DECISION ON ADMISSIBILITY AND MERITS
(delivered on 7 November 2003)

Case no. CH/03/13051

S.S.

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 8 October 2003 with the following members present:

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

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 Articles VIII(2) and XI of the Agreement and Rules 52, 57, and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. On 6 September 1997, Dr. Dragomir Kerović, a sitting Serb member of the House of Representatives of Bosnia and Herzegovina and a practicing physician in Lopare, along with three accomplices, kidnapped the applicant, a displaced person and the woman with whom he had shared an intimated relationship, and performed a forcible abortion upon her, thereby causing her to deliver a stillborn female fetus in the seventh month of pregnancy. Criminal charges were filed against Dr. Kerović and others on 28 October 1997. The Basic Court in Bijeljina did not issue its verdict in the case until 27 December 2001. In that judgment, it found the defendants guilty of kidnapping and/or forcible abortion against the applicant. On 20 June 2002, the District Court in Bijeljina confirmed the first instance judgment. However, on 4 November 2002, the Supreme Court of the Republika Srpska (the "Supreme Court"), acting in extraordinary review proceedings, vacated the verdicts and returned the entire case to the Basic Court in Bijeljina for renewed criminal proceedings. In particular, the Supreme Court found that because Dr. Kerović had been suffering from depression since 1993, the Basic Court should have ordered an expertise upon his mental competence (sanity) at the time of commission of the crimes. Neither the Basic Court nor District Court had found such expertise necessary because neither court found any reason whatsoever to doubt Dr. Kerović's accountability for the criminal offences. To date the renewed criminal proceedings are still pending before the Basic Court in Bijeljina, and Dr. Kerović remains at liberty.

2. The application raises issues under Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights (the "Convention"); Article 8 (right to respect for private and family life) of the Convention; Article 6 paragraph 1 (right to a fair trial in a reasonable time) of the Convention; and Article 13 (right to an effective remedy) of the Convention. The application also raises issues under Articles I(14) and II(2)(b) of the Agreement for discrimination in the enjoyment of these rights on the grounds of gender and social origin/status.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced to the Chamber and registered on 25 February 2003. The application was transmitted to the Chamber by the Office of the United Nations High Commissioner for Human Rights in Bosnia and Herzegovina (the "OHCHR"), along with a "letter of support".

4. The applicant was initially represented by Miodrag Stojanović, a lawyer practising in Bijeljina, the Republika Srpska. As of 31 July 2003, she is represented by Stanka Lazarević, also a lawyer practicing in Bijeljina.

5. In her application, the applicant requested the Chamber to order the respondent Party, as provisional measures, to suspend the public hearing before the Basic Court in Bijeljina in the renewed proceedings against the defendant Dragomir Kerović and his accomplices, until the Chamber fully considers the application. The applicant further requested the Chamber to order the Supreme Court to issue a decision on the merits of the case against the defendants. On 26 February 2003, the President of the Chamber decided to reject the provisional measures requested.

6. On 17 March 2003, the Chamber transmitted the application to the respondent Party for observations on the admissibility and merits under Articles 3, 6, 8, and 13 of the Convention and discrimination in the enjoyment of these rights on the grounds of gender and social origin/status under Article II(2)(b) of the Agreement.

7. On 17 April 2003, the respondent Party submitted its observations on the admissibility and merits of the application.

8. On 13 May 2003, the Chamber invited the OHCHR to participate as *amicus curiae* in the proceedings, pursuant to Rule 32*ter* of the Chamber's Rules of Procedure.

9. On 23 May 2003, the applicant requested that the Chamber protect her identity during the proceedings in order to prevent endangering her right to peaceful enjoyment of her family life.

10. On 30 May 2003, the OHCHR, as *amicus curiae*, submitted its observations on the admissibility and merits of the application.

11. On 11 June 2003, the Chamber requested the parties to submit additional information. On 19 June 2003, the applicant's representative submitted the requested information. On 23 and 25 June 2003, the respondent Party submitted the requested information.

12. On 1 August 2003, the Chamber requested the respondent Party to submit additional information concerning the first instance criminal proceedings against the defendant Kerović and his accomplices. In its response of 22 August 2003, the respondent Party explained that it could not submit the requested information because the case file was in Sarajevo at the Neuro-psychiatric Clinic of the Koševo Hospital, with Drs. Senadin Ljubović and Abdulah Kučukalić, neuro-psychiatrists.

13. On 22 August 2003, the Organisation for Security and Co-operation in Europe ("OSCE"), Mission to Bosnia and Herzegovina, authorised the Chamber to consider as part of its case file and to transmit to the parties its monitoring report dated 30 July 2003 summarising the criminal proceedings, main trial, appellate proceedings, and renewed proceedings before the domestic courts in the Republika Srpska against the defendant Kerović and his accomplices (the "OSCE Trial Monitoring Report").

14. On 26 August 2003, the Chamber transmitted the OSCE Trial Monitoring Report, translated into the local language, to the parties. The Chamber offered the parties an opportunity to submit any objections to the Report, in particular noting any relevant factual omissions or factual misrepresentations. The Chamber expressly notified the parties that it will assume that the OSCE Trial Monitoring Report accurately summarises the relevant facts in the criminal proceedings against the defendant Kerović and others unless specifically indicated otherwise by the parties.

15. On 1 September 2003, the respondent Party stated that it has "no objections" to the OSCE Trial Monitoring Report. This statement is based upon a letter from the President of the Basic Court in Bijeljina, who noted that since 14 August 2003, the case file has been in Sarajevo at the Neuro-psychiatric Clinic of the Koševo Hospital for an expertise of Dr. Kerović. He further stated that, "since the case file is not available to me, I cannot respond to the question whether the Report … precisely reflects the course of events in the proceedings and the case. Having observed the Report, I may state in all probability that the Report credibly mirrors the course of the proceedings in this case."

16. On 29 September 2003, the Chamber requested further additional information from the respondent Party. The respondent Party submitted the requested information on 6 October 2003.

17. The plenary Chamber deliberated on the admissibility and merits of the application on 7 March, 3 and 6 June, 2 September, and 8 October 2003. On the latter date it adopted the present decision on admissibility and merits.

III. STATEMENT OF THE FACTS

18. The facts presented are not materially disputed between the parties except as specifically indicated below.

A. Underlying critical events

19. The applicant is a citizen of Bosnia and Herzegovina of Serb origin. After the armed conflict she lived as a displaced person in Bijeljina, the Republika Srpska. During this time she became intimately involved with Dr. Dragomir Kerović, also a citizen of Bosnia and Herzegovina of Serb origin, from Lopare. Dr. Kerović was at this time a practicing physician, with a speciality in internal medicine, at the Health Centre in Lopare, as well as a high ranking official of the Serb Democratic Party ("SDS") and a Serb member of the House of Representatives of Bosnia and Herzegovina.

20. In early 1997 the applicant became pregnant with a child conceived during her relationship with Dr. Kerović. Dr. Kerović tried to convince her to have an abortion, but she refused.

21. On 6 September 1997, Živan Ilić, an accomplice of Dr. Kerović, offered Milan Milovanović and Radoslav Popović payment in the amount of 500 *Deutsche Marks* ("DEM") to kidnap the pregnant applicant and transport her to Lopare, so that Dr. Kerović could force her to undergo an abortion. They agreed. Živan Ilić drove them to the Health Centre in Lopare, where Dr. Kerović gave them police uniforms to wear and a police warrant with the name of the applicant on it, ordering that she be taken to the police station. At around 9 P.M. that night, Dr. Kerović drove Milovanović and Popović to the house of the applicant's father. Dr. Kerović waited outside in the car while Milovanović and Popović entered the house, dressed as policemen, and presented the warrant. When the applicant's parents objected, Milovanović and Popović used force to remove her from the house. They placed a knit bag over her head, forced her into the car, and Dr. Kerović drove the car in the direction of Ugljevik. Along the way, he stopped the car, and, assisted by Milanović and Popović, Dr. Kerović forcibly administered an injection to the applicant. Then they continued driving to the Health Centre in Lopare, where a man wearing a medical apron performed a surgical procedure to interrupt the applicant's pregnancy. The medical procedure lasted some 45 minutes, throughout which the knit bag remained over the applicant's head and she fell in and out of consciousness. Thereafter, Dr. Kerović, accompanied by Milanović and Popović, drove the applicant to the village of Ljeljenča, where they left her on the side of the road. A soldier found her later and called the police. The applicant experienced severe pain in her lower abdomen, bled heavily, and the next morning delivered a stillborn female fetus in the seventh month of pregnancy.

B. First instance investigative proceedings

22. On 28 October 1997, criminal charges were filed against Dragomir Kerović, Milan Milovanović, and Radoslav Popović under Article 50(1) for kidnapping and Article 41(3) for illicit abortion of the former Criminal Code of the Republika Srpska (Special Part) (Official Gazette of Republika Srpska nos. 15/92-616, 4/93-94, 17/93-69, 26/93-1006, 14/94-533, 3/96-41) (the "former Criminal Code"). These charges were later amended when the new Criminal Code of the Republika Srpska entered into force (see paragraph 96 below).

23. On 18 May 1998, Milovanović was taken into custody by the local police in Brčko. Popović remained at large as he had allegedly fled to Canada. Dr. Kerović also remained at large as he enjoyed immunity as a delegate of the House of Representatives of Bosnia and Herzegovina. On 18 May 1998, the deputy basic public prosecutor in Bijeljina filed a request to open investigative proceedings against the defendants Dr. Kerović, Milovanović, and Popović, and on the same day, the investigative judge issued the decision to open the investigation. The investigative judge further interviewed Milovanović as a suspect.

24. The preliminary hearing scheduled for 27 May 1998 was postponed due to the failure of Dr. Kerović to appear, as he was attending a session of the SDS in Pale scheduled for the same day.

25. On 29 May 1998, Dr. Kerović appeared at the preliminary hearing, but he invoked immunity as a delegate of the House of Representatives of Bosnia and Herzegovina and refused to offer any statement. Thereafter, the Basic Court in Bijeljina sent a letter to the Parliament of Bosnia and Herzegovina requesting the termination of Dr. Kerović's immunity as a delegate. The hearing scheduled for 12 June 1998 was postponed due to the failure of the Parliament of Bosnia and Herzegovina to respond to the Basic Court's request for termination of Dr. Kerović's immunity.

26. The hearing scheduled for 19 June 1998 was postponed due to the failure of Dr. Kerović to appear. He informed the Basic Court in Bijeljina that he was undergoing medical treatment at a hospital in Belgrade.

27. On 11 August 1998, in response to its inquiry, the Basic Court in Bijeljina received a letter from the Parliament of Bosnia and Herzegovina informing it that Dr. Kerović's immunity as a delegate would be decided upon at the session on 1 September 1998. However, thereafter, the Basic Court received no further information from the Parliament of Bosnia and Herzegovina regarding the status of Dr. Kerović's immunity as a delegate.

28. On the request of the deputy basic public prosecutor, the investigative judge issued a decision on 9 September 1998 extending the investigation to cover also Živan Ilić for kidnapping under Article 50(1) of the former Criminal Code. On the same day, the investigative judge interviewed him as a suspect.

29. The applicant, as the injured party, testified for the first time before the investigative judge of the Basic Court in Bijeljina also on 9 September 1998, as the defendant should be questioned prior to the injured party and others. At this time the applicant timely raised a claim under property law (*i.e.*, a civil claim for compensation for damages arising out of the commission of a crime, see paragraph 111 and footnote 1 below). As allowed by Article 108 of the Code of Criminal Procedure of the Republika Srpska, she did not specify the amount of her claim under property law. However, according to the respondent Party, she "achieved the status of the injured party, as in all other cases, at the moment when the criminal act was performed", *i.e.* on 6 September 1997.

30. On 14 October 1998, the investigative judge interviewed Sreten Todić, who had found the applicant in Ljeljenča Village, where she was left after the critical event (*i.e.*, after the forcible abortion was performed on her). He also interviewed Dr. Ljubica Kusurić, who examined the applicant after she was brought to the Hospital in Bijeljina by the local police.

31. The first psychiatric expertise upon Dr. Kerović's capacity to stand trial was conducted by Drs. Kovačević, Žigmund, and Simić from the Mental Health Centre in Belgrade. In their written findings of 20 October 1998, they stated that "the defendant Kerković is depressed and incapable of presenting his defence and standing trial".

32. According to the OSCE Trial Monitoring Report, on 12 December 1998, Dr. Kerović's immunity as a delegate terminated. As the Parliament of Bosnia and Herzegovina never responded to the inquiry of the Basic Court in Bijeljina (see paragraphs 25, 27 above), the President of the Basic Court concluded that Dr. Kerović's immunity as a delegate terminated when his mandate in the Parliament of Bosnia and Herzegovina expired, which occurred at some point prior to his appearances before the Basic Court in 2000.

33. The preliminary hearing scheduled for 29 December 1998 was postponed because the Basic Court in Bijeljina received medical findings establishing that Dr. Kerović was undergoing medical treatment at a hospital in Belgrade.

34. The preliminary hearing scheduled for 18 January 1999 was postponed due to the failure of Dr. Kerović to appear. His summons was returned to the Basic Court in Bijeljina as undeliverable, and his father informed the Court that Dr. Kerović was still undergoing medical treatment at a hospital in Belgrade. On the same day, the Basic Court in Bijeljina requested the local police in Lopare to locate Dr. Kerović and deliver him to the Court.

35. On 29 January 1999, the local police in Lopare informed the Basic Court in Bijeljina that Dr. Kerović was not available, attaching a certificate establishing that he was undergoing medical treatment at the Mental Health Centre in Belgrade.

36. On 3 February 1999, the investigative judge sent a letter to the Mental Health Centre in Belgrade asking for verification of whether Dr. Kerović was indeed hospitalised, what was the nature of his illness, and whether he was capable to attend the hearing. On 22 February 1999, the Mental Health Centre in Belgrade submitted its medical findings and opinion, stating that Dr. Kerović was hospitalised as a patient and that it is not recommended that he attend hearings until his medical treatment is completed.

37. On 1 March 1999, the Basic Court in Bijeljina issued a decision to commence the investigation against Dr. Kerović for the criminal offences of kidnapping and illicit abortion, and it further issued a warrant for his arrest.

38. On 12 March 1999, the President of the Basic Court in Bijeljina issued a decision ordering the investigative judge to visit the Mental Health Centre in Belgrade to verify whether Dr. Kerović was

indeed hospitalised there, as well as to personally determine the nature of his illness and the opinion of the doctors at the Hospital about his condition. On 16 March 1999, the investigative judge and the deputy basic public prosecutor visited the Mental Health Centre in Belgrade. They were informed that Dr. Kerović suffers from a "depressive syndrome", which is not an obstacle for him to attend hearings. On 17 March 1999, the Mental Health Centre in Belgrade informed the Basic Court in Bijeljina that Dr. Kerović's medical treatments were completed that day.

39. On 10 May 1999, as the investigation was completed, the investigative judge sent the case file to the Basic Public Prosecutor's Office. He proposed a trial *in absentia* against the defendants Dr. Kerović and Popović, who were both still at large despite the earlier issuance of arrest warrants.

40. On the same day defence counsel for Dr. Kerović proposed that the District Court in Bijeljina transfer the case to the District Court in Lopare due to the inefficiency of the Basic Court in Bijeljina, as shown by the long investigative proceedings, as well as the fact that most of the witnesses and the defendant reside in the Lopare Municipality.

C. First instance criminal proceedings

41. On 24 May 1999, the indictment was issued against the defendants Dr. Kerović, Milovanović, and Popović under Article 50(1) for kidnapping and Article 41(2) for illicit abortion and against the defendant Ilić under Article 50(1) for kidnapping.

42. On 28 May 1999, the presiding judge sent a proposal to transfer the case to the Basic Court in Lopare in accordance with its territorial jurisdiction. On 16 June 1999, the District Court issued the decision to transfer the case to the Basic Court in Lopare, as the court with territorial jurisdiction.

43. On 17 June 1999, Dr. Kerović informed the Basic Court in Lopare that he had deposited 10,000 KM bail as a guarantee that he would not leave his place of residence.

44. On 25 June 1999, the Basic Court in Lopare delivered the indictments to the defendants and their defence counsel. On 23 August 1999, an international arrest warrant and detention order was issued against the defendant Popović, who had allegedly fled to Canada.

45. The first hearing scheduled for 24 September 1999 was postponed due to the failure of the defence counsel for Milovanović and Popović to appear. The Basic Court then appointed *ex-officio* defence counsel to represent these two defendants.

46. During the main hearing on 20 October 1999, Dr. Kerović was interviewed. He stated that he was not capable of following the criminal proceedings, and he requested an expertise to be conducted by Dr. Ratko Kovačević, a neuro-psychiatrist from Lopare, on his capacity to stand trial. The Basic Court in Lopare summoned Dr. Kovačević to appear at the next hearing.

47. On 14 November 1999, Dr. Kovačević informed the Basic Court in Lopare that he could not be present at the hearing, nor deliver his opinion and analysis. Thereafter, the Court appointed another expert, Dr. Stevo Marjanović from Belgrade, to conduct an expertise upon Dr. Kerović's capacity to stand trial. The Basic Court in Lopare further informed the Municipal Assembly in Lopare and the Health Centre in Lopare about the pending criminal proceedings against Dr. Kerović.

48. At the hearing on 19 November 1999, Dr. Marjanović clarified the medical opinion given by the experts from Belgrade who had examined Dr. Kerović on 20 October 1998 (see paragraph 31 above). After reviewing these medical findings, but in the absence of an independent expertise, Dr. Marjanović testified that Dr. Kerović was not capable to stand trial. Based upon this opinion, the Basic Court in Lopare appointed Dr. Marjanović to conduct an expertise upon Dr. Kerović's capacity to stand trial. The expertise was conducted the same day. Dr. Marjanović opined that "Kerovic suffers from depressive syndrome, which is temporary, originating from 1993, when the defendant accidentally lost his eye". The expert concluded that Dr. Kerovic was not capable to stand trial.

49. The deputy basic public prosecutor appealed against the opinion of Dr. Marjanović and requested the Basic Court in Lopare to appoint another expert to conduct an additional expertise

upon Dr. Kerović's capacity to stand trial. On 26 November 1999, the Basic Court in Lopare ordered Dr. Zorica Lazarević from Bijeljina to conduct an expertise upon Dr. Kerović's capacity to stand trial.

50. The hearing scheduled for 17 December 1999 was postponed due to the failure of the deputy basic public prosecutor and Dr. Lazarević to appear as a result of adverse weather conditions (deep snow). On the same day the judge issued a decision appointing Dr. Lazarević to conduct the expertise of Dr. Kerović in the Sokolac Hospital, where the defendant would be exposed to 10 days of observation and examination.

51. On 31 January 2000, the Basic Court in Lopare sent a proposal to the District Court in Bijeljina to transfer the case to the jurisdiction of the District Court since the sentence for the criminal offence at issue is a legal minimum three years imprisonment, with no defined legal maximum sentence. The judge further opined that the criminal offence of kidnapping should be qualified under Article 50 paragraph 2, not paragraph 1, as stated in the indictment. Upon the approval of the District Court in Bijeljina, the Basic Court in Lopare transferred the case to the District Court in Bijeljina as the competent court with subject matter jurisdiction.

52. Also on 31 January 2000, the District Court in Bijeljina issued a decision appointing Dr. Bogdan Stojaković, a neuro-psychiatrist from Banja Luka, to conduct an expertise upon Dr. Kerović's capacity to stand trial. The expertise was scheduled for 5 June 2000.

53. Dr. Kerović proposed that the hearing scheduled for 5 June 2000 be postponed due to his poor health; accordingly, the District Court in Bijeljina postponed the scheduled expertise.

54. On 2 August 2000, the expertise of Dr. Kerović's capacity to stand trial was completed. Dr. Stojaković opined that "Kerovic is capable to attend and follow the trial".

55. On 21 August 2000, the District Court in Bijeljina transmitted the case file to the District Public Prosecutor's Office for its opinion as to whether the indictment should be changed. On 12 September 2000, the deputy district public prosecutor filed an amended indictment for kidnapping under Article 50(2) of the former Criminal Code.

56. At the hearing on 23 November 2000, the District Court in Bijeljina issued a decision to transfer the case to the Basic Court in Bijeljina, as the competent court in terms of subject matter jurisdiction. On 19 February 2001, upon the defendant's appeal, the Supreme Court issued a decision rejecting the appeal against the decision of the District Court in Bijeljina transferring the case to the Basic Court in Bijeljina as the competent court with subject matter jurisdiction.

57. On 15 March 2001, the Basic Public Prosecutor's Office informed the Basic Court in Bijeljina that it was taking over the prosecution of Dr. Kerović's case following the indictment issued by the District Public Prosecutor's Office in Bijeljina.

58. The first hearing scheduled for 26 April 2001 before the Basic Court in Bijeljina was postponed due to the failure of the defendant Milovanović to appear.

59. On 15 May 2001, the local police in Brčko informed the Basic Court in Bijeljina that they could not personally deliver the summons to Milovanović, but it was delivered to his mother. The hearing scheduled for 17 May 2001 was then postponed at the request of the *ex-officio* defence counsel of the defendant Popović, since he stated that he had only received the indictment that day and he did not have sufficient time to prepare the defence. The hearing scheduled for 29 May 2001 was also postponed due to the failure to appear of Milovanović's defence counsel, and the hearing scheduled for 13 June 2001 was postponed due to the failure to appear of the defendant Milovanović. The judge then decided to appoint another *ex-officio* defence counsel to represent the defendant Milovanović, and he was summoned for the next hearing.

60. The Basic Court in Bijeljina summoned three experts to give their opinion at the next hearing: Dr. Ratko Kovačević, Dr. Stevo Marjanović, and Dr. Bogdan Stojaković. However, the hearing scheduled for 5 September 2001 was postponed due to the failure to appear of Dr. Kovačević and Dr. Marjanović. Dr. Stojaković, who did appear at the hearing, opined that the expertise upon Dr.

Kerović's capacity to stand trial should be repeated due to the differing opinions of the three experts. He further stated that after a new expertise was conducted, a unique opinion should be given.

61. Dr. Kerović offered neuro-psychiatric findings dated 3 September 2001 indicating that for the prior three weeks, he had been suffering from symptoms indicative of anxiety depression (*e.g.* tension, agitation, insomnia, nightmares, decreased concentration). Afterwards, the Basic Court in Bijeljina ordered that the neuro-psychiatric and physical examinations of Dr. Kerović be repeated, as well as the assessment of his capacity to participate in the proceedings.

62. On 11 September 2001, upon the request of the President of the Basic Court, Dr. Stojaković supplemented his expert findings and opinion of 2 August 2000. He found "the existence of mild anxiety and depressive disturbances, but not to the level of psychosis". Therefore, he concluded that Dr. Kerović possessed procedural capacity to participate in the criminal proceedings.

63. At the main hearing on 17 September 2001, the applicant, as the injured party, offered her statement. Dr. Stojaković presented his opinion once again, stating that "Kerovic is capable to attend the trial". Dr. Kerović refused to state anything in his defence. Dr. Kerović's defence counsel requested to confront the experts Dr. Stojaković (who opined that Dr. Kerović was capable) and Dr. Marjanović (who opined that Dr. Kerović was not capable) in order to harmonise the differing opinions about Dr. Kerović's capacity to stand trial. The Basic Court in Bijeljina refused this request.

64. On the same day, the deputy basic public prosecutor modified the legal qualification of the criminal offences in accordance with the new Criminal Code of the Republika Srpska (Official Gazette of the Republika Srpska nos. 22/00 and 37/01) (the "Criminal Code"), which entered into force on 1 October 2000. The criminal offences were newly qualified as follows: Article 144(2) for kidnapping and Article 133(2) for illicit abortion (see paragraphs 100-101 below).

65. At the hearing on 26 September 2001, employees of the Hospital in Bijeljina, where the applicant was brought after the critical event, were interviewed as witnesses. The judge ordered the local police to bring other witnesses from Lopare, who did not appear at the hearing, to the next hearing scheduled for 5 October 2001. At the hearing on 5 October 2001, witnesses from Lopare were interviewed.

66. At the hearing on 5 October 2001, the defence counsel requested that Judge Lidija Borković be disqualified from the case. The hearing was then postponed until the Basic Court in Bijeljina decided upon the request for disqualification of the judge. On 8 October 2001, the President of the Basic Court in Bijeljina rejected the request for Judge Borković to be disqualified from the case. On 23 October 2001, the District Court in Bijeljina further rejected the request to disqualify the President of the Basic Court in Bijeljina, Judge Dragomir Živanović, from the case.

67. The hearing scheduled for 23 October 2001 was postponed due to the failure to appear of Dr. Kerović, who informed the court that he was undergoing medical treatment. The judge ordered the local police in Lopare to bring Dr. Kerović to the next hearing. However, the hearing scheduled for 2 November 2001 was also postponed due to the failure to appear of Dr. Kerović.

68. At the hearing on 6 December 2001, Dr. Kerović stated his defence for the first time: he is innocent and the case is "a well-planned and organised political conspiracy against him". Previously he had invoked his delegate's immunity and then refused to present his defence.

69. At the hearing on 12 December 2001, witnesses from Lopare were interviewed. The earlier statements of the applicant, as the injured party, were read during the trial (statements of 9 September 1998 before the investigative judge and of 17 September 2001 during the main hearing). Upon Dr. Kerović's request, the judge summoned additional witnesses who allegedly would testify that during the critical event, Dr. Kerović was attending meetings in Lopare and Pale, and therefore has an alibi.

70. At the hearing on 27 December 2001, the summoned witnesses were interviewed. The witnesses confirmed that Dr. Kerović was present at meetings held in Lopare and Pale on the day of the critical event. However, when the judge asked the witnesses to provide evidence of Dr. Kerović's

presence at these meetings (*e.g.*, tapes or minutes of the meetings), the witnesses remained silent and could not provide such substantiating evidence.

71. On 27 December 2001, the Basic Court in Bijeljina issued its judgment against the defendants Dr. Kerović, Milovanović, Popović, and Ilić. Based upon the facts recited above, the Basic Court concluded that "Dragomir Kerović, with his accomplices Milan Milovanović and Radoslav Popović, in a brutal manner forcible took one person with the intention to subject her to suffering and performed an abortion on a pregnant woman without her consent, and Živan Ilić assisted in taking one person with the intention to subject her to suffering". The Court found the defendant Dr. Kerović, along with his accomplices Milovanović and Popović, guilty of the criminal offence of kidnapping referred to in Article 144 paragraph 2 in conjunction with paragraph 1 and guilty of the criminal offence of illicit abortion referred to in Article 133 paragraph 2 in conjunction with Article 23 of the Criminal Code. The Court further found the defendant Ilić guilty of the criminal offence of kidnapping referred to in Article 144 paragraph 2 in conjunction with paragraph 1 of the Criminal Code. The Court sentenced the defendant Dr. Kerović to 6 years and six months imprisonment, the defendants Milovanović and Popović to 4 years and 6 months imprisonment, and the defendant Ilić to 2 years imprisonment. The Court referred the applicant to a civil action for her claim under property law, explaining that it "did not have sufficient information to decide on the injured party's claim under property law either partly or in its entirety".

72. In the reasoning of the judgment of 27 December 2001, the Basic Court explained that it had resolved as a preliminary issue the procedural capacity of the defendant Dr. Kerović. The Basic Court noted that throughout the proceedings, Dr. Kerović had claimed that he was not capable to follow the proceedings due to his psychological condition. Therefore, the Court ordered Dr. Stojaković to provide his findings and opinion. Dr. Stojaković concluded, after examining Dr. Kerović, that he was fully capable to stand trial. The Court further noted that previously, on 19 October 1998, Dr. Kovačević had conducted an expertise on Dr. Kerović's capacity to stand trial. However, as that expertise was "conducted on the proposal of the defendant's defence counsel and there is no trace in the court file that the Court ordered the expertise, the Court did not assess this finding and opinion of the expert, nor did it assess the finding and opinion of the expert Dr. Stevo Marjanović, who gave his expertise before the Basic Court in Lopare at the main hearing on 19 November 1999". In addition, the Court stated that it did not assess these two findings and opinion because "they were given in 1998 and 1999, whilst the finding and opinion of expert Dr. Stojaković was given in August 2000 and supplemented in September 2001. Therefore, the Panel is of the opinion that it was not necessary to perform further expertise in order to determine the procedural capacity of the defendant Kerović, and accordingly, it decided that the main hearing be held". With respect to the competence (sanity) of Dr. Kerović, the Basic Court explained as follows: "The Panel of this Court did not accept the proposal of defendant Kerović's defence counsel to perform an expertise by a neuro-psychiatrist to establish the defendant's accountability, *i.e.* his mental health during the critical period, considering that the Court never doubted his accountability, whilst the issue of his procedural capacity was resolved as a preliminary issue".

73. Upon delivery of the judgment of 27 December 2001, the defendants should have been taken into custody. Dr. Kerović was duly notified about the delivery. However, according to the President of the Basic Court in Bijeljina, Dr. Kerović "knowingly avoided to be present during the delivery of the judgment since he expected punishment and the procedural decision on detention". Therefore, Dr. Kerović was not taken into custody and to date he has never spent any time in detention or prison in connection with the applicant's kidnapping and forcible abortion.

D. Second instance criminal proceedings

74. On 9 February 2002, Dr. Kerović and the other defendants appealed against the judgment of 27 December 2001 to the District Court in Bijeljina. In his appeal, Dr. Kerović argued, *inter alia*, that the Basic Court should have ordered an expertise to be conducted upon his mental competence (sanity) at the time the criminal act was committed (as opposed to his procedural capacity to stand trial). According to the OSCE Trial Monitoring Report, this was the first time Dr. Kerović raised the issue of his mental competence (sanity) in the criminal proceedings.

75. On 11 February 2002, the deputy basic public prosecutor also appealed against the judgment of 27 December 2001, complaining about the lenient sentences and the failure of the Basic Court to pronounce an additional sanction against Dr. Kerović prohibiting him from performing his professional duties as a physician.

76. On 20 June 2002, the District Court in Bijeljina issued a judgment rejecting the defendants' appeals and upholding the judgment of 27 December 2001. The District Court concluded that the establishment of the factual background was regular and the legal qualification of the criminal offences was proper. The District Court also rejected as ill-founded the appeal of the deputy basic public prosecutor because, "although there are elements of abuse of his position in the actions of the accused Kerović …, there are no facts upon which it might reasonably be assumed that if the accused Kerović continues carrying out his duties, he might perform the criminal offence again".

77. With respect to Dr. Kerović's complaints about his procedural capacity to stand trial and his mental competence during the critical event, the District Court noted that the essence of the objections on appeal is that the Basic Court should have accepted the medical expertise conducted by Dr. Kerović's doctors in Belgrade. According to the District Court, "such complaint and request of the defendant's defence counsel is ill-founded because the psychiatric findings accepted by the Basic Court were made by a competent medical institution and authorised professional, who was not brought under suspicion vis-à-vis his professional competence during the first instance proceedings". The District Court also declared ill-founded Dr. Kerović's complaint that the Basic Court failed to conduct an expertise on his accountability (sanity). The District Court confirmed the decision of the Basic Court that there was no need to conduct an expertise upon the mental competence of Dr. Kerović at the time the crime was committed because there was no reason to suspect his accountability: Dr. Kerović had exhibited a high level of organisation and intellectual skills in organising, planning, and committing the offence. According to the District Court, there were no indications whatsoever during the first instance criminal proceedings to doubt the accountability of Dr. Kerović during the critical event, and defence counsel never offered any explanation or reasons for its insistence that Dr. Kerović be considered to have acted with diminished accountability. As there were no reasons to suspect Dr. Kerović's accountability, the Basic Court, as a matter of law, was not required to order any expertise on this issue. Moreover, such expertise can only be conducted based upon a court order. Therefore, the District Court found "that the decisions of the Basic Court are correct with regard to the assessment of the capacity of the accused Kerović to follow the main hearing, as well as the Court's assessment with regard to the accountability of the accused Kerović at the time of committing the criminal offence". During the entire proceedings, his capacity to stand trial was at issue, and it was determined on the basis of court-ordered expertise that he was capable to stand trial. This expertise further supported the conclusion that there was no need to order an expertise on his mental competence at the time of committing the offence. Therefore, the District Court confirmed the Basic Court's conclusion that Dr. Kerović committed the criminal offence with "direct premeditation".

E. Extraordinary review proceedings

78. On 7 August 2002, the defendant Ilić submitted a petition for extraordinary review of a final and binding decision to the Supreme Court due to violations of the Criminal Code and the Code of Criminal Procedure. Ilić argues that during none of the proceedings was his intention to kidnap the applicant established or proven, yet the criminal offence of kidnapping can only be committed with direct premeditation. In particular, he claims that the defendant Milovanović never testified that Ilić was involved in the kidnapping. Therefore, he proposes that the Supreme Court overturn his conviction for kidnapping the applicant.

79. On 19 August 2002, Dr. Kerović also submitted a petition for extraordinary review of a final and binding decision to the Supreme Court for a violation of the law. He asked the Supreme Court to revoke the verdicts of the Basic and District Courts and to return the case for re-trial or, in the alternative, to alter the verdicts by acquitting him or reducing his sentence.

80. In support of his petition, Dr. Kerović opines that "it is obvious that there are valid arguments pointing out (in the first instance proceedings and in the proceedings on appeal) that the courts were obliged to determine the accountability of the defendant Kerović". The courts should have

considered the expert opinion of Dr. Rade Lukić, a neuro-psychiatrist from Belgrade, dated 20 October 1998, as well as the report by Dr. Marjanović from the Mental Health Centre in Belgrade. These opinions state that Dr. Kerović "during the critical period, suffered from depression, as reflected in disturbed emotions, memory, will and impulses". According to Dr. Kerović, "having in mind the nature of the criminal act, the Court was obliged to conduct an expert opinion" and to determine whether the defendant was accountable (sane), in accordance with the basic rule on criminal responsibility (Articles 13 and 14 of the Criminal Code). Since it did not, it placed itself above the medical institutions. Dr. Kerović further complains because the lower courts did not differentiate between conducting an expert opinion on his accountability (sanity) at the time of the crime, on the one hand, and his competence to stand trial (procedural capacity), on the other hand. Dr. Stojaković only gave his opinion on Dr. Kerović's capacity to stand trial, whilst the Basic Court rejected the defence counsel's request to order an expertise upon Dr. Kerović's accountability during the critical event. Thus, "a violation of the law exists because the lower courts did not determine what the criminal act consists of, as to how the criminal act was committed in a brutal way". In addition, Dr. Kerović submits that the Court "arbitrarily assessed this as a qualified case of kidnapping", but the expert opinion of Dr. Curčić proves that the injured party "suffered only minor injuries". He further objects to the Court's determination of the credibility of certain witnesses.

81. In the alternative, Dr. Kerović opines that his sentence is too high. He claims "the injured party did not suffer severe injuries" and her motives were not taken into consideration, nor his or the injured party's previous lives.

82. On 28 August 2002, the Office of the Public Prosecutor of the Republika Srpska proposed that the Supreme Court reject as ill-founded Dr. Kerović's petition for extraordinary review.

83. On 4 November 2002, the Supreme Court, acting in the extraordinary review proceedings, issued a verdict vacating the verdicts of the Basic Court in Bijeljina of 27 December 2001 and the District Court in Bijeljina of 20 June 2002 and returning the case to the Basic Court for renewed proceedings.

84. The Supreme Court summarised Dr. Kerović's petition's as follows:

> "In the request of the convicted Dragomir Kerović, it is stated that the disputed verdicts have violated the Criminal Code, thereby harming the defendant, since the issue of the level of his accountability was not dealt with in a confident way. In this context the request raises a reasonable objection because in the critical period the defendant Kerović, in accordance with the medical evidence in the case file (KPB Belgrade, KPC Belgrade, medical opinion of Dr. Rade Lukić, report of the Mental Health Centre in Belgrade), was suffering from depression, as reflected in disturbed emotions, opinions, memories, will, and impulses, and this fact itself proves that it was necessary to conduct an expert screening of his mental state. Such circumstance was argued by the defence during the whole criminal proceedings, but the lower instance courts did not state true reasons for avoiding it, beyond the assessment of his ability to follow the proceedings."

85. In accordance with Article 429 in relation to Article 423 paragraph 1 of the Code of Criminal Procedure, the Supreme Court found that "the factual basis of the challenged verdicts contains such shortcomings as to reasonably doubt the assessed level of accountability of the defendant Kerović at the time of the commission of this crime", as shown by the medical documentation in the case file, noted in Dr. Kerović's petition, and the findings of Dr. Ratko Kovačević, a neuro-psychiatrist. Had the lower courts carefully considered that medical documentation, they could have resolved the problem raised by Dr. Kerović. Rather, the Basic Court only assessed the procedural capacity of Dr. Kerović. Article 258 paragraph 1 of the Code of Criminal Procedure obliged the court to assess the accountability of Dr. Kerović. In particular the Supreme Court noted the findings of Dr. Marjanović and Dr. Kovačević, both of whom found Dr. Kerović to have been suffering from depression since 1993 when he lost an eye — "a clear signal for the court to order an expert neuro-psychiatric screening of the defendant in order to assess his mental state". In such a situation, the Supreme Court opined that "there is obvious doubt as to the truth of the decisive facts, whether the defendant Kerović was, on one hand, completely capable to understand the significance of this act or able to direct his behaviour and, on the other hand, able to conceptualise his defence and prove it". As a

result of this factual circle of doubts, "it is not possible to assess whether there is a violation of criminal law, as contended in convicted Kerović's petition". The disputed verdicts neglected this issue, which could influence the assessment of the real role of other defendants in this case, especially since Dr. Kerović, according to the indictment, was the main creator and initiator of both criminal offences. Therefore, the Supreme Court vacated the challenged verdicts in their entirety.

86. The mandate of the three judges of the Supreme Court who issued the verdict of 4 November 2002 (Vladimir Radosavljević, Mirko Dabić, and Gojko Vukotić) expired on 12 March 2003. The High Judicial and Prosecutorial Council of the Republika Srpska did not thereafter re-appoint any of them to their positions.

F. Renewed criminal proceedings

87. Like the initial first instance proceedings, the renewed first instance proceedings before the Basic Court in Bijeljina have been marred by delays mostly attributable to the defendants.

88. The hearing scheduled for 18 December 2002 was postponed due to the failure of Dr. Kerović to appear. He claimed he did not receive formal notice of the hearing.

89. The hearing scheduled for 5 February 2003 was further postponed due to the failure of the defendants Milovanović and Ilić, as well as the defence counsel of Milovanović, to appear.

90. The Basic Court in Bijeljina postponed the hearing scheduled for 27 February 2003 because the defendant Ilić was not present due to alleged medical treatment in Belgrade and the address of the injured party was unknown.

91. The Basic Court in Bijeljina held a hearing on 20 March 2003, during which it decided, in a procedural decision, to conduct the proceedings even though the defendant Popović was not present, *i.e.* to try him *in absentia*. The Basic Court further ordered Dr. Stojanović, the neuro-psychiatrist from the Mental Hospital in Banja Luka, to perform an expertise on Dr. Kerović, both upon his mental competence (sanity) at the time of committing the crime and his procedural capacity to stand trial (*i.e.*, to attend and following the proceedings). Dr. Stojanović was ordered to supplement his previous medical findings and opinion offered on 11 September 2001 in order to clarify these two questions. The Basic Court then postponed the main trial for an indefinite period and ordered Dr. Kerović immediately to report to the Mental Hospital in Banja Luka.

92. As of 19 June 2003, Dr. Stojaković had not yet examined Dr. Kerović, nor, obviously, prepared his opinion and report. On 22 June 2003, Dr. Stojaković informed the Basic Court in Bijeljina that he was withdrawing from performing the expertise upon Dr. Kerović. He stated that such an expertise must be performed by an entire team of experts and not by himself alone. He further recommended that the expertise should be conducted in the Republic of Serbia and not in Bosnia and Herzegovina. As a result, on 25 June 2003, the President of the Basic Court in Bijeljina recommended that the Ministry of Justice of the Republika Srpska remove Dr. Stojaković from the official list of permanent court medical experts in the Republika Srpska due to his high level of obstructionism and lack of co-operation with the Court.

93. The Basic Court in Bijeljina further appointed Drs. Senadin Ljubović and Abdulah Kučukalić, neuro-psychiatrists practicing at the Neuro-psychiatric Clinic of the Koševo Hospital in Sarajevo to perform the psychiatric expertise of Dr. Kerović, both in terms of his competence (sanity) at the time of commission of the crime, as well as his present procedural capacity to stand trial. According to the President of the Basic Court in Bijeljina, on 14 August 2003, the case file was sent to the Neuro-psychiatric Clinic of the Koševo Hospital in Sarajevo so that the appointed experts could perform the expertise upon Dr. Kerović.

94. On 29 September 2003, Drs. Abdulah Kučukalić and Senadin Ljubović submitted to the Basic Court in Bijeljina their expert report of 19 September 2003 on the mental condition, that is the degree of competence (sanity) and procedural capacity, of Dr. Kerović. In preparing the report, the experts familiarised themselves with the ample court file and conducted a detailed psychiatric

examination of Dr. Kerović in the Clinical Centre in Sarajevo, in the presence of Dr. Kerović's defence counsel. Their conclusions and opinion are as follows:

> "1. During a thorough psychiatric examination of the accused Dragomir Kerović, we did not note any signs of temporary or permanent mental disturbance of a psychotic or organically conditioned nature, nor any signs of mental disturbance.
>
> "2. After carefully conducted analysis of ample documentation in relation to psychiatric treatment lasting for a long time period to date, which has been conducted in various mental institutions, it may be noted that all those reports contain no relevant difference in relation to the basic diagnosis of mental disturbance. All reports explicitly establish the reactive anxiety/depression of the accused, but its intensity has not exceeded the medium degree of manifestation. None of the findings noted any psychotic symptoms.
>
> "3. None of the expertises to date, including the reports of Dr. Ratko Kovačević and Dr. Stevo Marjanović, noted psychotic symptomatology but only described depressive disturbance, reactively conditioned [influenced from outside], which is a temporary mental disturbance, but without psychotic nature.
>
> "4. We have also registered the above-mentioned anxiety/depression symptomatology in our examination (a somewhat declining mood, increased anxiety, irritability, loss of will and interest, insomnia, over-irritability of peripheral system of nerves with completely preserved reality testing), which is a consequence of two significant stressful events (the loss of an eye and the initiation and course of these court proceedings), for which he could not mentally adjust.
>
> "5. If the court finds that the accused has committed the act he is burdened with, considering the expressed non-psychotic psychopathology of anxiety/depression before the commission of the act, for which he has valid medical documentation, then we are of opinion that due to the increased irritability and difficulties to control some of his impulses, his ability to understand the significance of the act that he is burdened with and the ability to control his actions, *tempore criminis*, WAS REDUCED BUT NOT SIGNIFICANTLY.
>
> "6. As the accused Dragomir Kerović presently displays only mild symptoms of depression, without signs of damage of cognitive abilities and with no presence of any psychotic symptoms, we are of opinion that his capability to stand trial and meaningfully to present his defence (procedural capacity) is PRESERVED."

95. The renewed proceedings are still pending to date.

IV. RELEVANT LEGAL PROVISIONS

A. Criminal Code of the Republika Srpska

96. During the relevant time period for the present case, there have been three different criminal laws applicable in the Republika Srpska. When the criminal charges were filed against Dr. Kerović and his accomplices, the applicable law was the former Criminal Code of the Republika Srpska (Special Part) (Official Gazette of Republika Srpska nos. 15/92-616, 4/93-94, 17/93-69, 26/93-1006, 14/94-533, 3/96-41). Thereafter, the Criminal Code of the Republika Srpska (Official Gazette of the Republika Srpska nos. 22/00 and 37/01) (the "Criminal Code") entered into force on 1 October 2000, and the charges against the defendants were amended in accordance with this Criminal Code. Finally, on 1 July 2003, the new Criminal Code of the Republika Srpska (Official Gazette of the Republika Srpska no. 49/03) entered into force. However, as the defendants were charged under the Criminal Code of 1 October 2000, the Chamber quotes those relevant provisions below that define the criminal offences and prescribe the punishment and sanctions for such offences.

97. Article 13 of the Criminal Code defines "criminal responsibility" as follows:

> "(1) A perpetrator is considered criminally responsible if he, being criminally competent (sane), has committed a criminal offence with premeditation or by negligence.
> "(2) A perpetrator is considered criminally responsible for an act committed out of negligence only where the law prescribes so."

98. Article 14 of the Criminal Code defines "competence (sanity)" as follows:

> "(1) The perpetrator of a criminal offence is not considered competent (sane) if, at the time of committing the criminal offence, he was incapable of understanding the significance of his act or controlling his conduct due to a mental disease, temporary or lasting mental disorder, or mental retardation (incompetence - insanity).
> "(2) If the capacity of the perpetrator to understand the significance of his act and his ability to control his conduct was substantially reduced due to one or all of the conditions referred to under paragraph 1 of this Article, then he may be punished less severely (significantly reduced competence).
> "(3) …"

99. Article 15 of the Criminal Code defines "premeditation" as follows:

> "A criminal offence is premeditated if the perpetrator, although aware of his deed, sought its execution; or if he is aware that a prohibited consequence might result from his action or omission but he consented to its execution."

100. As one of the "criminal offences against life and limb", Article 133 defines the offence of "illicit abortion", including forcible abortion, as follows:

> "(1) …
> "(2) Whoever performs or commences performing an abortion on a pregnant woman without her consent, and if she is under sixteen without the written consent of her parents, adoptive parent or guardian, shall be sentenced to imprisonment from one to eight years.
> "(3) If death, grievous bodily injury, or detriment to the health of the woman whose pregnancy has been terminated occurs as a result of the acts referred to in paragraphs 1 and 2 of this Article, then the perpetrator shall be sentenced … for the act referred to in paragraph 2 to imprisonment for two to twelve years."

101. As one of the "criminal offences against civil liberties and rights", Article 144 defines the offence of "abduction/kidnapping" as follows:

> "(1) Whoever commits the abduction of a person in order to extort money or other property gain from him or someone else, or to force him or someone else into action, omission of an action or acquiescence, shall be sentenced to imprisonment for one to eight years.
> "(2) Whoever commits the act defined by paragraph 1 of this Article against a child or a juvenile, or in a cruel way, or by threatening to kill or inflict grievous bodily injury, or in group or criminal organisation, shall be sentenced to imprisonment for one to ten years.
> "(3) The punishment prescribed under paragraph 2 of this Article shall also be applied if the abducted person was held for more than fifteen days, or the health of the abducted person has been severely impaired, or other serious consequences have occurred.
> "(4) …
> "(5) …"

B. Code of Criminal Procedure of the former Socialist Federal Republic of Yugoslavia

102. During the relevant time period for the present case, there have been two different criminal procedure laws applicable in the Republika Srpska. The Code of Criminal Procedure of the former Socialist Federal Republic of Yugoslavia (Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 26/86, 74/87, 57/89, and 3/90), adopted by the Republika Srpska (Official Gazette of the Republika Srpska nos. 26/93, 14/94, 6/97 and 61/01) (the "Code of Criminal Procedure") set forth the legally prescribed procedures for criminal proceedings. Thereafter, on 1 July 2003, the new Code of Criminal Procedure of the Republika Srpska (Official Gazette of the Republika Srpska no. 50/03) entered into force. However, as the proceedings at issue were

conducted under the now former Code of Criminal Procedure, the Chamber quotes those relevant provisions below.

1. Basic provisions

103. Chapter I defines the basic provisions of the Code of Criminal Procedure. The pertinent provisions are as follows:

> Article 14
>
> "It shall be the duty of the court to endeavour to conduct the proceedings without delay and to prevent every abuse of the rights to which the persons participating in the proceedings are entitled."
>
> Article 15
>
> "(1) The courts and government agencies participating in criminal proceedings must truthfully and completely establish the facts which are important to the rendering of a lawful decision.
> "(2) They have a duty to examine and establish with equal attention both those facts which go against the accused and those facts which are in his favour."

2. Provisions regarding expert evaluation

104. Part 7 of Chapter XVIII (Investigatory Actions) of the Code of Criminal Procedure concerns "expert evaluation". It provides, in pertinent part, as follows:

> Article 241
>
> "Expert evaluation shall be ordered when the finding and opinion of a person possessing the necessary specialised knowledge is required to establish or evaluate some important fact."
>
> Article 242(1)
>
> "Expert evaluation shall be ordered in a written order by the authority conducting the proceedings. The order shall indicate the facts to which the expert evaluation relates and the person called upon to make the assessment. The order shall also be delivered to the parties."
>
> Article 243
>
> "(1) A person summoned as an expert must respond to the summons and present his finding and opinion.
> "(2) If an expert fails to appear though duly summoned and fails to justify his absence or refuses to present his expert opinion, then he may be fined up to 500 dinars, and in case of an unjustified absence, he may be compelled to appear.
> "(3) …"
>
> Article 250
>
> "If the experts' data contained in their finding differ essentially or if their finding is unclear, incomplete or contradictory internally or to the investigated circumstances, and if these shortcomings cannot be corrected by interrogating the experts once again, then the expert evaluation shall be repeated with the same or other experts."
>
> Article 251
>
> "If an expert's opinion contains contradictions or shortcomings or if reasonable doubt arises as to the accuracy of the opinion given, and if these shortcomings or doubts cannot be eliminated by interrogating the expert once again, then the opinion of other experts shall be sought."
>
> Article 258
>
> "(1) Should suspicion arise that the accountability of the accused has been excused or diminished as a result of a permanent or temporary mental illness, temporary mental disorder or retarded mental

development, expert evaluations consisting of an examination of the accused by a psychiatrist shall be ordered.
"(2) …
"(3) Should the experts establish that the mental condition of the accused is disturbed, they shall define the nature, type, degree and duration of the disorder and they shall provide their opinion concerning the effect this mental state has had and continues to have on the comprehension and actions of the accused and as to whether and in what degree the disturbance of his mental state existed at the time when the crime was committed.
"(4) …
"(5) …"

3. Provisions regarding evidentiary procedure

105. Part 7 of Chapter XXI (Main Hearing/Trial) of the Code of Criminal Procedure concerns "evidentiary procedure". It provides, in pertinent part, as follows:

Article 333

"(1) Aside from the cases specifically envisaged in this Law, the transcript or record of the testimony of witnesses, co-defendants or participants already convicted of the crime and records or other documents concerning the finding and opinion of experts may be read by the panel only in the following cases:
1) if the persons examined have died, have become mentally ill or cannot be found, or if their appearance before the court is impossible or very difficult because of age, illness or other important causes;
2) if the witnesses or experts refuse to present testimony in the trial without a legitimate cause.
"(2) With the consent of the parties, the panel may decide that the record of the prior questioning of a witness or expert or his written finding and opinion should be read, even though the witness or expert is not present, regardless of whether he has been summoned to the trial. As an exception, without the consent of the parties, but after they have been heard, the panel may decide on a reading of the record of the questioning of a witness or expert in a previous trial which was held before the same presiding judge, even though the period referred to in Article 305 paragraph 3 of this Law has expired, … if in view of the other evidence presented it deems it necessary to familiarise itself with the content of the record or written finding and opinion. Once the record or written finding and opinion have been read and the comments of the parties heard (Article 335), the panel, taking into account other evidence presented as well, shall decide whether to question the witness or expert in person.
"(3) …
"(4) …
"(5) The reason for the reading of a transcript or record shall be noted in the trial record, and at the time of the reading it shall be stated whether the witness or expert was sworn."

4. Provisions regarding an appeal

106. Chapter XXIII of the Code of Criminal Procedure governs "regular legal remedies", namely, the right and process of an appeal against a verdict rendered in the first instance. It provides, in pertinent part, as follows:

Article 362(4)

"New facts and new evidence may be presented in the appeal, but the appellant must cite the reasons why he did not present them previously. In referring to new facts, the appellant must cite the evidence which would prove these facts; in referring to new evidence, he must cite the facts which he desires to prove with that evidence."

Article 363

"A verdict may be contested on the following grounds:
1) because of an essential violation of the provisions of criminal procedure;
2) because of a violation of the criminal code;
3) because the state of the facts was erroneously or incompletely established;
4) …"

Article 365

"A violation of the criminal code exists if the criminal code has been violated in the following points:
1) as to whether the act for which the accused is being prosecuted constitutes a crime;
2) as to whether circumstances exist which preclude criminal responsibility;
3) as to whether circumstances exist which preclude criminal prosecution …;
4) …
5) …
6) …"

Article 366

"(1) A verdict may be contested because the state of the facts has been incorrectly or incompletely established when the court has erroneously established some decisive fact or has failed to establish it.
"(2) It shall be taken that the state of the facts has been incompletely established when new facts or new evidence so indicate."

Article 378

"If an appeal has been filed only on behalf of the accused, then the verdict may not be modified to his detriment in relation to the legal assessment of the act and the criminal sanction."

5. Provisions regarding extraordinary legal remedies

107. Part 3 of Chapter XXIV (Extraordinary Legal Remedies) of the Code of Criminal Procedure concerns the "petition for protection of legality". It provides, in pertinent part, as follows:

Article 416

"The competent public prosecutor may file a petition for protection of legality against final and binding court decisions and against the court proceedings which preceded those final and binding decisions if a law has been violated."

Article 420

"(1) In deciding on a petition for protection of legality, the court shall limit itself solely to examining the violations of the law to which the public prosecutor has referred in his petition.
"(2) If the court finds that the grounds upon which it ruled in favour of one defendant are relevant also for other co-defendants, for whom a petition for protection of legality has not been filed, then it shall act *ex officio* as if such petition has been filed.
"(3) …"

Article 421

"The court shall issue a verdict refusing a petition for protection of legality as ill-founded if it finds no violation of the law to which the public prosecutor refers in his petition."

Article 422(1)

"When the court finds that the petition for protection of legality is well-founded, it shall issue a verdict that, according to the nature of the violation, either modifies the final and binding decision or entirely or partially vacates the decision of the court in the first instance or higher court or only the decision of the higher court, and it shall return the matter for a renewed decision to the court in the first instance or to the higher court, or it shall restrict itself solely to establishing the violation of the law."

Article 423(1)

"If, when a petition for protection of legality is being decided upon, there should arise considerable doubt as to the credibility of decisive facts, as established in the decision against which the petition was filed, thus rendering it impossible to decide upon the request for protection of legality, then the court shall issue a verdict in ruling on the petition for protection of legality which vacates that decision and orders that a new trial be held before the same or another first instance court with actual subject matter competence."

Article 424

"(1) If a final and binding verdict has been vacated and the case returned for a renewed trial, then the previous indictment or that part of it which pertains to the vacated part of the verdict shall be taken as the basis.
"(2) The court must perform all trial proceedings and examine the issues which have been noted by the court which ruled on the petition.
"(3) The parties may point out new facts and submit new evidence before the court in the first instance or the court in the second instance.
"(4) In rendering the new decision, the court is bound by the prohibition prescribed in Article 378 of this Law.
"(5) …"

108. Part 4 of Chapter XXIV (Extraordinary Legal Remedies) of the Code of Criminal Procedure concerns the "petition for extraordinary review of a final and binding verdict". It provides, in pertinent part, as follows:

Article 425(1)

"An accused whose prison sentence or reformatory sentence has become final and binding may file a petition for extraordinary review of the final and binding verdict because of a violation of law in the cases envisaged by this Law."

Article 427

"A petition for extraordinary review of a final and binding verdict may be filed on the following grounds:

1) because of a violation of criminal law to the detriment of the convicted person as envisaged in Article 365 paragraphs 1 through 4 of this Law or because of a violation referred to in paragraph 5 of that Article, if the exceeding of authority pertains to the decision concerning the sentence, security measure or confiscation of material property;
2) …;
3) because of a violation of the right of the convicted person to defence in a main hearing or because of a violation of the provisions of criminal procedure in the appeal proceedings, if that violation had a bearing on the rendering of a correct judgment."

Article 428(1)

"A petition for extraordinary review of a final and binding verdict may be filed by the convicted person and defence counsel."

Article 429

"The provisions of Article 419 paragraphs 1 and 2, Articles 420 and 421, Article 422 paragraphs 1 and 2, Article 423 paragraph 1, and Article 424 of this Law shall be appropriately applied to a petition for extraordinary review of a final and binding verdict. When Article 422 paragraph 1 of this Law is applied, the court may not limit itself solely to establishing the violation of the law, while the provision of paragraph 2 of that Article shall be applied solely in the part on pronouncing the sentence."

6. Provisions regarding the injured party

109. Article 147 of the Code of Criminal Procedure defines the term "injured party" as "a person injured or threatened in some personal or property right by a crime".

110. Chapter V of the Code of Criminal Procedure governs "the injured party and the private prosecutor". The defendant Kerović was prosecuted by a public prosecutor, so only the provisions concerning the injured party (*i.e.* the applicant) are relevant to the present decision, as follows:

Article 59

"(1) The injured party and the private prosecutor have the right during the investigation to call attention to all facts and suggest evidence which has a bearing on establishing the crime, on finding the perpetrator of the crime and on establishing their claims under property law.

"(2) In the main hearing they have the right to propose evidence, to put questions to the accused, witnesses and expert witnesses, and to make remarks and present clarifications concerning their testimony, and also to make other statements and other proposals.
"(3) The injured party, the injured party as prosecutor, and the private prosecutor have the right to examine the record and articles presented as evidence. ...
"(4) The investigative judge and the presiding judge of the panel shall inform the injured party and private prosecutor of their rights as referred to in paragraphs 1 through 3 of this Article."

7. Provisions regarding claims under property law[1]

111. Chapter X of the Code of Criminal Procedure governs "claims under property law". It provides, in pertinent part, as follows:

Article 103

"(1) A claim under property law which has arisen due to the commission of a crime shall be deliberated upon on the motion of the authorised persons in the criminal proceedings if this would not considerably prolong those proceedings.
"(2) A claim under property law may pertain to compensation for damage, repossession of things, or annulment of a particular legal transaction."

Article 104(1)

"The petition to realise a claim under property law in criminal proceedings may be filed by the person authorised to pursue that claim in a civil action."

Article 105(1)

"A petition to pursue a claim under property law in criminal proceedings shall be filed with the body or agency to whom the criminal charge is submitted or to the court before which the proceedings are being conducted."

Article 107

"(1) The court before which proceedings are being conducted shall interrogate the accused concerning the facts alleged in the petition and shall investigate the circumstances that have a bearing on the establishment of the claim under property law. But even before a petition to that effect is presented, the court has a duty to gather evidence and investigate what is necessary to decide upon the claim.
"(2) If the investigation of the claim under property law would considerably prolong the criminal proceedings, then the court shall restrict itself to gathering that information for which the subsequent establishment would be impossible or considerably more difficult."

Article 108

"(1) The court shall render a judgment on claims under property law.
"(2) In a verdict pronouncing the accused guilty, the court may award the injured party the entire claim under property law or may award him part of the claim under property law and refer him to a civil action for the remainder. If the information gathered in the criminal proceedings does not afford a reliable basis for either a complete or partial award, then the court shall instruct the injured party that he may file a civil action to pursue his entire claim under property law.
"(3) ..."

C. Law on Obligations of the former Socialist Federal Republic of Yugoslavia

112. Articles 195 and 200 of the Law on Obligations of the former Socialist Federal Republic of Yugoslavia (Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 29/78, 39/85,

[1] For the sake of clarification, the concept of "claims under property law" in the domestic law and domestic practice is not exclusively related to property claims, but rather applies more broadly to civil claims (*i.e.*, tort claims or *constitution de partie civile*) for compensation for damages arising out of or related to the commission of a crime.

45/89, and 57/89; Official Gazette of the Republika Srpska nos. 3/96 and 17/93) provide for civil claims with pecuniary and non-pecuniary damages for bodily injury or impairment of health, as follows:

> Article 195
>
> "(1) One who inflicts bodily injury or impairs a person's health is under an obligation to reimburse the medical expenses to that person and other necessary costs and expenses in this regard as well as the income lost because of that person's inability to work during the time of his medical treatment.
> "(2) If the injured person, due to his complete or partial inability to work loses income, or his necessities increase permanently, or the possibilities of his further development or advancement are ruined or reduced, then the responsible person is under an obligation to pay to the injured person a fixed annuity as compensation for that damage."
>
> Article 200
>
> "(1) For sustained physical pain, for mental suffering because of reduced quality of life, disfigurement, damaged reputation, honour, freedom or rights of personality, death of a loved one, as well as fear, the court shall, provided it finds that the circumstances of the case, especially the intensity of pain and fear and their duration, justify it, award fair monetary compensation, regardless of pecuniary compensation as well as in its absence.
> "(2) When deciding upon a compensation claim for non-pecuniary damages as well as the amount thereof, the court shall take into account the importance of the damaged asset and the purpose of the compensation, as long as the compensation does not serve a purpose incompatible with its nature and social role/purpose."

V. COMPLAINTS

113. As a crime victim, the applicant alleges a violation of Article 8 of the Convention because the respondent Party has failed to satisfy its obligation to ensure and protect her right to private and family life, in particular, as a result of the excessively long duration of the criminal proceedings against the perpetrators of the crimes against her. During the first instance criminal proceedings, the applicant was exposed to threats, insults, and assaults. Since then, she has made a new family life, and she fears that repeated encounters with the defendants in the renewed criminal proceedings will permanently damage her new family and personal life.

114. In addition, the applicant alleges a violation of Article 6 of the Convention because the proceedings in the criminal case against the perpetrators of the crimes against her have been lasting for an unusually long time. This is the result of the manner in which the criminal proceedings have been conducted by the respondent Party and obstruction by the defendants in order to delay the proceedings for an indefinite time. She further complains about a violation of Article 13 of the Convention because, as the crime victim, she appears only passively as an injured party in the criminal proceedings, whilst her rights are represented by the public prosecutor. In the decision ordering renewed criminal proceedings, she claims the Supreme Court did not enable her actively to participate in the renewed proceedings. Also, the applicant notes that the long lapse of time in concluding the criminal proceedings places the defendant in a more favourable position because, as time passes, it is more difficult to establish his mental state in 1997.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

115. In its observations of 17 April 2003, the respondent Party states that it has no objections to the facts pertaining to the progression of the trial at issue. However, the respondent Party opines that the applicant's allegation that "'the witness-injured party could not participate in the proceedings before the Supreme Court'" is "ill-founded" because the Supreme Court decided on the request for extraordinary review in extraordinary, *in camera* proceedings. Moreover, as an injured party, the applicant's status in the proceedings was regulated by the Code of Criminal Procedure, and it cannot

be characterised as "very passive". Although the respondent Party contends that the applicant has failed to substantiate her allegations that she was "subjected to constant threats, insults, and assaults", it "shares the opinion that the 'renewed encounter with the people who caused her unspeakable evil would be a painful experience that would leave permanent consequences on her present family and personal status'".

116. According to the respondent Party, "the reasons for the judgment [of the Supreme Court] are set forth in the reasoning of the judgment", and no further explanation is required. It submits that Articles 425 to 429 of the Code of Criminal Procedure define the conditions for filing a request for extraordinary review of a final and binding judgment, and "the whole of the Code of Criminal Procedure defines the standards". On the other hand, the special remedy of renewal of criminal proceedings is independently governed by Articles 400 to 411 of the Code of Criminal Procedure. In response to the argument of the OHCHR that the Supreme Court went beyond the request of the parties, the respondent Party highlights provisions 274 and 380 of the Code of Criminal Procedure, which standardise the rule on *beneficium cohaesionis* (*i.e.*, benefits of cohesion).

117. With respect to admissibility, the respondent Party firstly argues that the application does not concern facts but a mere statement of alleged violations of the Convention, which is insufficient to constitute an application. Secondly, it contends that the claim under Article 6 of the Convention should be declared inadmissible as incompatible *ratione materiae* with the Agreement. Thirdly, with respect to the right to privacy and protection from trauma and distress during the renewed trial, the respondent Party opines that the applicant has not exhausted the effective remedies. Namely, Article 333 of the Code of Criminal Procedure provides that in certain circumstances witness statements may be read aloud during the proceedings without the presence of the person at the hearing.

118. The respondent Party commences its observations on the merits by summarising the relevant provisions of the Code of Criminal Proceedings concerning the role of the injured party in the proceedings. The term "injured party" is defined in Article 147 paragraph 6, and Article 59 defines the general rights of the injured party. Other rights of the injured party are set forth in the following provisions, which, "to some extent, bring the injured party closer to the public prosecutor":

- the preliminary examination (Articles 168, 171, 176, 181, 284);
- the main hearing (Articles 313, 322 paragraph 3, 330, 335, 356);
- the appellate proceedings (Articles 373 paragraph 2, 374);
- the direct indictment (Article 160 paragraph 7); and
- the trial *in absentia* (Article 300 paragraph 4).

Apart from acting as a private prosecutor, in the criminal proceedings the injured party is not a party — the public prosecutor is the party. However, "the injured party appears as an accessory prosecutor for the claim under property law". Also the injured party acts as an "useful assistant" to the public prosecutor, and in this manner s/he "significantly assists the success of the proceedings".

119. Regarding the claim under Article 3 of the Convention, the respondent Party opines that the present case cannot be compared to the cases, in particular *X and Y v. The Netherland*s, in which the European Court of Human Rights found a violation for the State's failure to prosecute the perpetrator of a criminal offence. Moreover, the element of intent is missing from the present case. While the respondent Party sympathises "that the applicant would encounter difficulties, *i.e.* mental suffering and emotional distress, from facing the court proceedings and renewed interrogation", "the principles of directness/confrontation, material truth and adversariality require the presence of all process subjects at the main hearing".

120. With respect to Article 6 of the Convention, the respondent Party highlights that the court is obliged to ensure a fair trial to the accused. The European Court of Human Rights allows national courts to decide whether or not the presence of a witness at the hearing is necessary, and this is regulated by the Code of Criminal Procedure. Following the case of *Bera v. the Republika Srpska* (case no. CH/98/1214, decision on admissibility of 14 May 1999, Decisions January— July 1999,

paragraph 14), the respondent Party contends that it did not and could not violate any right of the applicant. "In accordance with Article 6, the respondent Party is, in fact, obliged to comply with the provisions pertaining to the accused, while also respecting the principle of balance and legitimate aim".

121. Concerning Article 8 of the Convention, the respondent Party summarises the relevant case-law and then states only that "it is aware of the consequences of the retrial on the applicant. However, the Code of Criminal Procedure allows for the interference with the privacy of the applicant, with the exceptions provided by Article 333, and to some extent by Articles 288-289 of the Code concerning exclusion of the public, which the applicant may propose to the panel of the court".

122. On the subject of Article 13 of the Convention, the respondent Party opines that the applicant may request, based on Article 333(3) of the Code of Criminal Procedure, to have the minutes of her previous testimony read in the renewed proceedings. In support, it cites two judgments of the Supreme Court of Croatia (judgment no. Kž.591/70-3 of 10 June 1970) and the Supreme Court of Serbia (judgment no. Kž.829/74 of 19 February 1974), in which the Supreme Courts allowed the testimony of the respective injured parties, who had been raped, to be read in lieu of live testimony due to their mental state. According to the respondent Party, Article 333 thus provides an effective remedy to the applicant.

123. Lastly, with respect to discrimination, the respondent Party states that it is obvious that it "did not discriminate against the applicant, especially on the grounds of gender and social origin."

124. In conclusion, the respondent Party submits "that it did not threaten the applicant's right and she was provided protection by the application of Article 333 of the Code; thus, for the above stated reasons, it suggests that the esteemed Chamber reject the application as ill-founded".

B. The applicant

125. The applicant relies upon the observations filed by the OHCHR, as *amicus curiae*, as summarised below.

C. The OHCHR as *amicus curiae*

126. In its submission of 30 May 2003, the OHCHR as *amicus curiae* addresses the factual background and the admissibility and merits of the application, as well as possible remedies for violations of the human rights of the applicant. As the Chamber has already established the factual background (see paragraphs 19-95 above), it will not repeat those facts again, but rather, it will mention the factual concerns highlighted by the OHCHR in its submission.

127. The OHCHR emphasises that the criminal investigation "lasted for a long period of time, during which the defendant Kerović used different tactics in an attempt to avoid prosecution". He invoked immunity, since he was a SDS member of the Parliament of Bosnia and Herzegovina at the time, and he further argued that he was not capable to follow the proceedings. In addition, witnesses were intimidated, and the applicant and her parents were subjected to undue pressure (OHCHR submission at paragraph 3). The OHCHR notes that "the issue of the mental competence of Dragomir Kerović was a feature throughout the hearings, with Kerović arguing his incompetence to follow the main trial" (*id.* at paragraph 6). The Basic Court in Bijeljina ordered a psychiatric evaluation and opinion from a court-appointed medical expert, who concluded that Kerović was competent to participate in the proceedings. Kerović did not object to this medical opinion, but rather, he sought to obtain an additional expert opinion without a court order, contrary to Articles 241 and 242 of the Code of Criminal Procedure (*id.* at paragraphs 7-8). After the Basic Court in Bijeljina announced its judgment of 27 December 2001, "Kerović should have been taken into custody; however, prior to the announcement he left the territory of Bosnia and Herzegovina and evaded custody altogether. He continues to be free pending the outcome of his case" (*id.* at paragraph 10). The Supreme Court then revoked the verdicts of the Basic Court and District Courts in Bijeljina, and it returned the case to the Basic Court for retrial (*id.* at paragraph 16). The Basic Court ordered an expert medical evaluation of Kerović, but "as of 29 May 2003, the evaluation has not been completed due to Kerović's lack of co-operation with the court-appointed expert. It must be

emphasised that Kerović remains at liberty and thus has no incentive to co-operate with the court" (*id.* at paragraphs 17-19).

128. The OHCHR suggests that this "seemingly complicated case be divided into different areas of concern", as follows:

- "The need to ensure the protection of Article 6 rights of the perpetrator Kerović.
- "An examination of the validity of the decision of the Supreme Court under domestic law and the application of international law.
- "The effect of this decision and lack of any remedy at that juncture for the applicant.
- "The nature of the obligations on the Republika Srpska under Articles 3, 8 and 14" (OHCHR submission at paragraph 21).

129. With respect to the Article 6 rights of Kerović, the OHCHR opines that "the defendant's rights under both national and international law were protected". In his appeal to the Supreme Court, the defendant argued only an error in applying national law, not an error under international law, nor does the record support any such claim, according to the OHCHR (*id.* at paragraph 23). The OHCHR submits that "having fulfilled its obligations under Article 6, there is then a burden on the State to consider wider Convention obligations". The Supreme Court, whilst reviewing the criminal case, must balance the rights of the accused under Article 6 against the obligation to protect the human rights of individual victims under Articles 3, 8, and 14 and the rights of the wider community under Article 6 (*id.* at paragraph 24). Such obligations due to the wider community under Article 6 include determining: 1) "whether the national criminal law was applied correctly"; 2) "whether the national criminal procedure law was applied correctly"; and 3) whether certain human rights and fundamental freedoms enumerated in the Constitution of Bosnia and Herzegovina have been provided. The OHCHR submits that the Supreme Court failed to follow this analytic process and its decision violates the Convention (*id.* at paragraphs 25-28).

130. The OHCHR questions whether the Supreme Court, as constituted at the relevant time, can be considered an "independent tribunal". If a court fails to "function in accordance with the particular rules that govern it", then it does not comply with Article 6 of the Convention. In this case the "Supreme Court has failed to uphold the Article 6 guarantee of an independent and impartial tribunal, instead strengthening the perception that highly placed individuals can and do act with impunity". It is noteworthy that "the Independent Judicial Commission investigated the three Supreme Court justices involved in the Kerović decision and … refused to allow the reappointment of all three" (OHCHR submission at paragraphs 29-31).

131. The OHCHR further contends that there is "considerable doubt" as to the validity of the Supreme Court decision under the applicable law. Kerović's defence counsel argued that the lower courts breached Articles 13 and 14 of the Criminal Code; consequently, the Supreme Court should have reviewed the case under Article 425 paragraph 1 of the Code of Criminal Procedure, but instead, it based its decision on Article 423 of the same Code (*id.* at paragraph 32). "The issue of the competence of Kerović in relation to the commission of the offence was never adjudicated upon by the lower courts since it was not an issue before them". The Supreme Court based its decision only on facts submitted by the defence and not on other facts unfavourable to the defendant, contrary to Article 15 paragraph 2 of the Code of Criminal Procedure (*id.* at paragraphs 33-34).

132. The OHCHR notes that the Code of Criminal Procedure "fails to properly set out the circumstances under which an appeal is to be taken and the standards which are to be applied in its review" (*id.* at paragraph 36). In its review, "the Supreme Court appears to have exceeded the request of the parties and sought to join parties who did not themselves file requests". This is legal, but not appropriate in the present case. In addition, "Kerović has alleged no new facts, no new evidence, and no cogent legal argument to justify reversal". He claims that "the lower courts erred (in 2001) by not *sua sponte* raising the issue of his incompetence at the time of the offence (in 1997)" because such issue was apparent as a result of his complaint that he was not competent to stand trial. Looking to Article 3 of Protocol No. 7 to the Convention by analogy, the OHCHR contends that such an argument should have been barred (*id.*). Moreover, noting the considerable passage of time, the OHCHR fears that it will be "patently impossible for any expert to obtain and analyse the

information necessary to make a professional judgment on Kerović's competence at the time of the commission" of the crime. If in the renewed proceedings the trial court cannot make a determination on Kerović's sanity at the time of the crime, then the Supreme Court decision vacating the verdicts against him will stand and he will remain at liberty (*id.* at paragraphs 37-38).

133. With respect to Article 13 of the Convention, the OHCHR argues that there was a positive obligation on the State to ensure "that there is a law, that there is a procedure and that the procedure is implemented in accordance with the law". "[I]t is clear that the applicant has an arguable claim that the decision of the Supreme Court did violate certain Convention rights. It is also clear that, save for any intervention by the Chamber, she has no legal mechanism for asserting those rights, either institutionally or substantively" (OHCHR submission at paragraphs 40-41). The OHCHR submits that there is "*de facto* a violation of Article 13" (*id.* at paragraph 46).

134. According to the OHCHR, "the nature of the crime in this case, the way in which it was committed, and the known consequences of that treatment were such that they are capable of falling within the definition of Article 3 of the [Convention]" (*id.* at paragraph 51). In particular, the "series of actions taken, which included kidnapping, assault, and sexual assault with the premeditated aim of forcing the applicant to undergo the trauma of the delivery of a stillborn baby, fall within Article 3" (*id.* at paragraph 54). Admittedly, such actions were taken by private individuals; however, the State has a positive obligation to "secure" the applicant's protection (*id.* at paragraph 55). The OHCHR submits that "given the acts perpetuated against the applicant, she can rely directly on the decision of the [European] Court in the case of *X and Y v. The Netherlands* to demand that the criminal law give her protection (*id.* at paragraph 64). Although the Criminal Code and the Code of Criminal Procedure applicable in the Republika Srpska "do provide such protection", the Code of Criminal Procedure "was then misapplied by the Supreme Court so as to undermine the effectiveness of the Criminal Code and hence, if that decision is allowed to stand, the Entity bears responsibility for subsequent violations" (*id.*). In addition, "following the decision in *X and Y v. The Netherlands*, the applicant can bring herself clearly within the Article 8 provisions and the Chamber should find that the misapplication of the rules of procedure by the Supreme Court violate her right to a private and family life" (*id.* at paragraph 66).

135. Regarding discrimination, the OHCHR notes that "the nature of the crime has a strong element of discrimination inherent within it … quite clearly this was a crime that can only be committed against a woman" (OHCHR submission at paragraphs 68-69). Therefore, it would be erroneous to apply the test of differential treatment in an analogous situation. Rather, the OHCHR draws the Chamber's attention to Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", which prohibits torture "for any reason based on discrimination of any kind". According to the OHCHR, "this is exactly the kind of treatment envisaged under this element of Article 1 and hence the Chamber has the jurisdiction to consider its application to the present case" (*id.* at paragraphs 70-71). Moreover, Article 14 in conjunction with Article 8 particularly obliges a court to ensure the protection of the victim and reduces the margin of appreciation enjoyed by the State (*id.* at paragraph 72). In this respect, the OHCHR highlights the great discrepancy between the position of the parties and the manner in which the proceedings have been conducted. Therefore, it submits that the Republika Srpska cannot argue "objective justification or proportionality" (*id.* at paragraphs 76). Lastly, the OHCHR contends that the Chamber should consider discrimination in connection with Article 26 of the International Covenant on Civil and Political Rights ("ICCPR") (*id.* at paragraphs 78-82). "In the present case, it is clear from the facts that the applicant has not had the benefit of this protection, on the contrary, Kerović has been able to abuse his position relative to the applicant to ensure that, as a result of her status, she has not received equal protection before the law". Consequently, if the Supreme Court decision stands, there will be a violation of Article 26 of the ICCPR (*id.* at paragraphs 83-84).

136. In conclusion, the OHCHR submits "that this is exactly the type of case which requires the intervention of the Chamber to protect individual rights in the face of an abuse of the system by an individual in a position of influence" (OHCHR submission at paragraph 86), as follows:

- "The procedure followed by the lower courts leading to the prosecution of Kerović was done in accordance with the RS Criminal Code and the Criminal Procedure Code and full respect was given to the Article 6 rights of the then defendant.
- "The application to the Supreme Court was wrong both in fact and in law, but the Court issued a decision abolishing the judgment reached by the lower courts after due process and remitted the matter for re-trial.
- "In so doing, the Supreme Court failed to comply with the obligation under Article 1 to secure the rights contained in the [Convention].
- "As the decision of the Supreme Court is final, there is therefore no effective remedy for the applicant. OHCHR would therefore submit that there has been a violation of Article 13 of the [Convention].
- "That the decision of the Supreme Court, by nullifying the effective prosecution of a particular form of criminal offence that falls to be considered within the scope of Article 3, is therefore a violation of Article 3 of the [Convention].
- "That for the same substantive reason the Chamber can find a violation of Article 8 of the [Convention].
- "In respect of discrimination: That the offence itself was inherently discriminatory and OHCHR would submit, that without the effective prosecution by the Entity, it constitutes a violation of Article 1 of the Convention against Torture.
- "That the failure to provide for effective and equal protection before the Law [means] the Entity is in violation of Article 26 of the ICCPR.
- "The application of Article 14 of the [Convention]: That there is a violation of Article 8 and Article 14.
- "As there is no possibility of the case being properly prosecuted given the impossibility of effective compliance with the Supreme Court decision in relation to the evidence, the OHCHR supports the application of the applicant for the following relief:
- "To set aside the decision of the Supreme Court and reinstate the verdict of the lower courts, following the Chamber's decisions in the cases of *Damjanović v. the Federation of Bosnia and Herzegovina*, CH/98/638, and *E.M. and Š.T. v. the Federation of Bosnia and Herzegovina*, CH/01/6979.
- "In the alternative: To remit the case to the reconstituted RS Supreme Court to review the application of the defendants, giving effect to their [Convention] and other human rights obligations.
- "To make an order for compensation to the applicant as against the RS authorities" (OHCHR submission at paragraphs 88-100).

VII. OPINION OF THE CHAMBER

A. Admissibility

137. Before considering the merits of this application, the Chamber must decide whether to accept it, taking into account the admissibility criteria set forth in Article VIII(2) of the Agreement.

1. Compatibility *ratione materiae*

138. 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."

139. The applicant complains because, as an injured party to the criminal proceedings, she considers her role in the criminal proceedings against the perpetrators of the crimes against her to be only passive. Moreover, she claims that in ordering the renewed proceedings, the Supreme Court has not enabled her to take an active role in the renewed proceedings. The only Article of the Convention under which this claim could fall is Article 6, which protects the right of everyone to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by

law" and guarantees to everyone charged with a criminal offence certain minimum rights.

140. The respondent Party submits that these complaints of the applicant under Article 6 of the Convention should be declared inadmissible as incompatible *ratione materiae* with the Agreement.

141. As the Chamber has explained in *Unković v. the Federation of Bosnia and Herzegovina* (case no. CH/99/2150, decision on review delivered on 10 May 2002, Decisions January–June 2002, paragraph 94), the exact text of Article 6 does not indicate that the applicant, as the crime victim and injured party to the criminal proceedings, has a viable claim under the protections applicable to criminal proceedings contained in that Article. Only persons charged with a criminal offence are entitled to the protections of Article 6 applicable in criminal proceedings.

142. None the less, domestic law provides the applicant with the right to participate in the criminal proceedings as an injured party because she is "a person injured or threatened in some personal or property right by a crime" (Article 147 of the Code of Criminal Procedure). Article 59 of the Code of Criminal Procedure sets forth the general rights of the injured party to participate in the criminal proceedings (see paragraph 110 above). As indicated by the respondent Party, other provisions of the Code of Criminal Procedure further specify the role of the injured party in the criminal proceedings (see paragraph 118 above). Accordingly, the Chamber notes that the applicant's claim that she is only "passively" involved in the criminal proceedings is not accurate. The domestic law provides her with ample opportunity actively to participate in the proceedings and to assist the public prosecutor in bringing the perpetrators of the crimes against her to justice.

143. However, in accordance with the jurisprudence of the Chamber, the applicant's right under domestic law to participate in the criminal proceedings as an injured party falls outside the scope of the protections of Article 6 applicable to criminal proceedings. It follows that the applicant's claim under Article 6 concerning her participation in the criminal proceedings is incompatible *ratione materiae* with the Agreement, and the Chamber, therefore, declares it inadmissible. The Chamber notes, however, that this ruling in no way affects the applicant's rights as a civil party to the criminal proceedings vis-à-vis her claim under property law.

2. Exhaustion of effective remedies under Article VIII(2)(a) of the Agreement

144. 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 ...".

145. 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 (the "European Court") 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 European 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. In previous cases the Chamber has held that the burden of proof is on the respondent Party to satisfy the Chamber that there was a remedy available to the applicant both in theory and in practice (*see, e.g.*, case no. CH/96/21, *Čegar*, decision on admissibility of 11 April 1997, paragraph 12, Decisions March 1996-December 1997).

a. Fairness of the proceedings

146. The Chamber recalls that the applicant's complaints, as supported by the submissions of the OHCHR as *amicus curiae*, appear to raise issues concerning the fairness of the proceedings.

147. The Chamber notes that the applicant's complaints concerning the fairness of the proceedings are premature as the renewed proceedings are still pending before the Basic Court in Bijeljina. The Chamber cannot assess the fairness of the proceedings mid-way through the proceedings, as any unfairness or appearance of unfairness may be cured during the course of the pending proceedings before the domestic courts. Accordingly, the domestic remedies have not been exhausted as required by Article VIII(2)(a) of the Agreement. The Chamber therefore decides to declare this part of the application inadmissible.

b. Protection from future injury resulting from the renewed proceedings

148. In her application, the applicant complains that repeated encounters with the defendants in the renewed criminal proceedings will permanently damage her private and family life. These complaints raise allegations that the respondent Party has violated its negative obligations under Articles 8 and 3 of the Convention. In response, the respondent Party submits that Article 333 of the Code of Criminal Procedure provides the applicant with a remedy against this complaint; therefore, she has not exhausted her available domestic remedies.

149. Article 333 of the Code of Criminal Procedure provides that in certain circumstances witness statements may be read aloud during the proceedings without the presence of the witness at the hearing, provided there are "important reasons" supporting this (see paragraph 105 above). The respondent Party refers to two cases by the Supreme Court of Serbia and the Supreme Court of Croatia in which the testimony of rape victims was read aloud in lieu of live testimony in order to protect the injured parties (see paragraph 122 above).

150. The Chamber notes that Article 333 of the Code of Criminal Procedure does appear, on its face, to provide the applicant with the possibility of protection from further testimony in the renewed criminal proceedings against the defendants. However, it remains to be seen whether the Basic Court in Bijeljina will rule that the circumstances of the case present "important reasons" to allow the applicant's prior testimony to be read in lieu of live testimony pursuant to Article 333. It also remains to be seen whether new issues will arise in the renewed proceedings that will require additional testimony from the applicant. Thus, the applicant's complaints in this respect necessarily require the Chamber to speculate on what will occur during the renewed proceedings. Such complaints are therefore premature as the renewed criminal proceedings are currently underway before the Basic Court in Bijeljina. Accordingly, the domestic remedies have not been exhausted as required by Article VIII(2)(a) of the Agreement. The Chamber therefore decides to declare this part of the application inadmissible as well.

3. Conclusion as to admissibility

151. The Chamber thus declares the application inadmissible as to the complaints concerning the applicant's participation in the criminal proceedings as an injured party, the fairness of the proceedings, and possible future injury resulting from the renewed proceedings. The Chamber declares the remainder of the application admissible, in particular under Articles 3, 8, and 13 of the Convention. The Chamber also declares the application admissible under Article 6 paragraph 1 of the Convention concerning the length of the proceedings to determine the applicant's civil claim under property law. Finally, the application is admissible with regard to discrimination in the enjoyment of these rights on the grounds of gender and social origin/status.

B. Merits

152. Under Article XI of the Agreement, the Chamber must next address the question of whether the facts established above disclose a breach by the Republika Srpska 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 6 of the Convention (length of proceedings)

153. The Chamber has declared the application admissible under Article 6 paragraph 1 of the Convention concerning the length of the proceedings to determine the applicant's civil claim under property law. This claim under property law has been pending before the courts since at least 9 September 1998, when the applicant properly raised it in the criminal proceedings against the perpetrators of the crimes against her (see paragraph 29 above).

154. Article 6 paragraph 1 of the Convention states as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

155. The European Court of Human Rights has explained that by requiring in Article 6 paragraph 1 that cases be heard "within a reasonable time", "the Convention underlines the importance of rendering justice without delays which might jeopardise its effectiveness and credibility" (Eur. Court HR, *H. v. France*, judgment of 24 October 1989, Series A no. 162, paragraph 58).

156. The proceedings at issue, insofar as relevant, concern the applicant's civil right to compensation as an injured party damaged in some personal or property right by the commission of a crime. As such, the Chamber finds this claim under property law to constitute a civil right, within the meaning of Article 6 paragraph 1 of the Convention. Accordingly, that provision is applicable to the proceedings in the present case in which the applicant is entitled to have her claim under property law resolved — be they criminal or civil proceedings (*see* Eur. Court HR, *Tomasi v. France*, judgment of 27 August 1992, Series A no. 241, paragraphs 121-122).

157. The first step in establishing the length of the proceedings is to determine the period of time to be considered. For the purposes of Article 6 paragraph 1 of the Convention, the Chamber finds that the period of time to be considered starts on the date on which the applicant raised her claim under property law in the criminal proceedings against the defendant Kerović and others, namely on 9 September 1998 (*see Tomasi v. France* at paragraph 124). In its judgment of 27 December 2001, the Basic Court in Bijeljina did not decide upon the applicant's claim under property law. Instead, the Basic Court referred the applicant to a civil action, since it "did not have sufficient information to decide on the injured party's claim under property law either partly or in its entirety". Thereafter, the Supreme Court vacated this judgment and ordered renewed criminal proceedings before the Basic Court. These renewed criminal proceedings are still pending, and to date there has been no decision on the applicant's claim under property law. Thus, the proceedings to determine her civil claim have been pending for over five years and they are still continuing to date.

158. The reasonableness of the length of proceedings is to be assessed having regard to the criteria laid down by the Chamber, namely the complexity of the case, the conduct of the applicant and of the relevant authorities, and the other circumstances of the case (*see, e.g.,* case no. CH/97/54, *Mitrović*, decision on admissibility of 10 June 1998, paragraph 10, Decisions and Reports 1998, with reference to the corresponding case-law of the European Court of Human Rights). In *Tomasi v. France*, a case in which the applicant joined the criminal proceedings as a civil party in order to obtain compensation for ill-treatment he suffered during police custody, the European Court further required "an overall assessment" of the circumstances of the case in deciding upon the reasonableness of the length of the proceedings to determine the applicant's civil claim (Eur. Court HR, *Tomasi v. France*, judgment of 27 August 1992, Series A no. 241, paragraph 125).

159. The Chamber notes that under the legal system in the Republika Srpska, as an injured party, the applicant's claim under property law is partly dependent upon the outcome and conduct of the criminal proceedings against the perpetrators of the crimes against her (see paragraph 111 above). The Chamber understands that it is the regular practice in Bosnia and Herzegovina that the courts conclude the criminal proceedings before they decide upon an injured party's claim under property law. Therefore, the applicant's civil claim is necessarily dependent upon the termination of the criminal proceedings against the defendant Kerović and others. As a result, those criminal

proceedings also bear upon the analysis of the reasonableness of the length of the proceedings to determine the applicant's civil claim.

160. With respect to the complexity of the case, the Chamber considers the criminal prosecution against Dr. Kerović and his accomplices to be somewhat complicated. The criminal proceedings are being conducted against four defendants on two different criminal offences (kidnapping and forcible abortion). The four defendants have raised different defences against the criminal offences for which they are charged. In the initial evidentiary proceedings, the Basic Court heard testimony from some 12 witnesses, including the injured party, and reviewed the statements of two other witnesses. It further considered expert testimony and evidence from the treating physician of the injured party after the critical event and from her pediatrician and gynecologist, as well as from the pathologist who examined her stillborn fetus. Myriad physical evidence was also entered into the court record. In addition, as explained in detail above, Dr. Kerović's capacity to stand trial was at issue throughout the initial first instance proceedings, and in the renewed proceedings, his mental competence (sanity) during the critical event is further at issue. These issues required and continue to require the Basic Court to obtain and consider additional medical expertise. None the less, in the view of the Chamber, the issues raised in the prosecution of the defendants for kidnapping and forcible abortion, and in the determination of the applicant's claim under property law, are not so complex as to require over five years of proceedings.

161. With respect to the conduct of the applicant, the Chamber sees nothing in the court record to indicate that the applicant, in any way, has been responsible for the delay in the proceedings. The respondent Party further has not argued that she has contributed to the prolonged delay.

162. With respect to the conduct of the competent authorities of the respondent Party, the European Court has pointed out that "only delays attributable to the State may justify a finding of a failure to comply with the reasonable time' requirement" (Eur. Court HR, *Vernillo v. France*, judgment of 20 February 1991, Series A no. 198, paragraph 34). However, the Chamber, like the European Court, is further aware of the difficulties, caused by a variety of factors, which sometimes cause the delay of proceedings before the national courts (*id.* at paragraph 38).

163. In *Moreira de Azevedo v. Portugal* (Eur. Court HR, judgment of 23 October 1990, Series A no. 189), the European Court considered the complaint of the applicant, an injured party to a crime, that the criminal proceedings, in which his civil claim for damages resulting from the crime would be determined, had violated the principle of "reasonable time". The trial required expert medical evidence on the condition of the applicant, and in providing such evidence, significant delays occurred. The applicant ascribed these delays to the defective functioning of the judicial system, attributable to the State. The State argued that a lack of efficiency by the medical experts could not be attributable to its judicial authorities. The European Court found that "the State is responsible for all it authorities and not merely its judicial organs" (*id.* at paragraph 73). Moreover, the State "failed to show what practical and effective measures Portuguese law provided in the present case to accelerate the progress of the criminal proceedings" (*id.* at paragraph 74). Consequently, the European Court found that the principle of "reasonable time" was exceeded.

164. In the present case, the Chamber observes that the delays in the length of the proceedings fall into two categories: delays attributable to the defendants and delays or irregularities attributable to the respondent Party. Firstly, the delays attributable to the defendants occurred during the investigative proceedings (when Dr. Kerović either claimed immunity as a delegate, failed to appear for hearings, or was unavailable due to medical treatment in Belgrade); during the first instance proceedings (when the defendants or their defence counsel failed to appear for hearings, when Dr. Kerović was unavailable due to his poor health, or due to defendants' motions to disqualify the judges); and during the renewed criminal proceedings (when the defendants or their defence counsel failed to appear for hearings). Secondly, the delays or irregularities attributable to the authorities of the Republika Srpska also occurred during the investigative proceedings (due to the failure of the Parliament of Bosnia and Herzegovina to respond to the Basic Court's request to terminate Dr. Kerović's immunity as a delegate); during the first instance proceedings (due to transferring the case to the Basic Court in Lopare, then to the District Court in Bijlejina, and then back to the Basic Court in Bijeljina and suspensions in order to obtain expertise on Dr. Kerović's capacity to stand trial); and

during the renewed criminal proceedings (due to delays in obtaining the necessary expertise on Dr. Kerović's mental competence and capacity to stand trial).

165. The Chamber further observes that the judicial organs of the Republika Srpska tolerated significant obstructionism on the part of the defendants. In addition, Dr. Kerović has never spent even one day in detention, nor did the courts take any actions or measures to otherwise ensure his attendance and co-operation with the proceedings. As a result, he was able to very effectively delay the proceedings without incurring any penalty, such as, for example, the loss of the bail he posted.

166. Conversely, the Chamber recognises that the judicial organs of the Republika Srpska undertook certain actions to attempt to increase the efficiency of the proceedings. For example, the Basic Court requested that the Parliament of Bosnia and Herzegovina terminate Dr. Kerović's immunity as a delegate in order to remove this obstruction to the proceedings. It further ordered the police to locate Dr. Kerović and other witnesses in order to ensure their attendance at hearings. The investigative judge personally travelled to Belgrade to verify Dr. Kerović's hospitalisation and mental condition, and immediately thereafter, the Hospital proclaimed his medical treatments completed. The Basic Court appointed new *ex-officio* defence counsel to the defendants when their previous defence counsel failed to appear for hearings. Moreover, the District Court decided upon the defendants' appeals in 4 months, and the Supreme Court decided upon the defendants' petitions for extraordinary review in 3 months. None the less, the overwhelming impression resulting from a careful review of the record of the proceedings is one of inordinate delay. Granted, some of this delay is attributable to a clear pattern of obstruction on the part of the defendants, in particular Dr. Kerović, which was, in turn, tolerated by the courts to an unacceptable extent. Therefore, as the European Court observed in *Moreira de Azevedo v. Portugal*, the Chamber also observes that the Republika Srpska has failed to show practical and effective measures provided by the applicable law to accelerate the progress of the criminal proceedings, which, to date, have lasted for over 5 years and are still continuing. Assessing all the circumstances of the case together, the Chamber finds that such a prolonged period of delay cannot be considered reasonable.

167. For these reasons, the Chamber concludes that the Republika Srpska has violated the applicant's right to a hearing within a reasonable time for the determination of her civil claim under property law, as guaranteed by Article 6 paragraph 1 of the Convention.

2. Article 8 of the Convention (right to respect for private and family life)

168. 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."

169. The applicant alleges that the Republika Srpska has violated her rights guaranteed by Article 8 of the Convention because it has failed to protect her right to private and family life, in particular, as a result of the excessively long duration of the criminal proceedings against the perpetrators of the crimes against her. The applicant highlights that during the first instance criminal proceedings, she was exposed to threats, insults, and assaults. Since then, she has made a new family life, and she fears that repeated encounters with the defendants in the renewed criminal proceedings will permanently damage her new family and personal life. The OHCHR, as *amicus curiae*, strongly supports the applicant's complaints. It submits that in accordance with the jurisprudence of the European Court of Human Rights in *X and Y v. The Netherlands* (judgment of 26 March 1985, Series A no. 91), the protections of Article 8 are applicable to the present case, and "the Chamber should find that the misapplication of the rules of procedure by the Supreme Court violate her right to a private and family life" (see paragraph 134 above).

170. The respondent Party appears to concede that Article 8 is applicable to the present case as it "shares the opinion that the 'renewed encounter with the people who caused her unspeakable evil would be a painful experience that would leave permanent consequences on her present family and personal status'" (see paragraph 115 above). However, it claims that the case is not comparable to *X and Y v. The Netherland*s. The respondent Party notes that the Code of Criminal Procedure allows for the interference with the applicant's privacy, with certain exceptions that the applicant may propose to the court (see paragraph 121 above); thereby, it strikes a fair balance.

171. Preliminarily, the Chamber notes that the European Court of Human Rights has highlighted that an examination of the same set of facts may be justified under both Article 6 of the Convention, which protects procedural safeguards, and Article 8 of the Convention, which ensures proper respect for private and family life, because of "the difference in nature of the interests protected" (Eur. Court HR, *Van Kuck v. Germany*, judgment of 12 June 2003, paragraph 74). Thus, in the present case, the facts complained of not only deprived the applicant of the determination of her civil right within a reasonable time, but also had repercussions upon her private life (*see id.* at paragraph 75).

a. Sphere of "private and family life"

172. The Chamber recalls that the European Court of Human Rights has consistently explained that "the concept of 'private life' is a broad term not susceptible to exhaustive definition":

> "It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. Likewise, the Court has held that though no previous case has established as such any right to self-determination as being contained in Article 8, the notion of personal autonomy is an important principle underlying the interpretation of its guarantees. Moreover, the very essence of the Convention being respect for human dignity and human freedom, protection is given to the right of transsexuals to personal development and to physical and moral security" (Eur. Court HR, *Van Kuck v. Germany*, judgment of 12 June 2003, paragraph 69 (citations omitted)).

173. In identifying the specific aspect of "private and family life" at issue in a particular case, the Chamber observes that the European Court of Human Rights looks to the facts underlying the application. For example, in *X and Y v. The Netherlands*, the applicants alleged that the impossibility to institute criminal proceedings against the perpetrator of sexual abuse against applicant Y, a mentally handicapped teenager, violated Article 8 of the Convention. The European Court agreed that "private life" is "a concept which covers the physical and moral integrity of the person, including his or her sexual life" (Eur. Court HR, judgment of 26 March 1985, Series A no. 91, paragraph 22). In *Stubbings and Others v. United Kingdom*, the applicants, victims of child sexual abuse, alleged that their rights protected by Article 8 had been violated because the law deprived them of an effective civil remedy against their alleged abusers. Again, the European Court confirmed that Article 8 is applicable to these complaints (Eur. Court HR, judgment of 22 October 1996, Reports of Judgments and Decisions 1996-IV, paragraphs 59, 61). In *Mikulić v. Croatia*, the applicant complained that she had been kept in a state of prolonged uncertainty as to her personal identity due to the inefficiency of the domestic courts in paternity proceedings. The European Court found that there was a direct link between establishing the applicant's paternity and her private life; thus, her complaints fell within the ambit of Article 8 (Eur. Court HR, judgment of 7 February 2002, paragraph 55). Finally, in *Y.F. v. Turkey*, the applicant complained that his wife had been subjected, against her will, to a gynaecological examination by a medical doctor following her detention in police custody. The European Court observed that Article 8 is "clearly applicable to these complaints" because "a person's body concerns the most intimate aspect of one's private life" (Eur. Court HR, judgment of 22 July 2003, paragraph 33).

174. Similarly, in the present case the applicant alleges that the Republika Srpska has failed to satisfy its positive obligation to ensure respect for her private and family life in that it has failed to establish efficient mechanisms to effectively prosecute the perpetrators of kidnapping and forcible

abortion against her. Moreover, she alleges that the Republika Srpska has failed to protect her from threats, insults, and assaults against her person during the proceedings, and instead, has placed her in a position to risk repeated encounters with the defendants in the renewed criminal proceedings, which may result in permanent damage to her newly established private and family life. The Chamber recalls that the respondent Party appears to agree that the applicant's complaints concerning the risk of repeated encounters with the defendants in the renewed criminal proceedings engage her right to respect for her private and family life (see paragraph 115 above). Thus, in the Chamber's view, and in accordance with the jurisprudence of the European Court, the applicant's complaints properly fall within the sphere of private and family life protected by Article 8 of the Convention.

b. Positive obligations of Article 8 of the Convention

175. According to the constant jurisprudence of the European Court of Human Rights,

> "[W]hile the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves" (Eur. Court HR, *Van Kuck v. Germany*, judgment of 12 June 2003, paragraph 70; *see also X and Y v. The Netherlands*, judgment of 26 March 1985, Series A no. 91, paragraph 23).
>
> "However, the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition" (*Van Kuck v. Germany*, paragraph 71).

176. In the context of a case involving the protection of children from sexual abuse, the Court further observed that "vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives" (Eur. Court HR, *Stubbings and Others v. United Kingdom*, judgment of 22 October 1996, Reports of Judgments and Decisions 1996-IV, paragraph 64).

177. In the Chamber's view, the present case raises issues concerning the respondent Party's positive obligations under Article 8 of the Convention as the applicant alleges that the Republika Srpska has failed to protect her from heinous crimes against her person and against the life of her unborn child in that it has failed to effectively prosecute the perpetrators of these crimes. The applicant further alleges that in the renewed criminal proceedings the Republika Srpska will place her in a position to risk repeated encounters with the defendants, who could threaten, insult, and assault both her person and her moral integrity. The respondent Party must carry out the criminal proceedings against the defendants in such a way as to neither improperly infringe upon the applicant's rights nor fail to adequately protect them.

c. Fair balance test

178. For both the "positive" and "negative" obligations contained in Article 8, according to the European Court, "the applicable principles are nonetheless similar. In determining whether or not such an obligation exists, regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual; and in both contexts the State enjoys a certain margin of appreciation" (Eur. Court HR, *Mikulić v. Croatia*, judgment of 7 February 2002, paragraph 58). In balancing these competing interests, the European Court "has emphasised the particular importance of matters relating to a most intimate part of an individual's life" (Eur. Court HR, *Van Kuck v. Germany*, judgment of 12 June 2003, paragraph 72).

179. The European Court has further recognised that "there are different ways of ensuring respect for private life and the nature of the State's obligation will depend upon the particular aspect of private life that is in issue. It follows that the choice in principles falls within the Contracting States'

margin of appreciation" (Eur. Court HR, *Stubbings and Others v. United Kingdom*, judgment of 22 October 1996, Reports and Judgments and Decisions 1996-IV, paragraph 63).

180. In the leading case of *X and Y v. The Netherlands*, the European Court considered whether the legal system of The Netherlands should provide for the possibility of criminal prosecution against a person alleged to have sexually abused a mentally handicapped teenager. The Government pointed to the availability of civil-law remedies. However, the European Court considered "effective deterrence" "indispensable", which can be achieved only by criminal-law protections. In this respect, the case brought to light a gap in the legal system caused by certain applicable procedural obstacles, thereby resulting in a violation of the applicants' rights protected by Article 8 (judgment of 26 March 1985, Series A no. 91, paragraph 27).

181. In *Mikulić v. Croatia*, the European Court considered whether Croatia, in processing the applicant's paternity claim, breached its positive obligations due under Article 8. The European Court "reiterate[d] that its task is not to substitute itself for the competent Croatian authorities in determining the most appropriate methods for establishing paternity through judicial proceedings in Croatia, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation" (judgment of 7 February 2002, paragraph 59). The European Court noted in particular that no measures existed under domestic law to compel the defendant to comply with the court order to perform DNA testing, nor was there any provision regulating the consequences for such non-compliance. The defendant failed to appear for six appointments for the DNA testing. Finally, after three and one half years, the court concluded, based on testimony from the applicant's mother and the defendant's avoidance, that he was the applicant's father. However, the appellate court found the evidence insufficient to establish paternity.

182. The European Court observed that a procedural provision giving the courts discretionary power to assess evidence "is not in itself a sufficient and adequate means for establishing paternity in cases where the putative father is avoiding the court's order that DNA tests be carried out" (*id.* at paragraph 62). Moreover, "the court has been unable to find adequate procedural means to prevent [the putative father] from impeding the proceedings" (*id.* at paragraph 63). Although Croatia was free to reach different solutions to the problem, the European Court explained that:

> "the interests of the individual seeking the establishment of paternity must be secured when paternity cannot be established by means of DNA testing. The lack of any procedural measure to compel the alleged father to comply with the court's order is only in conformity with the principle of proportionality if it provides alternative means enabling an independent authority to determine the paternity claim speedily. No such procedure was available to the applicant in the present case" (Eur. Court HR, *Mikulić v. Croatia*, judgment of 7 February 2002, paragraph 64).

Therefore, the European Court concluded that the procedure available failed to strike a fair balance and was thus not proportionate. It concluded that the "inefficiency of the courts has left the applicant in a state of prolonged uncertainty as to her personal identity. The Croatian authorities have therefore failed to secure to the applicant the 'respect' for her private life to which she is entitled under the Convention" (*id.* at paragraphs 65-66).

183. Applying these principles to the present case, the Chamber notes that for six years, the judicial authorities of the Republika Srpska have been unable to effectively prosecute Dr. Kerović and his accomplices for the crimes of kidnapping and forcible abortion committed against the applicant and her unborn child. The applicant understandably desires these criminal proceedings to be efficiently and successfully concluded, so that she may place this terrible period of her life behind her and know that her perpetrators have been brought to justice and duly punished. It is apparent from a close examination of the criminal proceedings, that they have been fraught with obstacles, some procedural and others resulting from the court's inability to gain the co-operation of the defendants, Dr. Kerović in particular. In this regard, the Chamber notes with concern that the Basic Court took insufficient action to ensure that the proceedings were conducted expeditiously, either by compelling Dr. Kerović and his defence counsel to attend the proceedings or otherwise by taking measures to counteract his obstructionism, all the while leaving the applicant in a state of apprehension.

184. Moreover, the issue of Dr. Kerović's procedural capacity to stand trial and mental competence (sanity) at the time of the offence have unduly complicated the proceedings. Articles 13 and 14 of the Criminal Code appear to define competence (sanity) as an element of criminal responsibility (see paragraphs 97-98 above), as opposed to defining the lack of competence (insanity) as an affirmative defence, as in some other legal systems. The result of this distinction is that it is the responsibility of the court rather than the defendant to raise this issue. However, Article 258 of the Code of Criminal Procedure only requires the court to order an expertise on the issue of competence (sanity) of the accused if "suspicion" should arise that it has been excused or diminished (see paragraph 104 above). Thus, the Code of Criminal Procedure appears to leave considerable discretion to the court in determining when such an expertise is required to establish a critical element of the criminal offence. In this case, the Basic Court in Bijeljina decided, based upon all the evidence before it, that no such expertise was necessary, as it had no suspicion whatsoever about Dr. Kerović's competence in September 1997 (see paragraph 72 above). The District Court agreed, remarking that he had exhibited a high level of organisation and intellectual skills in organising, planning and committing the offence. Therefore, "as a matter of law", the Basic Court was not required to order any expertise on this issue (see paragraph 77 above). However, the Supreme Court did not agree. In its view, medical evidence in the case file indicating that Dr. Kerović had suffered from depression since 1993 should have been "a clear signal" to the court to order an expertise upon his mental state in 1997. As the Code of Criminal Procedure fails to define precisely what constitutes "suspicion" and based upon what quality and quantity of evidence the court should find such "suspicion" and order an expertise, the Chamber observes that the judicial decision on whether to order an expertise on a defendant's competence (sanity) is merely a judgment call, over which reasonable minds can differ. The Chamber further notes that the Code of Criminal Procedure also omits any precise standards of review. This lack of clarity and standards in the governing law opens the door to significant opportunity for procedural manipulation, as highlighted by this case. It further often results in prolonged appellate and renewed proceedings that thwart legal certainty, also highlighted by this case.

185. In this case, however, it is not necessary for the Chamber to determine whether or not an expertise should have been ordered upon Dr. Kerović's competence (sanity) in 1997, although, the Chamber notes with some concern that the decision of the Supreme Court appears suspect in this regard. After all, the facts establish that in September 1997, Dr. Kerović was an active member of the House of Representatives of Bosnia and Herzegovina, as well as a practicing physician. None the less, the question for the Chamber is whether, taking into account the courts' disagreement over the necessity for an expertise upon Dr. Kerović's mental state and the courts' inability to gain Dr. Kerović's co-operation in the criminal proceedings (or more precisely, to avoid his obstructionism and delaying tactics), the judiciary of the Republika Srpska achieved a fair balance between the general interest and the applicant's interest.

186. In assessing the fair balance struck to date, the Chamber observes that considerable measures have been taken to consider the interests of the defendants and the courts in general, while no measures appear to have been taken to protect the interests of the applicant, who is both the crime victim and the injured party. For example, the proceedings have been delayed repeatedly in order to respect Dr. Kerović's immunity as a delegate, to allow for expertise upon his capacity to stand trial, due to his poor health and need to seek medical treatment, and as a result of numerous failures to appear for hearings. It appears that the court did order that the applicant's privacy be protected from the public, although it seems to have done little else to protect her from threats, insults or assaults against her person or moral integrity by the defendants. This is so, despite the applicant's clear vulnerability as a displaced person and a crime victim, which entitled her to increased, not decreased, protection from the authorities. The Chamber is further unaware of any actions that have been taken to date to ensure that the applicant will not, in the renewed proceedings, be forced to interact with the defendants or otherwise be subjected once again to threats, insults, or assaults from them. The respondent Party has not guaranteed that the applicant will be given police or other protection during the proceedings. It has highlighted Article 333 of the Code of Criminal Procedure, which allows for witnesses statements to be read in certain limited circumstances, but it remains unknown, nearly one year after the renewed proceedings commenced, whether the court will apply this provision to protect the applicant.

187. Considering the totality of the circumstances, the Chamber finds that the failure of the judiciary of the Republika Srpska effectively and efficiently to conclude the criminal proceedings at issue has disproportionately infringed upon the applicant's right to respect for her private and family life.

d. Conclusion as to Article 8 of the Convention

188. In conclusion, the Chamber finds that the applicant's complaints fall within the ambit of the right to respect for private and family life protected by Article 8 of the Convention. However, the judiciary of the Republika Srpska has failed in this case to achieve a fair balance between the general interest and the applicant's interest in that it has failed effectively and efficiently to conclude the criminal proceedings against the perpetrators of the crimes against the applicant. In this manner, the Republika Srpska has violated its positive obligations due to the applicant under Article 8 of the Convention.

3. Article 3 of the Convention (prohibition of inhuman or degrading treatment)

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

190. The Chamber recalls that Article 3 of the Convention "must be regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe" (Eur. Court HR, *Pretty v. United Kingdom*, judgment of 29 April 2002, paragraph 49). It is written in absolute terms, with no exceptions allowed (*id.*). Although Article 3 is most commonly applied where an individual risks being subjected to proscribed treatment from intentionally inflicted acts by State authorities, Article 3 also contains a positive obligation that "requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment, including such treatment administered by private individuals" (*id.* at paragraphs 50-51). "Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity" (Eur. Court HR, *A v. United Kingdom*, judgment of 23 September 1998, Reports of Judgments and Decisions 1998-IV, paragraph 22).

191. The European Court of Human Rights has said that "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim" (*id.* at paragraph 20). In this sense, "ill-treatment"

> "involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible (Eur. Court HR, *Pretty v. United Kingdom*, judgment of 29 April 2002, paragraph 52 (citations omitted)).

192. In *A v. United Kingdom*, the European Court considered whether the State should be held responsible under Article 3 of the Convention for child abuse inflicted upon the applicant by his stepfather. The European Court accepted that repeatedly beating the applicant, a nine-year-old child, with a garden cane with considerable force reached the severity prohibited by Article 3 (Eur. Court HR, judgment of 23 September 1998, Reports of Judgments and Decisions 1998-IV, paragraph 21). However, under English law, the defence of "reasonable chastisement" applied to a charge of assault against a child. In the case, "despite the fact that the applicant had been subjected to treatment of sufficient severity to fall within the scope of Article 3, the jury acquitted his stepfather, who had administered the treatment" (*id.* at paragraph 23). Consequently, the European Court

concluded that "the law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3" (*id.* at paragraph 24).

193. Applying these principles to the present case, the Chamber firstly finds that the treatment inflicted upon the applicant in the form of kidnapping her, drugging her against her will, performing a forcible abortion upon her while she fell in and out of consciousness, which caused her later to give birth to a stillborn female fetus in the seventh month of pregnancy, and leaving her on the side of the road certainly falls within the scope of "ill-treatment" prohibited by Article 3 of the Convention.

194. The question in this case is whether the Republika Srpska has taken sufficient measures to satisfy its positive obligation under Article 3 of the Convention to secure the applicant's protection from such vile acts. In this sense, the Chamber considers the applicant, as a displaced person and the victim of a crime committed upon her by an acting member of the House of Representatives of Bosnia and Herzegovina, to be a vulnerable person entitled to increased State protection.

195. The Chamber recalls that the laws of the Republika Srpska appropriately criminalize the offences of kidnapping and forcible abortion and that Dr. Kerović and his accomplices have been charged and prosecuted for these criminal offences. However, as the Chamber observed above, the manner in which the competence (sanity) of a defendant is addressed in the domestic law leaves room for confusion and procedural manipulation (see paragraph 184 above), both of which occurred in the present case. Consequently, six years after the events in question, the prosecution still has not been concluded. Moreover, taking into account the recent turn of events resulting from the Supreme Court vacating the convictions and ordering renewed proceedings, including an expertise upon Dr. Kerović's mental competence (sanity) in September 1997 (see paragraph 85 above), the Chamber wonders whether the judiciary of the Republika Srpska will ever be able to effectively conclude the criminal proceedings. It cannot now do so efficiently, as the Chamber has already found that the proceedings have exceeded a reasonable length within the meaning of Article 6 paragraph 1 of the Convention (see paragraph 167 above).

196. As explained above, in the present case Article 3 obliges the Republika Srpska to provide "effective deterrence" against the depraved acts committed against the applicant. However, it appears to the Chamber that no such actual deterrence has occurred. At the time of the events in question, Dr. Kerović was a member of the House of Representatives of Bosnia and Herzegovina and a practicing physician, and he continued to serve in these capacities thereafter. He has never, throughout the course of the criminal proceedings to date, spent even one day in detention, despite the clear pattern of obstruction on his part. It also appears that no other sanctions or measures were taken against him to otherwise ensure his attendance and co-operation with the proceedings. At the conclusion of the first instance proceedings, upon which he was pronounced guilty of the criminal offences of kidnapping and forcible abortion, he still was not taken into custody. According to the President of the Basic Court in Bijeljina, he "knowingly avoided to be present during the delivery of the judgment since he expected punishment and the procedural decision on detention" (see paragraph 73 above). The Chamber further recalls that although the Basic Court sentenced Dr. Kerović to six years and six months imprisonment, it did not prohibit him from continuing to practice as a physician. The deputy basic public prosecutor appealed on this point, but the District Court rejected the appeal (see paragraphs 75-76 above). Lastly, it appears that Dr. Kerović has not exhibited any remorse for his actions. In his petition for extraordinary review to the Supreme Court, he argued that the applicant "suffered only minor injuries", "not … severe injuries" (see paragraphs 80-81 above); it seems he has completely failed to recognise that the consequence of his actions was to kill his own baby and to physically and emotionally traumatise the woman with whom he previously had an intimate relationship. The sum total of the acts of the respondent Party in allowing or tolerating such behaviour by Dr. Kerović has been to confirm that high-level politicians may commit crimes against vulnerable members of society with impunity. They may continue to practice their chosen professions, refuse to co-operate with the criminal prosecution, and avoid custody and punishment altogether, or at least, for an extended period of time. They may, in effect, act as if nothing has happened. This is surely not the kind of "effective deterrence" required by the Republika Srpska in response to such heinous criminal offences.

197. In the Chamber's view, due to its failure to effectively and efficiently conclude the prosecution against the defendants, who inflicted severe ill-treatment against the applicant, the Republika Srpska

has not satisfied its positive obligation to secure the applicant's protection from such ill-treatment, as prohibited by Article 3 of the Convention, in the form of providing "effective deterrence, against such serious breaches of personal integrity". Therefore, the Republika Srpska has violated Article 3 of the Convention.

4. Discrimination on the basis of gender and social origin/status

198. The Chamber transmitted the case with respect to discrimination based on gender and social origin/status. In response the respondent Party states that it is obvious that it did not discriminate against the applicant (see paragraph 123 above). Conversely, the OHCHR as *amicus curiae* argues that "the nature of the crime has a strong element of discrimination inherent within it ... quite clearly this was a crime that can only be committed against women" (see paragraph 135 above).

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

5. Article 13 of the Convention (right to an effective remedy)

200. 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."

201. Taking into consideration its conclusion that the Republika Srpska has violated the applicant's rights protected by Article 6 paragraph 1 of the Convention, the Chamber decides that it is not necessary separately to examine the application under Article 13 of the Convention.

6. Conclusion as to merits

202. In summary, the Chamber decides that the Republika Srpska violated Article 6 paragraph 1 of the Convention in that it failed to determine the applicant's civil claim under property law within a reasonable time. The Chamber further decides that the Republika Srpska violated its positive obligation due under Article 8 of the Convention in that it failed effectively and efficiently to conclude the criminal proceedings against the perpetrators of the crimes of kidnapping and forcible abortion against the applicant. Similarly, due to its failure to provide effective deterrence against the serious crimes inflicted upon the applicant, the Republika Srpska violated its positive obligation due under Article 3 of the Convention.

VIII. REMEDIES

203. 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. 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 applicant.

204. The applicant has not requested any monetary compensation. Rather, she requests the Chamber to order the Supreme Court of the Republika Srpska to address the merits of the case against Dr. Kerović and his accomplices and to issue a decision in accordance with the case file. The OHCHR as *amicus curiae* joins the applicant and asks the Chamber to set aside the decision of the Supreme Court and to re-instate the verdict of the lower courts. Alternatively, the OHCHR asks the Chamber to remit the case to the reconstituted Supreme Court to review the defendants' petitions, giving effect to its human rights obligations under the Convention. The OHCHR further asks the Chamber to award the applicant compensation.

205. Taking into account its finding that the judiciary of the Republika Srpska has failed effectively and efficiently to conclude the proceedings against the perpetrators of the crimes against the applicant, the Chamber will order the Republika Srpska to take all necessary actions to ensure that the competent courts expeditiously and effectively decide the pending criminal case on the merits in a final and binding manner, at the latest by 8 months from the date of delivery of the present decision, *i.e.* by 8 July 2004. In setting the time limit of 8 months, the Chamber notes that in the initial criminal proceedings, once the first instance proceedings finally proceeded in a meaningful way and in the absence of obstruction by the defendants, they were completed in some six weeks cumulative time. Thereafter, the second instance court decided upon the appeals within four months. Accordingly, in the Chamber's view, if the competent domestic courts proceed with the renewed criminal proceedings expeditiously, they will be able to comply with this order. In reaching the final and binding decision, the courts shall give full effect to the applicant's human rights and shall endeavour to offer her the greatest protection available under domestic law. In addition, the courts shall comply with all the obligations due under the Convention, as elaborated upon in this decision. They shall further take all necessary, available, and appropriate measures under domestic law to ensure the defendants' co-operation with and attendance during the criminal proceedings, until they are finally resolved.

206. In addition, in order to remedy the established violation of Article 6 paragraph 1 of the Convention regarding the length of proceedings to determine the applicant's civil claim under property law, the Chamber finds it appropriate to order the Republika Srpska to take all necessary steps to promptly decide the applicant's civil claim under property law at the latest by 3 months from the date the judgment by the domestic courts in the criminal proceedings becomes final and binding.

207. As a remedy for her sense of injustice, as well as the ill-treatment and disrespect inflicted upon her by the Republika Srpska, the Chamber finds it appropriate to order the Republika Srpska to pay to the applicant the sum of ten thousand (10,000) Convertible Marks (*Konvertibilnih Maraka*, "KM") as compensation for non-pecuniary damages. Such sum shall be paid to her within one month from the date of delivery of this decision, *i.e.* by 8 December 2003.

208. Additionally, the Chamber awards simple interest at an annual rate of 10% on the sum awarded to be paid to the applicant in the preceding paragraph. Interest shall be paid as of one month from the date of delivery of this decision on the sum awarded or any unpaid portion thereof as of 8 December 2003 until the date of settlement in full.

IX. CONCLUSIONS

209. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible with respect to Article 6 paragraph 1 (length of proceedings), Article 8 (right to respect for private and family life), Article 3 (prohibition of inhuman or degrading treatment), and Article 13 (right to an effective remedy) of the European Convention on Human Rights and discrimination in the enjoyment of these rights on the grounds of gender and social origin/status under Articles 1(14) and II(2)(b) of the Human Rights Agreement;

2. unanimously, to declare the remainder of the application inadmissible, in particular as to the complaints concerning the applicant's participation in the criminal proceedings as an injured party, the fairness of the proceedings, and possible future injury resulting from the renewed proceedings;

3. unanimously, that the Republika Srpska has violated the applicant's right to a hearing within a reasonable time for the determination of her civil claim under property law, as guaranteed by Article 6 paragraph 1 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

4. unanimously, that the Republika Srpska has failed to satisfy its positive obligations to secure respect for the applicant's right to private and family life, as guaranteed by Article 8 of the

European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

5. unanimously, that the Republika Srpska has failed to satisfy its positive obligations to secure the applicant's protection from ill-treatment, as guaranteed by Article 3 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

6. unanimously, that it is unnecessary separately to examine the application with respect to discrimination;

7. unanimously, that it is unnecessary separately to examine the application under Article 13 of the Convention;

8. unanimously, to order the Republika Srpska to take all necessary steps to ensure that the competent courts expeditiously and effectively decide the pending criminal case on the merits in a final and binding manner, at the latest by 8 months from the date of delivery of the present decision, *i.e.* by 8 July 2004, giving full effect to the applicant's human rights and endeavouring to offer her the greatest protection available under domestic law, as well as complying with all the obligations due under the Convention, as elaborated upon in this decision, including taking all necessary, available, and appropriate measures under domestic law to ensure the defendants' co-operation with and attendance during the criminal proceedings, until they are finally resolved;

9. unanimously, to order the competent courts of the Republika Srpska to take all necessary action promptly to decide the applicant's civil claim under property law at the latest by 3 months from the date the judgment by the domestic courts in the criminal proceedings becomes final and binding;

10. unanimously, as a remedy for her sense of injustice, as well as the ill-treatment and disrespect inflicted upon her by the Republika Srpska, to order the Republika Srpska to pay to the applicant the sum of ten thousand (10,000) Convertible Marks (*Konvertibilnih Maraka*) as compensation for non-pecuniary damages, such sum to paid to her within one month from the date of delivery of this decision, *i.e.* by 8 December 2003;

11. unanimously, to order the Republika Srpska to pay simple interest at an annual rate of 10% on the sum awarded to be paid to the applicant in the preceding conclusion, or any unpaid portion thereof, as of 8 December 2003 until the date of settlement in full;

12. unanimously, to order the Republika Srpska to report to the Chamber or its successor institution on the steps taken by it to comply with the present decision after one year, *i.e.* by 8 November 2004.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber