing person. The applicant states that her mother-in-law has been missing since 14 June 1992, when she was captured together with her husband by the RS Army and taken to Zamnice Camp in Višegrad.

12. In December 1996, a tracing request was opened for the applicant's mother-in-law with the ICRC registering her as a person whose whereabouts are unknown after 14 June 1992. The ICRC submitted this request to the Working Group established as part of the "Process for tracing persons unaccounted for in connection with the conflict on the territory of Bosnia and Herzegovina and informing the families accordingly" (the "Working Group"), but no answer has been provided.

13. On 11 January 2002, the Municipal Court II in Sarajevo, in extra-judicial proceedings initiated by the applicant, issued a procedural decision declaring Sumbula Smajić dead as of 14 June 1992. The applicant alleged that her mother-in-law was captured in Jelašci on 14 June 1992 and taken to the Zamnice Camp in Višegrad, and since then, she disappeared without a trace. The Court considered a certificate issued by the ICRC for Bosnia and Herzegovina on 24 April 2001 registering the applicant's mother-in-law as a missing person since 14 June 1992. The Court heard testimony from two witnesses, Derva Ćosić and Hasinija Ćosić, who confirmed the above-mentioned statements of the applicant. The Court has also published a notice and request for information in the Official Gazette of the Federation of Bosnia and Herzegovina, but neither the missing person nor anyone else responded.

14. The applicant states that she still searches for her mother-in-law through the ICRC, although she assumes that she is not alive any more. She alleges violations of the right to life, right to freedom, right to work, and right to peaceful enjoyment of home and property. She further sets forth a claim for compensation for non-pecuniary damage.

2. CH/02/8880 Sadija SMAJIĆ (for Fadil SMAJIĆ)

15. The application was submitted to the Chamber on 14 February 2002.

16. The applicant is the wife of Fadil Smajić, who is indicated in the application form as the alleged victim and a missing person. The applicant states that her husband was captured by the RS Army and JNA on an unknown date, and this is when he disappeared.

17. In July 1996, a tracing request was opened for the applicant's husband with the ICRC, registering him as a person whose whereabouts are unknown after an unknown date in 1992. The ICRC submitted this request to the Working Group, but no answer has been provided.

18. According to a death certificate issued on 5 August 1998, the applicant's husband was declared dead as of 2 May 1992. The applicant further states that extra-judicial proceedings have been completed before the Municipal Court in Sarajevo, in which her husband was declared dead.

19. The applicant states that she still searches for her husband through the ICRC, although she assumes that he is not alive any more. She alleges violations of the right to life, right to freedom, right to work, and right to peaceful enjoyment of home and property. She further sets forth a claim for compensation for pecuniary and non-pecuniary damages.

3. CH/02/8881 Sadija SMAJIĆ (for Nezir SMAJIĆ)

20. The application was submitted to the Chamber on 14 February 2002.

21. The applicant is the daughter-in-law of Nezir Smajić, who is indicated in the application form as the alleged victim and a missing person. The applicant states that her father-in-law has been missing since 14 June 1992, when he was captured by the RS Army and taken to the Zamnice Camp in Višegrad.

22. In December 1992, a tracing request was opened for the applicant's father-in-law with the ICRC, registering him as a person whose whereabouts are unknown after 14 June 1992. The ICRC submitted this request to the Working Group, but no answer has been provided.

23. On 11 January 2002, the Municipal Court II in Sarajevo, in extra-judicial proceedings initiated by the applicant, issued a procedural decision declaring Nezir Smajić dead as of 14 June 1992. The applicant alleged that her father-in-law was taken prisoner in Jelašci on 14 June 1992 and taken to the Zamnice Camp in Višegrad, and since then, he disappeared without a trace. The Court considered a certificate issued by the ICRC for Bosnia and Herzegovina on 24 April 2001 registering the applicant's father-in-law as a missing person since 14 June 1992. The Court heard testimony from two witnesses, Derva Ćosić and Hasinija Ćosić, who confirmed the above-mentioned statements of the applicant. The Court has also published a notice and request for information in the Official Gazette of the Federation of Bosnia and Herzegovina, but neither the missing person nor anyone else responded.

24. The applicant states that she has no information about her father-in-law so far. She alleges violations of the right to life, right to freedom, right to work, and right to peaceful enjoyment of home and property. She further sets forth a claim for compensation for non-pecuniary damage.

4. CH/02/8882 Derva ĆOSIĆ (for Sabit ĆOSIĆ)

25. The application was submitted to the Chamber on 14 February 2002.

26. The applicant is the wife of Sabit Ćosić, who is indicated in the application form as the alleged victim and a missing person. The applicant states that her husband was taken from his work place by the RS Army and JNA on an unknown date, and this is when he disappeared.

27. In July 1996, a tracing request was opened for the applicant's husband with the ICRC, registering him as a person whose whereabouts are unknown after an unknown date in 1992. The ICRC submitted this request to the Working Group, but no answer has been provided.

28. According to a death certificate issued on 5 August 1998, the applicant's husband was declared dead since 24 June 1992. The applicant further states that extra-judicial proceedings have been completed before the Municipal Court in Sarajevo, in which her husband was declared dead.

29. The applicant alleges violations of the right to life, right to freedom, right to work and right to peaceful enjoyment of home and property. She further sets forth a claim for compensation for non-pecuniary damage.

5. CH/02/8883 Derva ĆOSIĆ (for Sadik ĆOSIĆ)

30. The application was submitted to the Chamber on 14 February 2002.

31. The applicant is the daughter-in-law of Sadik Ćosić, who is indicated in the application as the alleged victim and a missing person. The applicant states that her father-in-law has been missing since an unidentified date when he was last seen in Dušće, Višegrad Municipality.

32. According to a certificate issued by the ICRC in Zagreb on 2 June 1997, the applicant's father-in-law was registered as a missing person since 19 June 1992. The tracing request was opened with

the ICRC for the applicant's father-in-law on 17 December 1996. The ICRC submitted this request to the Working Group, but no answer has been provided.

33. The applicant states that extra-judicial proceedings have been completed before the Municipal Court in Sarajevo in which her father-in-law was declared dead.

34. The applicant alleges violations of the right to life, right to freedom, right to work, right to peaceful enjoyment of home and property, right to freedom of movement and right to religious freedom and tradition. She further sets forth a claim for compensation for non-pecuniary damage.

6. CH/02/9384 Zema and Ferid DŽAFIĆ (for Zajko DŽAFIĆ)

35. The application was submitted to the Chamber on 4 March 2002.

36. The applicants are the wife and son of Zajko Džafić, who is indicated in the application form as the alleged victim and a missing person. The applicants state that their husband and father has been missing since June 1992, when he was last seen in the police station (SUP) in Višegrad.

37. In August 1995, a tracing request was opened for the applicants' husband and father with the ICRC, registering him as a person whose whereabouts are unknown after an unknown date in 1992. The ICRC submitted this request to the Working Group, but no answer has been provided.

38. On 9 April 2001, the Municipal Court II in Sarajevo, in extra-judicial proceedings initiated by the applicant Zema Džafić, issued a procedural decision declaring Zajko Džafić dead as of 1 June 1992. The Court heard testimony from Maida Karaman and Najila Smajić, who said that on 1 June 1992, Zajko Džafić went to the police station in Višegrad to ask for information about his son and since then he disappeared. The Court has also published a notice and request for information in the Official Gazette of the Federation of Bosnia and Herzegovina, but neither the missing person nor anyone else responded.

39. The applicants state that they still search for information about their loved one through the ICRC. They allege violations of the right to life of their loved one and their right to peaceful family life and right to property. They further set forth claims for compensation for pecuniary and non-pecuniary damages.

7. CH/02/9386 Nermina DŽAFIĆ (for Faid DŽAFIĆ)

40. The application was submitted to the Chamber on 4 March 2002.

41. The applicant is the wife of Faid Džafić, who is indicated in the application form as the alleged victim and a missing person. The applicant states that her husband has been missing since May 1992, when he was captured by the RS Army and taken to Višegrad with other captured people.

42. The applicant states that she has contacted representatives of the ICRC for Bosnia and Herzegovina and the State Commission for Tracing Missing Persons (the "State Commission") with no success. In August 1995, a tracing request was opened for the applicant's husband with the ICRC, registering him as a person whose whereabouts are unknown after an unknown date in 1992. The ICRC submitted this request to the Working Group, but no answer has been provided.

43. According to a death certificate issued on 27 May 1999, the applicant's husband was declared dead since 25 May 1992.

44. The applicant alleges a violation of the right to life of her husband and violations of the right to private and family life of her children. She further sets forth claims for compensation for pecuniary and non-pecuniary damages.

IV. RELEVANT LEGISLATION

A. Agreement on Refugees and Displaced Persons

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

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

B. International Law and Activities regarding Missing Persons

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

46. 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).

47. 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,
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> "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, ..."

48. 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.
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> "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."

49. Article 2 provides as follows:

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

50. 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."

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

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

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

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

2. ICRC Process for Tracing and Identifying Unaccounted for Persons

52. Under international humanitarian law, the ICRC is the principal agency authorised to collect information about missing persons, and all parties to armed conflicts are under an obligation to provide all necessary information at their disposal to trace missing persons (both combatants and civilians) and to satisfy the "right of family members to know the fate of their relatives" pursuant to Article 32 of Protocol No. 1 to the Geneva Conventions. This general obligation is also reflected in Article V of Annex 7 to the General Framework Agreement (see paragraph 45 above). In order to implement its responsibilities under Article V of Annex 7 and international humanitarian law, the State of Bosnia and Herzegovina and the Entities, as well as the ICRC, established a "Process for tracing persons unaccounted for in connection with the conflict on the territory of Bosnia and Herzegovina and informing the families accordingly".

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

54. The Process is to be implemented by the Federation of Bosnia and Herzegovina, the Republika Srpska, and Bosnia and Herzegovina (Section 1.4.A of the terms of reference of the Process). Each party shall "identify spontaneously any dead person found in an area under its control, and notify those belonging to another party to the ICRC or the Working Group without delay" (*id.*). When approached with a request for information on the whereabouts or fate of an unaccounted for person, the parties "shall make any internal enquiries necessary to obtain the information requested" (*id.*).

Each party shall "cooperate with the ICRC and the Working Group to elucidate the fate of persons unaccounted for" (*id.*). "Chaired by the ICRC the Working Group will be the forum through which the parties will provide all required information and take the necessary steps to trace persons unaccounted for and to inform their families accordingly" (Section 1.4.C of the terms of reference of the Process).

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

C. National Activities regarding Missing Persons

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

1. State Commission on Tracing Missing Persons

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

58. On 15 March 1996, the Government of the Republic of Bosnia and Herzegovina enacted the Decision on Establishment of the State Commission on Tracing Missing Persons (OG RBiH no. 9/96 of 24 March 1996), which entered into force on 24 March 1996. Paragraph I of this Decision establishes the State Commission on tracing citizens of the Republic of Bosnia and Herzegovina who disappeared during the aggression on the Republic of Bosnia and Herzegovina (the "State Commission"). Paragraph II provides that the State Commission shall carry out the following duties: maintain records of citizens of the Republic of Bosnia and Herzegovina who went missing due to the hostilities in the former Yugoslavia; undertake direct activities to trace such persons and to establish the truth on their fate; undertake activities to register, trace, identify, and take-over the mortal remains of killed persons; provide information to authorised institutions; issue certificates to the families of the missing, detained, and killed; and co-operate with specialised national and

international agencies and institutions that deal with the issue of missing, detained, and killed persons. Paragraph X states that the State Commission on Tracing Missing Persons shall assume the archives and other documentation of the State Commission and regional commissions described in the preceding paragraph. Paragraph XI renders the Decision on Establishment of the State Commission on Exchange of Prisoners-of-War (OG RBiH nos. 10/92 and 20/92) ineffective upon the entry into force of this Decision. On 10 May 1996, the Government of the Republic of Bosnia and Herzegovina enacted the Decision on Amendments to the Decision on Establishment of the State Commission on Tracing Missing Persons (OG RBiH no. 17/96 of 31 May 1996). The amendments, which mostly concern the establishment of the Expert Team for Locating Mass Graves and Identification of Victims, entered into force on 31 May 1996.

2. Federal Commission for Missing Persons

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

60. The Chamber notes that both the State Commission and the Federal Commission presently exist *de jure* because a decree enacted on the Federation level cannot over-ride a decision enacted by the Republic of Bosnia and Herzegovina, which was then taken over as law in Bosnia and Herzegovina pursuant to Article 2 of Annex II to the Constitution of Bosnia and Herzegovina. Mr. Amor Mašović is the President of the State Commission; he is also a co-President of the Federal Commission, along with his Croat colleague, Mr. Marko Jurišić. However, the State Commission does not receive any money from Bosnia and Herzegovina, and as a practical matter, most of the work presently conducted with respect to the registration, search, exhumation, and identification of missing persons of Bosniak or Croat origin is in fact conducted by the Federal Commission. None the less, the State Commission does continue to serve citizens of Bosniak origin in some capacities.

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

61. According to the respondent Party, the Commission for Tracing Missing and Detained Persons of the Republika Srpska (the "RS Commission") operates on the basis of the Banja Luka Agreement of 25 June 1996 and its mandate follows from that Agreement. The RS Commission undertakes 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

62. 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. COMPLAINTS

63. The applicants are all family members of persons missing from Višegrad, who disappeared between May and June 1992, allegedly after being taken prisoner by soldiers of the RS Army. They allege that, as close family members, they are themselves victims of alleged or apparent human rights violations resulting from the lack of specific information on the fate and the whereabouts of their loved ones last seen in 1992. They seek to know the truth. All of the applicants also seek compensation for their continuing suffering.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

64. In its observations of 23 August 2003, the Republika Srpska claims that the applications, as regards their factual statements, are incomplete, vague and of little informative value for the purpose of any action to be taken by the respondent Party. In its additional observations of 13 November 2003, the respondent Party submits factual information obtained from the Ministry of Internal Affairs of the Republika Srpska on 4 November 2003, including basic biographical details of the missing persons as contained in their identification cards and the following explanation:

> "Upon checking, it was established that there were no records from 1992 in the Police Station in Višegrad; thus, we cannot determine whether the disappearances of the persons sought were reported at the time, and whether they disappeared, and if they were, where and in what manner, as well as whether these persons were processed by the police or were charged with a misdemeanour.
>
> "According to statements of citizens, there were no major military operations by the police and the Republika Srpska Army in the area of the Dušče and Vučine settlements and the Dubovo Village in May and June 1992, except for the battle that was waged on 12 April 1992 in the Vučine settlement area.
>
> "Talking to some inhabitants of the Dubovo Village, data was obtained that the Bosniak population of this village left the village and went towards Višegrad early in April

1992. It was also established that the Yugoslav People's Army did not perform military operations late in May and June 1992, as it had retreated from this area on 17 May 1992."

65. In its observations of 23 August 2003, the respondent Party suggests that the applications should be declared inadmissible in their entirety, for a variety of reasons. Firstly, the applicants failed to address any organ of the respondent Party to obtain information on the fate of their missing family members; therefore, they failed to exhaust a domestic remedy available to them. In this context, the respondent Party states that no tracing requests pertaining to the present applications were transmitted to it by the ICRC, presumably because "the applicants failed to lodge requests before the ICRC". Secondly, as the underlying events occurred before the entry into force of the Agreement, it is asserted that the Chamber lacks jurisdiction *ratione temporis* to consider the cases.

66. On the merits, the Republika Srpska argues that the applications are ill-founded because the applicants were not subjected to any treatment that falls within the scope of Article 3, and there was no interference with or violation of the applicants' rights under Article 8 of the Convention. Consequently, the respondent Party also considers the compensation claims submitted by the applicants to be ill-founded.

B. The applicants

67. The applicants did not make any further submissions, so the Chamber presumes they maintain all the complaints raised in the applications.

VII. OPINION OF THE CHAMBER

A. Admissibility

68. Before considering the merits of these applications, the Chamber must decide whether to accept them, taking into account the admissibility criteria set forth in Article VIII(2) of the Agreement.

1. Exhaustion of effective remedies

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

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

71. The respondent Party argues that the applicants have failed to exhaust effective domestic remedies in that they have not addressed any of its organs with a request to obtain information on the fate of their missing family members. Specifically, they did not request information directly from the RS Commission.

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

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

73. Furthermore, the Chamber recalls that under the *Process for tracing persons unaccounted for* (see paragraphs 52-55 above), as well as in Article V of Annex 7 quoted above, the State of Bosnia and Herzegovina and the Entities, including the Republika Srpska, agreed to co-operate in the effort to trace unaccounted for persons. The *Process for tracing persons unaccounted for* further clarifies that the Parties shall share information, and a copy of all tracing requests are provided to the Working Group, which has three representatives of the Republika Srpska (see paragraph 53 above). All the applicants addressed the ICRC and opened tracing requests for their loved ones in 1995 or 1996. The respondent Party does not admit that the applicants have addressed the ICRC, as it argues that it never received the requests from the ICRC. However, the ICRC has specifically confirmed that tracing requests were opened for all the missing persons mentioned in this decision in 1995 or 1996; moreover, the ICRC stated that it submitted all the tracing requests to the Working Group of the *Process for tracing persons unaccounted for*.

74. Taking into account the respondent Party's obligation under Article V of Annex 7 to "cooperate fully with the ICRC in its efforts to determine the identities, whereabouts and fate of the unaccounted for" and the fact that all tracing requests were provided to representatives of the Republika Srpska through the Working Group, the Chamber considers that the relevant authorities of the respondent Party were made aware of the applicants' requests for information about the fate and whereabouts of their loved ones missing from Višegrad through the *Process for tracing persons unaccounted for*. In the present cases the respondent Party has had at least seven years since the tracing requests were opened to gather such information, and the authorities have provided no information whatsoever on the fate and whereabouts of any of the applicants' missing loved ones.

75. Considering that all the applicants opened tracing requests with the ICRC in 1995 or 1996 and they registered their loved ones as missing from Višegrad, the Chamber concludes that the applicants have exhausted the remedy provided for in Annex 7 for the purposes of Article VIII(2)(a) of the Agreement. Therefore, the Chamber rejects this ground for declaring the applications inadmissible.

2. *Ratione temporis*

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

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

78. 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).

79. 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).

80. 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 of family members seeking information about the fate and whereabouts of loved ones who have been missing since the armed conflict raise allegations of a continuing violation of the human rights of the family members by the respondent Party. Both Articles 3 and 8 of the Convention impose a positive obligation on the respondent Party "to investigate thoroughly into allegations of arbitrary deprivations of liberty even in cases where it cannot be established, although it is alleged, that the deprivation of liberty is attributable to the authorities" *(id.* at paragraph 88 (quoting *Demirović, Berbić, and Berbić v. Republika Srpska* (application no. 7/96, Report of the Ombudsperson of 30 September 1998))).

81. The Chamber recalls that all the applicants opened tracing requests with the ICRC in 1995 or 1996. These requests were opened after 14 December 1995, when the Agreement entered into force. The applicants stress that they still search for their loved ones through the ICRC, although they assume that they are not alive any more. Yet, more than 11 years after the events in question, none of the applicants has been officially informed about the fate and whereabouts of their missing loved ones. 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 applications fall within the Chamber's competence *ratione temporis*, within the meaning of Article VIII(2)(c) of the Agreement, and they are admissible.

3. Conclusion as to admissibility

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

B. Merits

83. 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 8 of the Convention (Right to Respect for Private and Family Life – *i.e.*, Right to Access to Information)

84. 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."

85. 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 nos. CH/99/3196, *Palić v. the Republika Srpska*, decision on admissibility and merits of 9 December 2000, paragraphs 82-84, Decisions January—June 2001; CH/01/8365 *et al.*, *Selimović and Others v. The Republika Srpska*, decision on admissibility and merits of 3 March 2003, paragraphs 173-174; *see also* Eur. Court HR, *Gaskin v. United Kingdom*, judgment of 7 July 1989, Series A no. 160; Eur. Court HR, *M.G. v. United Kingdom*, judgment of 24 September 2002).

86. In the present applications, the applicants' family members were taken into custody by the RS Army in the time period from May to June 1992, when many Bosniaks went missing from Višegrad. In two cases, the applicants' family members were initially detained in the infamous Zamnice Camp, and then the detained persons were never seen again. Although tracing requests were opened for all their missing loved ones with the ICRC in 1995 or 1996, none of the applicants has received any official information on their fate or whereabouts.

87. Despite the respondent Party's statement that the police station in Višegrad contains no records from 1992, from the underlying facts, including the contextual facts as established by the ICTY in *Prosecutor v. Mitar Vasiljević*, the Chamber concludes that the authorities of the respondent Party had within their "possession or control" information about the Bosniaks from Višegrad who were detained in the Zamnice Camp or who disappeared without being previously held in custody. In any event, the possibility that information and evidence pertaining to the fate of these persons was lost or destroyed by members of the armed forces or police of the respondent Party does not relieve the respondent Party of its positive obligations under Article 8 of the Convention. Rather, it appears that the authorities of the Republika Srpska arbitrarily and without justification failed to take any meaningful action to locate, discover, or disclose information sought by the applicants about their missing loved ones. It appears that after the Chamber transmitted these cases to the Republika Srpska, a superficial investigation was conducted by the Ministry of Internal Affairs which included taking statements from anonymous citizens (see paragraph 64 above), but this investigation does not reveal any meaningful information relevant to the fate and whereabouts of the missing persons and it further stands in contrast to the facts established by the ICTY. Thus, there remains no evidence, for example, that the authorities of the Republika Srpska have interviewed any of the members of its armed forces who were involved in the events in Višegrad and the treatment of the Bosniaks, interviewed any other possible witnesses, or disclosed any physical evidence still in its possession with a view to making the requested information available to the families of the victims from Višegrad. Such inaction or passivity is a breach of the Republika Srpska's responsibilities due under Annex 7 to the General Framework Agreement and the *Process for tracing persons unaccounted for*.

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

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

89. Article 3 of the Convention provides that: "No one shall be subjected to torture or to inhuman

or degrading treatment or punishment."

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

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

91. 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" (case no. CH/99/2150, *Unković*, decision on review of 6 May 2002, paragraph 115, Decisions January—June 2002).

92. Applying the above factors to the applicants in the present cases, the Chamber observes that all the applicants are close family members (*i.e.*, wives, daughters or daughters-in-law) of the persons who have been missing from Višegrad since May to June 1992. That the applicants have suffered as a result of the events taking place in Višegrad in 1992 and the resultant loss of their loved ones under such conditions is indisputable and apparent from the applications. Such emotional suffering, in the view of the Chamber, is of a dimension and character to constitute "inhuman treatment" within the meaning of Article 3 of the Convention.

93. Applying the above factors to the respondent Party, the Chamber observes that the authorities of the Republika Srpska have done nothing to clarify the fate and whereabouts of the presumed victims of the Višegrad events or to take any other action to relieve the suffering of their surviving family members. Apart from the superficial investigation conducted by the Ministry of Internal Affairs as explained in the submission of 13 November 2003 (see paragraph 64 above), the authorities have not investigated in a meaningful way the facts concerning the illegal detention of Bosniak men and women at the Zamnice Camp or the circumstances of disappearances of Bosniaks occurring in Višegrad in May to June 1992 and thereafter, not interviewed any of the participating members of its armed forces who took part in the operation, not contacted the surviving family members, and not undertaken action substantively to assist the actions of others (*e.g.*, the ICRC, the State Commission, the International Commission on Missing Persons, or the ICTY) to clarify the events at Višegrad. Moreover, the Chamber must note that according to the ICTY, the authorities of the Republika Srpska were directly involved in the disappearances in Višegrad. None the less, the applicants and other survivors of the Višegrad events of summer 1992 have waited for more than eleven years for clarification of the fate and whereabouts of their missing loved ones by the competent authorities. As no meaningful information has been forthcoming, the reaction of the authorities of the Republika Srpska can only be described as "complacency" or indifference, which aggravates an already tragic situation.

94. 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 that it has failed to inform the applicants about the truth of the fate and whereabouts of their loved ones missing from Višegrad since May to June 1992.

3. Discrimination in the enjoyment of Articles 8 and 3 of the Convention

95. Taking into consideration its conclusion that the Republika Srpska has violated the applicants' rights protected by Articles 8 and 3 of the Convention, the Chamber decides that it is not necessary separately to examine the applications with respect to discrimination.

4. Conclusion as to the merits

96. In summary, the Chamber concludes that the respondent Party's failure to make accessible and disclose information requested by the applicants about their missing loved ones from Višegrad constitutes a violation of its positive obligations to secure respect for their rights to private and family life, as guaranteed by Article 8 of the Convention. In addition, the respondent Party's failure to inform the applicants about the truth of the fate and whereabouts of their missing loved ones, including conducting a meaningful and effective investigation into the events at Višegrad in May 1992 and the months thereafter, violates their rights to be free from inhuman and degrading treatment, as guaranteed by Article 3 of the Convention.

VIII. REMEDIES

97. 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.

98. The Chamber recalls that the applicants seek to know the truth about their missing loved ones, who may be presumed victims of the events in Višegrad in summer 1992 and thereafter. The applicants also seek compensation for their suffering. In fashioning a remedy for the established breaches of the Agreement, Article XI(1)(b) provides the Chamber with broad remedial powers and the Chamber is not limited to the requests of the applicants.

99. In accordance with its previous case law in missing persons cases (see, CH/01/8365 *et al.*, *Selimović v. The Republika Srpska*, decision on admissibility and merits of 3 March 2003, paragraphs 205-210), the Chamber will order the Republika Srpska, as a matter of urgency, to release all information presently within its possession, control, and knowledge with respect to the fate and whereabouts of the missing loved ones of the applicants, including information on whether any of the missing persons are still alive and held in detention and if so, the location of their detention, and whether any of the missing persons are known to have been killed in the Višegrad events and if so, the location of their mortal remains. The Republika Srpska shall immediately release any such missing persons who are still alive and held in detention unlawfully. The Republika Srpska shall also, as a matter of urgency, disclose to the ICRC, the International Commission on Missing Persons, and the State Commission all information within its possession, control, and knowledge with respect to the location of any gravesites, individual or mass, primary or secondary, of the victims of the Višegrad events not previously disclosed.

100. The Chamber will further order the Republika Srpska to conduct a full, meaningful, thorough, and detailed investigation into the events giving rise to the established human rights violations, with a view to making known to the applicants, all other family members, and the public, the Republika Srpska's role in the facts surrounding events in Višegrad in 1992 and the subsequent assaults on the non-Serb population, its subsequent efforts to cover up those facts, and the fate and whereabouts of the persons missing from Višegrad since summer 1992. Such investigation should also be conducted with a view to bringing the perpetrators of any crimes committed in connection with the missing persons from Višegrad to justice before the competent domestic criminal courts or to transferring persons wanted by the ICTY for prosecution for war crimes, genocide, or crimes against humanity in connection with the Višegrad events. This investigation should include, among other necessary measures, an internal investigation of present and former members of the armed forces of the respondent Party who may have relevant personal knowledge of the Višegrad events. The Republika Srpska shall disclose the results of this investigation to the Chamber, the ICRC, the International Commission on Missing Persons, the State Commission, and the ICTY, as well as to the OHR, the Organisation for Security and Co-operation in Europe (the "OSCE") Mission to Bosnia and Herzegovina, and the Office of the Council of Europe in Bosnia and Herzegovina, at the latest within six months after the date of delivery of this decision.

101. The Chamber further finds it appropriate to make a collective compensation award to benefit all the family members of the persons missing from Višegrad since summer 1992. In this regard, the Chamber particularly highlights that in the present decision, it has found violations of the rights of the family members protected by Articles 8 and 3 of the Convention, but it has not found any violations of the rights of the missing persons because such claims are outside the competence of the Chamber *ratione temporis* (see paragraph 78 above). The Chamber understands that the primary goal of the present applications is the applicants' desire to know the fate and whereabouts of their missing loved ones. If it is determined that the missing persons were killed in the Višegrad events, then the applicants would like to bury the remains of their loved ones in accordance with their traditions and beliefs.

102. The Chamber notes that on 15 June 2000, the Institute for Missing Persons (hereinafter "MPI") was founded on the initiative and with the support of all domestic missing persons commissions, the International Commission on Missing Persons, the ICRC and family associations of

missing persons. Furthermore, the Chamber notes that the Presidency of Bosnia and Herzegovina is a co-founder of the MPI pursuant to a decision of 11 June 2003. The MPI is a legal entity on the State level registered with the Cantonal Court in Sarajevo, serving the aim of collecting, registering, and storing remains and data about missing persons; exhuming and identifying missing persons from the armed conflict; and advocating for the release of information.

103. Therefore, the Chamber finds it appropriate to order the Republika Srpska to make a lump sum contribution to the MPI for the collective benefit of all the applicants and the families of the victims of the Višegrad events in the total amount of one-hundred thousand Convertible Marks (100,000 KM), to be used in accordance with the Statute of the MPI for the purpose of collecting information on the fate and whereabouts of missing persons primarily from the Municipality of Višegrad. This amount shall be paid by the Republika Srpska at the latest six months after the delivery of the present decision. The Chamber will further order the Republika Srpska to pay simple interest at an annual rate of 10% (ten per cent) on the lump sum specified or any unpaid portion thereof after the expiry of six months from the date of delivery of this decision, *i.e.*, 5 June 2004, until the date of settlement in full.

104. Although the Chamber recognises that the applicants have personally suffered pecuniary and non-pecuniary damages, the Chamber will not make any individual awards of compensation. The lump sum payment specified in the preceding paragraph, which shall be used for the collective benefit of all the applicants, will, in the Chamber's view, provide the best form of reparation for the violations found of the applicants' rights guaranteed by Articles 3 and 8 of the Convention to know the fate and whereabouts of their missing loved ones from Višegrad.

105. In light of the violations found in the present cases, the Chamber considers that a further appropriate remedy would be for the Republika Srpska to make a public acknowledgement of responsibility for the Višegrad events and a public apology to the victims' relatives and the Bosniak community of Bosnia and Herzegovina as a whole. However, a public acknowledgement of responsibility and a public apology can only provide a real remedy for the applicants when the statements are honest, genuine, sincere, and self-initiated, *i.e.*, not compelled by a court order. Therefore, the Chamber will refrain from ordering the Republika Srpska to make such a public acknowledgement of responsibility or a public apology because, in the context of the Višegrad cases, the Chamber finds such an order inopportune. The Chamber expresses the hope, however, that someday these statements will be forthcoming from the Republika Srpska on its own initiative.

IX. CONCLUSIONS

106. For the above reasons, the Chamber decides,

1. unanimously, that the applicants' claims arising or continuing after 14 December 1995 under Articles 3 and 8 of the European Convention on Human Rights and discrimination in connection with these rights under Article I(14) and II(2)(b) of the Human Rights Agreement are admissible;

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

3. unanimously, that the failure of the Republika Srpska to make accessible and disclose information requested by the applicants about their missing loved ones from Višegrad violates its positive obligations to secure respect for their rights to private and family life, as guaranteed by Article 8 of the Convention, the Republika Srpska thereby being in breach of Article I of the Agreement;

4. by 10 votes to 3, that the failure of the Republika Srpska to inform the applicants about the truth of the fate and whereabouts of their missing loved ones, including conducting a meaningful and effective investigation into the events during and after the take-over of the Municipality of Višegrad in May 1992, violates their rights to be free from inhuman and degrading treatment, as guaranteed by Article 3 of the Convention, the Republika Srpska thereby being in breach of Article I of the Agreement;

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

6. unanimously, to order the Republika Srpska, as a matter of urgency, to release all information presently within its possession, control, and knowledge with respect to the fate and whereabouts of the missing loved ones of the applicants, including information on whether any of the missing persons are still alive and held in detention and if so, the location of their detention, and whether any of the missing persons are known to have been killed in the events in Višegrad in summer 1992 and if so, the location of their mortal remains. The Republika Srpska shall immediately release any such missing persons who are still alive and held in detention unlawfully. The Republika Srpska shall also, as a matter of urgency, disclose to the ICRC, the International Commission on Missing Persons, and the State Commission all information within its possession, control, and knowledge with respect to the location of any gravesites, individual or mass, primary or secondary, of the victims of the Višegrad events not previously disclosed;

7. unanimously, to order the Republika Srpska to conduct a full, meaningful, thorough, and detailed investigation into the events giving rise to the established human rights violations; the Republika Srpska shall disclose the results of this investigation to the ICRC, the International Commission on Missing Persons, the State Commission, and the ICTY, as well as to the OHR, the OSCE Mission to Bosnia and Herzegovina, and the Office of the Council of Europe in Bosnia and Herzegovina, within six months from the date of delivery of this decision;

8. by 10 votes to 3, to order the Republika Srpska to make a lump sum contribution to the Institute for Missing Persons in the total amount of one-hundred thousand Convertible Marks (100,000 KM), to be used in accordance with the Statute of the Institute for Missing Persons for the purpose of collecting information on the fate and whereabouts of missing persons primarily from the Municipality of Višegrad, to be paid within six months from the date of delivery of this decision, *i.e.* by 5 June 2004;

9. by 10 votes to 3, that simple interest at an annual rate of 10 % (ten per cent) will be payable on the sum awarded in the previous conclusion from the expiry of the six-month period set for such payment until the date of final settlement;

10. unanimously, to dismiss any remaining claims for compensation; and

11. unanimously, to order the Republika Srpska to submit to the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina a full report on the steps taken by it to comply with these orders within six months after the date of delivery of this decision, *i.e.* by 5 June 2004.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber