



**DECISION ON REVIEW**  
**(delivered on 10 May 2002)**

**Case no. CH/99/2150**

**Dorđo UNKOVIĆ**

**against**

**THE FEDERATION OF BOSNIA AND HERZEGOVINA**

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 6 May 2002 with the following members present:

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

Mr. Ulrich GARMS, Registrar  
Ms. Olga KAPIĆ, Deputy Registrar

Having considered the request for review from the respondent Party of the decision of the Second Panel of the Chamber on the admissibility and merits of the aforementioned case;

Having considered the First Panel's recommendation;

Having regard to its decision of 10 January 2002 accepting the respondent Party's request for review;

Adopts the following decision pursuant to Article X(2) of the Human Rights Agreement (the "Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina, as well as Rule 65 of the Chamber's Rules of Procedure:

## **I. INTRODUCTION**

1. The applicant, a citizen of Bosnia and Herzegovina of Serb origin, is a pensioner living in Sarajevo. At the beginning of the 1992-95 armed conflict in Bosnia and Herzegovina, the applicant's daughter, Vlasta Golubović, and her husband and two children, all of Serb origin, were living in Konjic, the Federation of Bosnia and Herzegovina. The applicant lost contact with his daughter and her family in the summer of 1992. Thereafter, the applicant heard rumours that his daughter's family had been killed, but he did not receive any official information to confirm such rumours. In January 1999, the applicant learned from the newspapers that two men had been arrested for killing the Golubović family in Konjic at the beginning of July 1992. In May 1999, the applicant applied, and was later recognised, as an injured party in the main criminal trial against the three men charged with killing the Golubović family. On 25 July 2000, the Cantonal Court in Mostar issued a verdict finding the defendants guilty of war crimes against civilians. The applicant complains that the authorities of the respondent Party wilfully withheld information from him until 1999 concerning his daughter's fate and that this has caused him "mental suffering, pain and sorrow".

2. This case raises issues under Articles 3 (prohibition of torture), 6 (right to a fair trial), 8 (right to respect for private and family life), and 13 (right to an effective remedy) of the European Convention on Human Rights (the "Convention"). On 9 November 2001, the Second Panel delivered its decision on admissibility and merits in the case in which it found "that the apprehension, distress, and sorrow caused to the applicant as a result of the respondent Party failing to investigate and pursue the fate of the Golubović family in a timely manner constitutes inhuman and degrading treatment of the applicant in violation of his right protected by Article 3 of the Convention". The Second Panel declared the applicant's claim under Article 6 of the Convention inadmissible and found it unnecessary to separately examine the case under Articles 8 and 13 of the Convention. The Second Panel ordered the respondent Party to pay to the applicant 10,000 Convertible Marks (*Konvertibilnih Maraka*, "KM") by way of compensation for non-pecuniary damage for his mental suffering.

3. Considering the respondent Party's request for review of this decision, the plenary Chamber, on 10 January 2002, accepted review of the decision in its entirety.

## **II. SUMMARY OF THE PROCEEDINGS BEFORE THE CHAMBER**

4. The application was introduced on 10 May 1999 and registered on 11 May 1999. The applicant is not represented by a lawyer.

5. Pursuant to Rule 60 of the Chamber's Rules of Procedure, on 9 November 2001, the Second Panel delivered its decision on admissibility and merits in this case (adopted on 10 October 2001).

6. On 10 December 2001, the respondent Party submitted its request for review of the decision on admissibility and merits.

7. In accordance with Rule 64(1) of the Chamber's Rules of Procedure, the First Panel considered the request for review on 9 January 2002 and recommended that the request be accepted. In accordance with Rule 64(2), the plenary Chamber considered the request for review and the recommendation of the First Panel on 10 January 2002, and adopted the decision on request for review on that date.

8. On 17 January 2002, the Chamber transmitted the respondent Party's request for review and the decision on request for review to the applicant. On 29 January 2002, the applicant submitted a reply to the request for review filed by the respondent Party.

9. The plenary Chamber deliberated on the decision on review on 10 January and 8, 9, and 12 April 2002. On 12 April 2002, the Chamber adopted the present decision on review.

### III. ESTABLISHMENT OF THE FACTS

10. On review, the plenary Chamber accepts the establishment of the facts by the Second Panel. In addition, the Chamber includes facts made available during the review proceedings. The facts presented are not materially disputed between the parties, except as specifically indicated below. In addition to information provided by the parties, the Chamber also requested international organisations to provide supplemental information, in accordance with its practice in previous cases (see, e.g., case no. CH/98/1374, *Pržulj*, decision on admissibility and merits of 10 January 2000, paragraphs 13, 53 and 54, Decisions January-June 2000).

#### A. Facts of the underlying criminal case

11. The applicant, Đorđo Unković, who is a citizen of Bosnia and Herzegovina of Serb origin, is a pensioner living in Sarajevo. He is the father of Vlasta Golubović, now deceased. Vlasta Golubović, her husband Đuro Golubović, and their two sons Petar and Pavle (born in 1985 and 1987, respectively), all citizens of Bosnia and Herzegovina of Serb origin, lived in Konjic, the Federation of Bosnia and Herzegovina, before the 1992-95 war in Bosnia and Herzegovina. Vlasta and Đuro Golubović worked as teachers in Konjic. In the summer of 1992, the applicant lost contact with his daughter and her family in Konjic.

12. On 10 July 1992, the Golubović family was abducted from their home in Konjic by a group of armed and uniformed men, taken to the outskirts of town, and killed with firearms. At that time, Konjic was under the control of the Army of the Republic of Bosnia and Herzegovina.

13. On 20 December 1993, criminal investigators from the local police inspected the site of the killing of the Golubović family. On 9 April 1994, Deputy Public Prosecutor from Mostar, Ibro Bulić, officially requested that the Court of First Instance in Konjic commence investigative proceedings into the killing of the Golubović family. This request was not made earlier because, due to the hostilities, it was physically impossible to reach Konjic from Mostar. On 11 April 1994, the investigative judge of the Court in Konjic issued a procedural decision that initiated investigative proceedings. Four suspects, all of Bosniak origin, were placed in pre-trial detention. In April and May 1994, investigative hearings were held while the four suspects remained in pre-trial detention.

14. On 7 May 1994, a panel of three judges from the Konjic Court ordered that the suspects be released from pre-trial detention on the basis of the opinion of a psychiatrist from Sarajevo that the suspects were in a state of "significantly diminished mental competence" during the alleged criminal acts. On 9 May 1994, Public Prosecutor Bulić appealed the decision to release the suspects, but the Supreme Court of the Republic of Bosnia and Herzegovina rejected the appeal.

15. In early December 1995, the Konjic Court officially concluded the investigative proceedings against the suspects in the killing of the Golubović family. On 8 December 1995, Public Prosecutor Bulić indicted six suspects in connection with the murder of the Golubović family: three men were charged with committing war crimes against civilians, two men were charged with failure to report the preparation of a crime, and the last man was charged with failure to report the commission of a crime.

16. Despite the requirement in domestic criminal procedure law that the trial must commence within two months of the indictment and several requests by Public Prosecutor Bulić, the first hearing in the main criminal trial against the three men charged with committing war crimes against civilians was not held until 16 October 1996. The hearing was held at the East Mostar High Court. During the hearing, Public Prosecutor Bulić announced that he would amend the indictment down from war crimes against civilians to murder. Due to lack of heating in the courtroom, the hearing was postponed until 6 November 1996, when the second hearing took place. On 28 November 1996, the third hearing in the main trial occurred, and on 27 December 1996, the fourth hearing occurred. On 8 January 1997, the fifth hearing in the main trial failed to take place. No further hearings were scheduled in 1997 or 1998, and the accused men remained at large.

17. On 7 January 1999, Public Prosecutor Bulić filed a request for the three men charged with murder to be detained. In mid-January 1999, the President of the East Mostar High Court appointed a new panel of judges to preside over the main criminal trial. On 15 January 1999, the Court issued a detention order for the three men charged with murder. On 18 January 1999, two of the men were

arrested, and shortly thereafter, the third man voluntarily gave himself up to the police after he heard about the warrant for his arrest.

18. In February and March 1999, the Organisation for Security and Co-operation in Europe (OSCE) and the Office of the High Representative (OHR) investigated whether the indictments in the main criminal trial had been reviewed by the Office of the Prosecutor for the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague, in accordance with the Rules of the Road. The President of the East Mostar High Court confirmed that the case had not been submitted to the ICTY. On 11 March 1999, the High Representative requested that the competent authorities of the Federation of Bosnia and Herzegovina immediately transmit the main case to the Office of the Prosecutor for the ICTY for review. The High Representative also requested that the court proceedings in the main case be stayed pending a response from the ICTY. On 12 March 1999, the Minister of Justice of the Federation of Bosnia and Herzegovina ordered the President of the East Mostar High Court to postpone the trial in the main case indefinitely and immediately to transmit the case to the ICTY. On 16 March 1999, the Ministry of Justice submitted the case file to the ICTY. On 26 April 1999, the Office of the Prosecutor of the ICTY sent a letter to the ICTY Liaison Office of the Embassy of Bosnia and Herzegovina in The Hague expressing the view that there was sufficient evidence to provide reasonable grounds to suspect that the three men accused in the main case committed a serious violation of international humanitarian law and that the case file supported criminal prosecution of them for either war crimes against civilians or murder.

19. On 24 May 1999, the main trial commenced at the East Mostar High Court. The five-member panel of judges were all of Bosniak origin. In May and June 1999, the Court considered several procedural and evidentiary motions filed by the defence, including a motion to terminate the detention of the accused men. On 29 June 1999, the President of the East Mostar High Court informed the OSCE that he reassigned the case to a new panel of judges because under a new Law on Criminal Procedure of the Federation of Bosnia and Herzegovina, he and another member of the panel were disqualified from hearing the case.

20. On 6 July 1999, the High Representative issued a decision ordering that the Canton Seven Cantonal Court be established no later than 1 September 1999 (nearly two years after the High Representative imposed the Canton Seven Law on Courts, which failed to be implemented due to political obstruction). On 23 July 1999, the Canton Seven Cantonal Assembly confirmed the appointment of 18 judges to the Cantonal Court, seven of whom were of Bosniak origin, seven of Croat origin, and four of Serb or other origin. The Cantonal Assembly also confirmed the appointment of a Cantonal Prosecutor and three Deputy Prosecutors, including Ibro Bulić.

21. On 23 August 1999, the main trial of the three men charged with murder re-commenced in the East Mostar High Court. However, only three of the five judges on the panel assigned to preside over the case were present. At the beginning of the hearing, one of the judges stated that the Court lacked jurisdiction to hear the case because the Cantonal Court was not yet properly constituted. The hearing was adjourned without resolution of the jurisdictional issue and no new date for continuation of the hearing was scheduled.

22. In September 1999, the OSCE and OHR took the position that until the Cantonal Court was fully functional, the East Mostar High Court would continue to have jurisdiction over this case and other cases. The OSCE and OHR further stated that, provided the defendants' rights to a trial within a reasonable time were not violated, justice would be better served by having the case heard by a multi-ethnic, properly constituted Cantonal Court, rather than by a mono-ethnic court established during the war. Later in September the legal conditions for the Cantonal Court to begin hearing criminal cases over which it had original jurisdiction were completed.

23. On 28 October 1999, the trial against all six men indicted in connection with the killing of the Golubović family commenced. A panel of five judges (three Bosniak, one Croat, and one Serb) presided over the case. All six defendants were present, and four (those charged with more serious offences) were represented by private attorneys. Deputy Cantonal Prosecutor Ibro Bulić presented the prosecution. Since more than thirty days had passed since the previous hearing in the case, the Court ordered that the main trial should commence from the beginning. The trial resumed on 11 November 1999. Witnesses from the investigative proceedings in 1994-95 testified. The trial was scheduled to continue on 18 November 1999, but on that day the President of the Cantonal

Court unexpectedly closed the Court in celebration of "Herceg-Bosna" Day. On 2 December 1999, the trial continued. Additional witnesses from the investigative proceedings in 1994-95 testified.

24. On 8 December 1999, the Cantonal Court issued decisions on various procedural and evidentiary motions earlier made by the prosecution and defence at the hearing on 28 October 1999. These decisions were appealed to the Supreme Court of the Federation of Bosnia and Herzegovina, which issued its decisions on the appeals on 27 December 1999. The Supreme Court returned the case to the Cantonal Court and rejected the defence motion to exclude evidence.

25. On 4 January 2000, the Cantonal Court terminated the criminal proceedings against the three men charged with failure to report the preparation of a crime and failure to report the commission of a crime, respectively, because such crimes fell within the scope of the Law on Amnesty of the Federation of Bosnia and Herzegovina, which entered into force in November 1999.

26. On 2 February 2000, the main criminal trial against the three men charged with murder recommenced. Once again the trial started from the beginning since more than thirty days had passed since the previous hearing. One of the three defendants was questioned. On 7 February 2000, the main trial continued and the other two defendants were questioned. At the conclusion of the hearing, Cantonal Prosecutor Bulić announced an amendment of the indictment up from murder to war crimes against civilians. According to the amended indictment, the three defendants, together with two other deceased men, as members of the Intervention Unit of the Reserve Police Force of the Republic of Bosnia and Herzegovina, were accomplices in the 10 July 1992 killing of Đuro and Vlasta Golubović and their two children, Petar and Pavle, in Konjic. The trial continued on 24-25 February, 23-24 March, 20 April, 23-25 May, 12 June, 30 June, 12 July, and 20 July 2000. On 12 July 2000, the Cantonal Court completed the evidentiary proceedings, and on 20 July 2000, the parties presented their closing arguments.

27. On 25 July 2000, the Cantonal Court issued its verdict in the main case (no. K. 10/99). The three defendants were found guilty of war crimes against civilians. The Court found that "the victims were taken from their homes and killed mainly on the basis of their Serb origin". The Court also found that "the accused were members of the Armed Forces" and they, as "the direct perpetrators of this criminal offence are responsible for it since they did not receive any order from anyone to commit these acts". Two defendants were sentenced to 12 years imprisonment each, and the third defendant was sentenced to 9 years imprisonment. The injured families were directed to regular civil proceedings with respect to any possible compensation claim because such claim "has not been submitted to this Panel, and, in this criminal proceeding, it could not be decidedly determined." This judgment became effective on 8 February 2001 pursuant to the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina (no. Kž. 456/00) confirming it.

## **B. The applicant's information on and participation in the underlying criminal case**

28. In his application filed with the Chamber on 10 May 1999, the applicant stated that he lost contact with his daughter, Vlasta Golubović, and her family in the summer of 1992. Afterwards, for seven years, he did not receive any official information concerning the fate of the Golubović family from the authorities, nor from the school in Konjic where Vlasta and Đuro Golubović were teachers, nor from neighbours or friends of the family.

29. The applicant claims that his attempts to gather information on the disappearance of his daughter and her family failed due to his fear of the domestic authorities and his lack of financial resources to pursue a private investigation. The applicant emphasises that these were "dangerous times" in Bosnia and Herzegovina. During the war, the applicant worked in the civilian protection unit of the local community "Kvadrant", and through this office, he sent weekly messages to Konjic for information concerning the Golubović family, but he did not receive any replies. Most of the information he was able to gather came from newspaper articles.

30. The Chamber notes the existence of the State Commission for Tracing Missing Persons, which was established pursuant to the Decision Forming the State Commission for Tracing Missing Persons which entered into force on 24 March 1996 (Official Gazette of the Republic of Bosnia and Herzegovina, no. 9/96 and 17/96). According to the information in the Chamber's files, the applicant did not apply for assistance from this State Commission. However, in his reply submission

of 29 January 2002, the applicant claims that he sought information from Mr. Mašović of the State Commission for Tracing Missing Persons, but he did not receive any information.

31. The applicant further states that he contacted the International Committee of the Red Cross (the "Red Cross" or "ICRC") to attempt to locate the Golubović family, and he was told that "they were either killed or missing". The Chamber has confirmed this fact with the Red Cross. According to the information available to the Chamber, as a general practice, the Red Cross maintains a database of information on missing persons, which it shares with the competent organs of the State of Bosnia and Herzegovina and the Entities, including the Federation of Bosnia and Herzegovina, but it keeps the identity of the inquirers strictly confidential. Moreover, the Red Cross only notes in its records the first inquirer who files a tracing request for a particular missing person. As a result, the absence of a record of an inquirer does not mean that that person did not make a tracing request about a missing person. In the case of Mr. Unković, staff of the Red Cross specifically recall that he repeatedly requested information about the Golubović family. These requests were initially made in approximately 1996-1997, before the Red Cross tracing system was put into place. The Red Cross sent messages to Konjic, but it was unable to obtain any specific information about the fate of the Golubović family at that time.

32. On 22 January 1999, the *Oslobođenje* newspaper published a story that two men, who later became defendants in the main criminal case, were arrested on suspicion of murdering the Golubović family in Konjic at the beginning of the war in 1992. A third suspect remained at large. The applicant read this news story on or about 22 January 1999.

33. On 5 May 1999, the applicant applied to the Cantonal Court as an injured party in case no. K. 10/99, the main criminal case against the three men charged with murdering the Golubović family in Konjic. Thereafter, he received summons and was sometimes present in the courtroom during the trial in the main case.

34. According to the court records, the applicant participated in the criminal proceedings in the main case. On 24 May 1999, the court record noted that "Mr. Đorđo Unković from Sarajevo entered the courtroom late. He is the representative of the injured party, father of Vlasta Golubović and grandfather of the two killed children, Petar and Pavle." On 23 August 1999, the court record noted that "Đorđo Unković from Sarajevo, as the representative of the injured party, entered the courtroom late."

35. On 5 October 1999, on the request of the applicant, the First Instance Court in Konjic established in four individual procedural decisions, the date of death of Vlasta, Đuro, Petar, and Pavle Golubović as 10 July 1992 and the place of death as Konjic. The Court also confirmed that the remains of the Golubović family were buried in the Orthodox Cemetery in Konjic.

36. On 28 October 1999, the court record in the main criminal case noted the absence of anyone on behalf of the injured party and stated that "the representative of the injured party will be informed in writing about the new trial date [on 11 November 1999]".

37. On 2 November 1999, *Oslobođenje* published another article related to the case entitled *The Secret of the Crime Committed on the Golubović Family*. In that article it was reported that Neđo Ninković, the President of the Municipal Court in Konjic prior to the 1992-95 war, published his memoirs in Belgrade. According to the article, in his book, Ninković described the abduction and murder of the Golubović family in Konjic on 9-10 July 1992. He reported that the bodies were buried in the Orthodox Cemetery in Musala. The article also stated that legal proceedings were underway against six persons involved in the crime, and each person was identified by name.

38. According to the court record of 2 December 1999, Đorđo Unković filed a power of attorney on 15 November 1999 authorising Dušan Tomić, Secretary General of the Children's Embassy in Sarajevo, to represent the injured party in the main criminal case.

39. On 7 January 2000, the applicant informed the Chamber that he received his first official information from the domestic authorities: that is, a copy of a procedural decision dated 8 December 1999 from the Cantonal Court in Mostar in case no. K. 10/99, the main criminal case against the men charged with murdering the Golubović family (see paragraph 24 above).

40. On 2 February 2000, Dušan Tomić questioned one of the defendants in the main criminal case. On 24 February 2000, Dušan Tomić reported to the Cantonal Court that he had been physically attacked outside the court building by an unknown person following the previous hearing.

41. On 20 April 2000, in connection with the trial in the main case, the Cantonal Court was informed that a new gravestone for the Golubović family had been located in the Orthodox Cemetery in Konjic. On 6 May 2000, pursuant to a court order, a forensic expert from Sarajevo exhumed the four bodies of the Golubović family from the Orthodox Cemetery in Konjic. The applicant paid the exhumation costs. He was present for the exhumation, and he positively identified the bodies.

42. On 27 August 2001, the applicant informed the Chamber that he had not to date filed any lawsuit for compensation for damages. He further stated that he never received an official copy of the judgment in the main criminal case from the Cantonal Court. The Chamber had already sent the applicant a copy of the judgment on 21 August 2001.

#### **IV. RELEVANT LEGISLATION**

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

43. The Agreement on Refugees and Displaced Persons, set out in Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina (the "General Framework Agreement"), provides in Article V that:

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

44. In order to implement its responsibilities under the General Framework Agreement and international humanitarian law, the State of Bosnia and Herzegovina and the Entities, as well as the Red Cross, established a *Process for tracing persons unaccounted for in connection with the conflict on the territory of Bosnia and Herzegovina and informing the families accordingly* (the "Process"). Under Section 1.1 of the general framework and terms of reference of this Process, "the parties shall take all necessary steps to enable families ... to exercise their right to know the fate of persons unaccounted for, and to this end shall provide all relevant information through the tracing mechanisms of the ICRC and cooperate within a Working Group." Moreover, in Section 1.2 of the terms of reference, "the parties recognise that the success of any tracing effort made by ICRC and the Working Group depends entirely on the cooperation of the parties, in particular of the parties which were in control of the area where and when the person sought reportedly disappeared." When approached with a request for information on the whereabouts or fate of an unaccounted for person, the parties "shall make any internal enquiries necessary to obtain the information requested" (Section 1.4.A of the terms of reference of the Process).

##### **B. UN Declaration on the Protection of All Persons from Enforced Disappearance of 18 December 1992 (A/RES/47/133)**

45. The UN Declaration on the Protection of All Persons from Enforced Disappearance of 18 December 1992 defines in its preamble enforced disappearances in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of the liberty, which places such persons outside the protection of the law. Although the Declaration, as such, may not be binding in international law, it gives clear guidance, based upon international human rights law, including law binding upon Bosnia and Herzegovina and the Entities, as to what constitutes a violation of such law.

46. According to Article 1, any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, *inter alia*, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.

### **C. Code of Criminal Procedure**

#### **1. Provisions related to the injured party**

47. The Code of Criminal Procedure of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina— hereinafter “OG FBiH”— no. 43/98) provides for the participation of the injured party, that is, “a person injured or threatened in some personal or property right or by a crime”, in criminal proceedings (Article 139(1)(6)). The provisions relevant to this decision are quoted below, as follows:

48. Article 55 concerning the injured party and the private prosecutor provides:

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

“(2) In the main trial 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 make other proposals.

“(3) The injured party, the injured party as prosecutor and the private prosecutor have the right to examine the records 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 2 of this article.”

49. Article 159 concerning the preliminary examination provides:

“(1) During the inquiry the parties and the defense counsel and the injured party may file motions with the investigative judge that certain investigative actions be taken. ...”

50. Article 160 also concerning the preliminary examination provides:

“(5) The investigative judge must suitably inform the prosecutor, defense counsel, the injured party and the accused concerning the time and place of investigative procedures which they may attend unless postponement is risky. ...

“(7) Persons who attend investigative procedures may propose that the investigative judge for the purpose of clarifying the matter put certain questions to the accused, witness or expert witness, and with permission of the investigative judge they may also put questions directly. Such persons have the right to have their remarks concerning the performance of certain actions entered in the court record, and they may also propose that certain evidence be presented.”

51. Article 276 concerning preparation for the main trial provides:

“(1) The accused and his defense counsel, the prosecutor and injured party and their legal representatives and attorneys, as well as an interpreter shall be summoned to the main trial. ...

“(4) In the summons the court shall inform an injured party who is not being called as a witness that the main trial will be held even without him and that his statements concerning a claim under property law will be read. The injured party shall also be warned that should he not appear, it

shall be assumed that he does not wish to continue prosecution if the competent prosecutor drops the charge.”

52. Article 279 also concerning preparation for the main trial provides:

“(3) The parties, defense counsel and injured party shall be informed of the time and place of the examination. When the parties, defense counsel and injured party attend the examination, they shall have the rights referred to in Article 160, Paragraph 7 of this law.” (See paragraph 50 above).

53. Article 308 concerning commencement of the main trial and examination of the accused provides:

“(2) If the injured party is present, but still has not filed his claim under property law, the presiding judge shall instruct him that he may file a petition to realise that claim in criminal proceedings and shall instruct him about his rights under Article 55 of this law.” (See paragraph 48 above).

54. Article 310 also concerning commencement of the main trial and examination of the accused provides:

“(3) If the injured party is present, he may argue in support of a claim under property law; if he is not present, his petition shall be read by the presiding judge.”

55. Article 313 further concerning commencement of the main trial and examination of the accused provides:

“(1) When the presiding judge completes the examination of the accused, the members of the panel may put questions directly to the accused. The prosecutor, defense counsel, the injured party, a legal representative, attorney, co-accused and experts may put questions directly to the accused with the permission of the presiding judge.”

56. Article 322 concerning evidentiary procedure provides:

“(1) When the presiding judge completes the questioning of a witness or expert, the members of the panel may put questions to the witness or expert directly. The prosecutor, accused, defense counsel, injured party, legal representative, attorney and experts may put questions directly to witnesses and experts with permission of the presiding judge.”

57. Article 325 also concerning evidentiary procedures provides:

“(3) The parties, defense counsel and the injured party shall always be informed as to the time and place of the questioning of a witness or conduct of an on-the-spot inquest or reconstruction, with instruction that he may attend these proceedings. When the parties, defense counsel and the injured party are present at these proceedings, they have the right envisaged in Article 160, Paragraph 7, of this law.” (See paragraph 50 above).

58. Article 330 further concerning evidentiary procedures provides:

“After questioning each witness or expert and after the reading of each record or other official document, the presiding judge shall ask the parties, defense counsel and injured party for their comments.”

59. Article 334 concerning the closing arguments of the parties provides:

“Upon completion of the evidentiary proceeding, the presiding judge shall recognise the parties, the injured party and defense counsel. The prosecutor shall speak first, and then the injured party, defense counsel and the accused.”

60. Article 336 also concerning the closing arguments of the parties provides:

“The injured party or his attorney may defend a claim under property law in his speech and point out evidence of the criminal responsibility of the accused.”

61. Article 349 concerning announcement of the verdict provides:

“(1) After announcing the verdict the presiding judge shall instruct the parties and the injured party concerning the right of appeal and the right to answer the appeal.”

62. Article 354 concerning the right to file an appeal provides, in pertinent part:

“(1) An appeal may be filed by the principals, defense counsel, legal representative of the accused and the injured party. ...

“(4) An injured party may contest a verdict only with respect to the court’s decision concerning the punitive sanctions for crimes committed against life or body, against dignity of personality or moral or against public traffic security, concerning the costs of criminal proceedings and the claim under the property law... .”

63. Article 355 concerning the right to waive the right of appeal provides, in pertinent part:

“(2) The prosecutor and injured party may waive the right of appeal from the moment when the verdict is announced to the end of the period allowed for filing an appeal, and they may abandon an appeal already filed until a decision is rendered by the court in the second instance.

“(3) The waiving and abandonment of an appeal cannot be revoked.”

## **2. Provisions related to property law claims<sup>1</sup>**

64. The Code of Criminal Procedure includes provisions allowing property law claims arising out of the commitment of a crime to be considered in the criminal proceedings. Article 96 states:

“(1) A claim under property law which has arisen because of the commitment of a crime shall be deliberated on the motion of the authorised persons in criminal proceedings if this would not considerably prolong those proceedings.

“(2) A claim under property law may pertain to reimbursement of damage, recovery of things, or annulment of a particular legal transaction.”

65. Article 97(1) states:

“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.”

66. Article 98 states:

“(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 proceedings are being conducted.

“(2) The petition may be submitted no later than the end of the main trial before the court in the first instance.

“(3) The person authorised to submit the petition must state his claim specifically and submit evidence.

“(4) If the authorised person has not filed the petition to pursue his claim under property law in criminal proceedings before the indictment is brought, he shall be informed that he may file that petition up to the end of the main trial. ...”

---

<sup>1</sup> For the sake of clarification, the concept of “property law claims” 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.

## 67. Article 100 states:

“(1) The court before which proceedings are being conducted shall examine 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 conduct the investigation necessary to making a decision on the claim.

“(2) If the investigation of the claim under property law would considerably prolong criminal proceedings, the court shall restrict itself to the gathering of that data which would be impossible or considerably more difficult to subsequently establish.”

## 68. Article 101 states:

“(1) The court shall render 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 data of criminal proceedings do not afford a reliable basis for either complete or partial award, the court shall instruct the injured party that he may take civil action to pursue his entire claim under property law.”

**D. Law on Obligations**

69. The Law on Obligations of the Federation of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina, nos. 2/92 and 13/94) “regulates obligations which arise from contracts, the infliction of damage, acquisition without legal grounds, business conduct without order, unilateral statements of will and other facts stipulated by law” (Article 1).

## 70. Article 200 provides for cash compensation, as follows:

“(1) The court shall allocate just cash compensation for suffered bodily pain, mental suffering due to a decrease of life activity, impairment, violated reputation, honour, freedom or personal right, death of a close person, as well as for fear, if it establishes that this is justified taking into account the circumstances of the case and especially the intensity of the pain and fear, regardless of whether compensation for material damage exists or not.

“(2) While deciding about the request for compensation of consequential damage, as well as about the amount of compensation, the court shall take into account the significance of the damaged goods and the purpose of the compensation, as well as ensure that the compensation does not favour tendencies which would not be compatible with its nature and social purpose.”

71. Article 201 concerns persons entitled to cash compensation in the event of death or severe disability. It provides, in pertinent part:

“(1) In the event of death of a person, the court may award to the members of his/her close family (spouse, children and parents) just cash compensation for their mental suffering. ...”

**V. COMPLAINT**

72. In his application, the applicant states that he cannot indicate which of his human rights have been violated: he is “only seeking justice”. His main complaint in his application (which was filed on 10 May 1999) appears to be that the authorities failed to pursue the truth about the death of his daughter and her family in a timely manner. In addition, the applicant complains that the authorities failed to inform him and wilfully withheld information about the fate of the Golubović family and about the proceedings against the suspects involved in the killing of the family. The applicant seeks pecuniary compensation for the lost property of the Golubović family, including all of their personal property from their fully-furnished three-room apartment in Konjic and their new car, which he alleges were stolen. The applicant further seeks non-pecuniary compensation for his “mental suffering, pain and sorrow” resulting from his prolonged uncertainty as to the fate of the Golubović family. He does not appear to seek compensation for the lives of the Golubović family which were taken away from him.

73. On the request of the Chamber, the applicant has confirmed that he intends his application to be filed on his own account, and not on account of the deceased persons, that is, his daughter and her family, as it was in the Chamber's previous missing person cases (e.g., case no. CH/96/1, *Matanović v. the Republika Srpska*, decision on merits of 11 July 1997, Decisions on Admissibility and Merits March 1996-December 1997; and case no. CH/97/74, *Balić v. the Republika Srpska*, decision on admissibility of 10 September 1998, Decisions and Reports 1998).

## **VI. SUBMISSIONS OF THE PARTIES**

### **A. The respondent Party**

74. In the proceedings before the Second Panel, the respondent Party submitted that the application is inadmissible *ratione temporis*, as the murder of the Golubović family took place on 10 July 1992. The respondent Party also argued that the application is inadmissible because the applicant failed to exhaust domestic remedies. In particular the respondent Party pointed out that the applicant could have filed a property law claim, including a claim for compensation, under Articles 96, 98, and 101 of the Code of Criminal Procedure of the Federation of Bosnia and Herzegovina (see paragraphs 64, 66, and 68 above) in the criminal proceedings against the men charged with murdering the Golubović family. He also could have initiated a civil lawsuit independent from the criminal proceedings. According to the respondent Party in its submission of 14 February 2000, the applicant filed such a claim for compensation in the criminal proceedings on 5 May 1999.

75. With regard to the merits, the respondent Party argued that the application is ill-founded because the applicant was not subjected to any treatment that falls within the scope of Article 3, all requirements of Article 6 have been complied with, and there was no interference with or violation of the applicant's rights under Article 8 of the Convention.

76. In its request for review, the Federation of Bosnia and Herzegovina challenges the decision on admissibility and merits with respect to the conclusion on admissibility, the finding of a violation, and the award of compensation for non-pecuniary damages. The respondent Party's primary challenge to the decision appears to be that it is "unmanageable" and unfair.

77. With respect to the facts, the respondent Party argues that the applicant made few, if any, efforts to obtain information about the fate and whereabouts of his daughter and her family. The respondent Party did not know of the existence of the applicant, but when, on 5 May 1999, he applied to be recognised as an injured party by the Cantonal Court in Mostar, his application was immediately accepted. Through the trial successfully conducted by the respondent Party against the men who murdered the Golubović family, the applicant was offered the possibility to learn the whereabouts and fate of the Golubović family. With respect to compensation for non-pecuniary damages, the respondent Party argues that the applicant failed to exhaust effective remedies because, as an injured party to criminal proceedings, he has the right under domestic law to submit a property law claim for his mental suffering and for the loss of his family members. The respondent Party further contends that the application should be inadmissible as outside the competence of the Chamber *ratione temporis*. Taking into consideration the fact that the respondent Party prosecuted and sentenced the murderers of the Golubović family, it submits that it did not show the requisite minimum level of cruelty toward the applicant in order to be found responsible for a violation of Article 3 of the Convention.

### **B. The applicant**

78. In his submissions in the proceedings before the Second Panel, the applicant confirmed that he does not know to which provisions of the Convention his complaints pertain. He requested the assistance of the Chamber in "seeking the truth".

79. In his submission of 22 March 2000 responding to the respondent Party's argument that he failed to exhaust domestic remedies, the applicant stated that the respondent Party "recommends remedies which [he] is not able to achieve". The applicant further explained that he was not invited

to participate in the criminal proceedings against the men charged with murdering the Golubović family, and he was not allowed to speak in those proceedings. The applicant emphasised that he is an elderly poor pensioner suffering from ill health and disability, and he is unable to conduct further proceedings without financial and expert assistance.

80. With respect to his compensation claim for the lost personal property and car of the Golubović family, the applicant alleges this property was stolen from the apartment of the Golubović family in Konjic after their murder by the same men involved in the crime. He stated on 22 March 2000 that he had not requested any kind of compensation for his property law claims from the Cantonal Court in Mostar. He did, however, in his submission to the Court of 5 May 1999, make the court generally aware of the lost personal property and car of the Golubović family. Since the criminal case against the men charged with murder was still pending at that time, the applicant claimed he could not file any civil action or request compensation for his property law claims. On 27 August 2001, the applicant confirmed that he had not to date filed any lawsuit for compensation for damage.

81. In his reply to the request for review, the applicant emphasises that he “made a lot of efforts at a dangerous time” to attempt to obtain information about the fate of the Golubović family. As explained above in the statement of facts, he claims he approached the State Commission for Tracing Missing Persons and the International Committee of the Red Cross, and he regularly sent messages to Konjic for information, but he did not receive any information. Rather, he “learned the truth through the media”. He notes that after being informed of his application to the Chamber, the respondent Party started to defend itself. He acknowledges that the respondent Party recognised him as an injured party to the criminal proceedings against the men who murdered the Golubović family, but he states that he was “more of a listener than a participant before the court” because no one asked him any questions as a witness.

## **VII. DECISION ON REVIEW OF THE PLENARY CHAMBER**

### **A. Scope of the case on review**

82. In the decision on request for review of 10 January 2002, the plenary Chamber decided to “review the decision of the Second Panel in its entirety”. The plenary Chamber agreed with the reasoning of the First Panel, which recommended that the request for review be granted. “The First Panel consider[ed] that the request for review raises significant issues concerning the admissibility of the application and the application of the emerging body of international caselaw that recognises the claims of family members under Article 3 of the Convention to be free from inhuman treatment as a result of their inability to obtain information from competent authorities about the whereabouts and fate of a loved one who disappeared under life-threatening circumstances. This is an issue affecting many citizens of Bosnia and Herzegovina.” Accordingly, the decision on admissibility and merits of 9 November 2001 is hereby set aside and superseded by the present decision on review.

### **B. Admissibility**

83. Although not specified by the applicant, the Chamber considers that this case raises issues under Articles 3, 6, 8, and 13 of the Convention. In addition, the applicant seeks pecuniary compensation for lost personal property of the Golubović family and non-pecuniary compensation for his “mental suffering, pain and sorrow” resulting from his prolonged uncertainty as to the fate of his daughter and her family. Before considering the merits of this case, the Chamber must decide whether to accept it, in whole or in part, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement.

#### **1. Competence *ratione temporis***

84. In accordance with Article VIII(2)(c) of the Agreement, “[t]he Chamber shall also dismiss any application which it considers incompatible with this Agreement”.

85. The respondent Party contends that the application is inadmissible *ratione temporis* because the murder of the Golubović family occurred on 10 July 1992, prior to the entry into force of the Agreement on 14 December 1995. In support of this argument, it cites *Obrad Čabak v. the Federation of Bosnia and Herzegovina* (case no. CH/98/522, decision on admissibility of 15 October 1998, Decisions and Reports 1998), in which the father applied on behalf of his son who had been abducted in June 1992. There was no evidence that the son was detained after 14 December 1995, and the father made no complaints on his own behalf. Thus, in the *Čabak* case, the Chamber declared the application inadmissible as outside its competence *ratione temporis* (*id.* at paragraphs 15-16).

86. The Chamber notes that the applicant has not raised any claims on behalf of the Golubović family; consequently, cases like *Čabak* are not analogous. Rather, while the applicant's claims arise out of the murder of the Golubović family in July 1992, his actual claims are direct claims on his own behalf arising out of his suffering caused by the alleged failure of the authorities of the respondent Party to timely inform him about the fate of the Golubović family and about the criminal proceedings against the men charged with that crime. Thus, the applicant alleges an ongoing violation of his human rights by the respondent Party that commenced in July 1992 and continued forward until at least May 1999, when the applicant was recognised as an injured party in the criminal proceedings.

87. In accordance with the Chamber's previous practice, claims by or on behalf of missing persons or crime victims directly related to acts exclusively occurring prior to 14 December 1995 (and in the absence of a continuing violation) are inadmissible as outside the Chamber's competence *ratione temporis*. One leading case on this principle is *Matanović v. the Republika Srpska*, which involved the alleged unlawful detention of a Roman Catholic priest and his parents, commencing prior to 14 December 1995 and continuing thereafter. In describing its competence *ratione temporis*, the Chamber stated as follows:

“In accordance with generally accepted principles of law, the Agreement cannot be applied retroactively. Accordingly, the Chamber is not competent to consider events that took place prior to 14 December 1995, including the arrest and detention of the alleged victims up to 14 December 1995. However, in so far as it is claimed that the alleged victims have continued to be arbitrarily detained and thus deprived of their liberty after 14 December 1995, the subject matter is compatible with the Agreement and comes within the competence of the Chamber *ratione temporis*.” (case no. CH/96/1, *Matanović*, decision on admissibility of 13 September 1996, at section IV, Decisions on Admissibility and Merits March 1996-December 1997).

88. In the only case considering the *ratione temporis* issue in connection with a claim filed by a family member like the primary claim at issue in this case, the competent body applied the reasoning of a continuing violation. In *Demirović, Berbić, and Berbić v. Republika Srpska* (application no. 7/96, Report of the Ombudsperson of 30 September 1998), the Human Rights Ombudsperson considered whether the respondent Party's failure to investigate an abduction that occurred on 14 August 1995 gave rise to violations under Articles 3 and 13 of the Convention as to the family member of the missing persons. “The Ombudsperson considers in this respect that an obligation is incumbent under Article 3 of the Convention on the authorities to investigate thoroughly into allegations of arbitrary deprivations of liberty even in cases where it cannot be established, although it is alleged, that the deprivation of liberty is attributable to the authorities, and this on account for example, as in this case, of a limited competence *ratione temporis*.” Even though most of the facts occurred prior to 14 December 1995, the Ombudsperson stated that “she cannot overlook the fact that they date back to only a few months before.... In these circumstances, and taking into account the average length of investigations of this kind, the Ombudsperson finds it unreasonable to conclude that, as early as three months later, the obligation for the authorities to carry out a thorough investigation had already ceased.”

89. The Chamber is not competent *ratione temporis* to consider whether events occurring before the entry into force of the Agreement on 14 December 1995 gave rise to violations of human rights. The Chamber may, however, consider relevant evidence of such events as background information to events occurring after 14 December 1995 (case no. CH/97/67, *Zahirović*, decision on admissibility and merits of 10 June 1999, paragraphs 104-06, Decisions January–July 1999). Thus, insofar as the applicant's claims relate to failures by the respondent Party that continued after 14 December

1995, they fall within the Chamber's competence *ratione temporis* and they are admissible.

90. However, to the extent the applicant may be seen to complain about a violation of his right to peaceful enjoyment of possessions with regard to the lost personal property of the Golubović family, allegedly stolen in July 1992 in connection with their murder, this claim, which could be seen to fall within the scope of Article 1 of Protocol No. 1, is clearly outside the Chamber's competence *ratione temporis* under Article VIII(2)(c) of the Agreement.

**2. Article 6 of the Convention (right to a fair determination of criminal charges or civil rights)**

91. Article 6 of the Convention encompasses procedural rights in both criminal and civil proceedings. It states, in pertinent part, as follows:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...”

**a. Competence *ratione materiae***

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

93. The Chamber interprets one of the applicant's claims to be that the respondent Party violated his right to participate in the criminal proceedings against the men charged with murdering the Golubović family and also violated his right to have such proceedings resolved in a timely and thorough manner. The only Article under which this claim could fall is Article 6 of the Convention which protects the right of everyone to “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law” and guarantees to everyone charged with a criminal offence certain minimum rights.

94. However, the Chamber recognises that the exact text of Article 6 does not indicate that the applicant, as the relative of a crime victim or an injured party to criminal proceedings, has a viable claim under the protections applicable to criminal proceedings contained in that Article. The applicant has not been charged with a criminal offence. Domestic law provides the applicant with the right to participate in criminal proceedings as an injured party because he is “a person injured or threatened in some personal or property right or by a crime” (Article 139(1)(6) of the Code of Criminal Procedure of the Federation of Bosnia and Herzegovina (OG FBiH no. 43/98) (see paragraphs 47-63 above). However, this right under domestic law falls outside the scope of the protections of Article 6 applicable to criminal proceedings. It follows that the applicant's claim under Article 6 in this respect is incompatible *ratione materiae* with the Agreement, and the Chamber, therefore, declares it inadmissible.

**b. Exhaustion of effective remedies**

95. According to Article VIII(2)(a) of the Agreement, the Chamber must consider whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted. To the extent the applicant may be seen to complain that, in the course of the criminal proceedings against the men who murdered the Golubović family, he did not receive compensation for the lost personal property of the family or for any other pecuniary and non-pecuniary damages suffered by him as a result of their killing, such a claim would refer to “the determination of his civil rights” within the scope of Article 6 of the Convention (Eur. Court HR, *Affaire Acquaviva v. France*, judgment of 21 November 1995, Series A no. 333, pp. 14-15, paragraphs 45-48).

96. Pursuant to Articles 96 through 98 of the Code of Criminal Procedure (see paragraphs 64-66 above), the applicant, could have filed a property law claim (*i.e.*, a civil claim for compensation for pecuniary or non-pecuniary damages arising out of the commission of a crime) in the criminal proceedings against the men charged with killing the Golubović family. The documents in the Chamber's case file and the statements of the applicant establish that he did not officially make such a claim in the criminal proceedings. In the final judgment issued by the Cantonal Court in

Mostar on 25 July 2000, which judgment became effective on 8 February 2001 pursuant to the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina confirming it, the Cantonal Court directed the injured party “to civil proceedings for the realisation of a possible compensation claim” as such a claim was not submitted to the Court and could not be determined in the criminal proceedings. In a letter received by the Chamber on 27 August 2001, the applicant confirmed that he has not filed civil proceedings for compensation.

97. Consequently, the Chamber finds that the applicant has not availed himself of domestic remedies with respect to any claim under Article 6 for his failure to obtain pecuniary or non-pecuniary compensation in the criminal proceedings, including for the alleged stolen property of the Golubović family. He did not raise his property law claim in the criminal proceedings against the men charged with murdering the Golubović family. He also has not pursued civil proceedings against these men or against the Federation of Bosnia and Herzegovina. The applicant has not shown that these remedies were or would be ineffective, and they do not appear to be so to the Chamber. Accordingly, the Chamber finds that the applicant has not, as required by Article VIII(2)(a) of the Agreement, exhausted the effective domestic remedies in this regard. The Chamber, therefore, declares the part of the application concerning a claim under Article 6 with respect to the determination of the applicant’s property law claim inadmissible.

98. However, the Chamber notes that, insofar as the applicant is claiming compensation for non-pecuniary damages before the Chamber as a remedy for the alleged violations of his human rights protected under the Agreement, the respondent Party’s argument that the applicant failed to exhaust domestic remedies is ill-founded and based upon a misunderstanding of Article VIII(2)(a) of the Agreement. This provision requires an applicant to avail himself of domestic remedies regarding the alleged violations, and not regarding compensation claimed before the Chamber as a remedy for those violations. The Chamber may therefore award compensation, if—having found a breach of the Agreement—it deems that compensation would provide a proper remedy for an established breach. In this respect it is irrelevant whether or not the applicant has submitted a similar claim for compensation to a competent domestic authority.

### **3. Conclusion as to admissibility**

99. Since no other ground for declaring the case inadmissible has been established, the Chamber declares admissible the remainder of the application concerning the applicant’s claims under Articles 3, 8, and 13 of the Convention.

## **B. Merits**

100. Under Article XI of the Agreement the Chamber must next address the question whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement. Under Article I of the Agreement the Parties are obliged to “secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms”, including the rights and freedoms provided for in the Convention.

### **1. Article 3 (Prohibition of Inhuman or Degrading Treatment)**

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

102. The applicant claims that he experienced mental suffering as a result of the uncertainty surrounding the fate of his daughter and her family. He claims that he “made a lot of efforts at [a] dangerous time” to attempt to obtain information about the fate of the Golubović family, but he discovered nothing. Rather, he “learned the truth through the media”. He submits that the authorities should have earlier pursued the truth about the death of the Golubović family and should have informed him of the information regarding that. The authorities also should have informed him about the criminal proceedings against the suspects involved in the killing of the Golubović family.

103. With respect to the facts relevant to the applicant’s claim under Article 3 of the Convention, the respondent Party points out in its request for review that the applicant did not seek assistance or information from the State Commission for Tracing Missing Persons. The respondent Party further claims that the applicant did not appeal to the International Committee of the Red Cross, but this

statement is inaccurate, as explained above. According to the respondent Party, the applicant made few, if any, efforts to obtain information about the fate and whereabouts of his daughter and her family, other than to apply to the Cantonal Court in Mostar as an injured party in the criminal proceedings on 5 May 1999 and file his application with the Chamber on 10 May 1999. The respondent Party highlights that at the time of the criminal proceedings, it “could not have been aware of the existence of an injured party who did not bear the same last name [as the victims]; did not live in the same city at a time when connections did not exist between Sarajevo, where the applicant resided, and Konjic, where the proceedings were conducted; and no request to locate the Golubović family had been submitted or existed.” Moreover, when, on 5 May 1999, the applicant did finally apply to be recognised as an injured party by the Cantonal Court in Mostar, his application was immediately accepted and he was offered the possibility to learn about the fate of the Golubović family. The respondent Party argues that since the Public Prosecutor is one segment of the organs of the respondent Party, it should be rewarded for his actions to bring to successful resolution the criminal proceedings against the men who murdered the Golubović family. It argues that “it is indisputable that punishing the perpetrators of murder confirms that the respondent Party shares the grief of the applicant for his loss, just as it shares the grief for the tens of thousands of other missing persons in Bosnia and Herzegovina, especially those from Srebrenica and Žepa.”

104. With respect to application of the relevant caselaw, the respondent Party highlights that when the European Court of Human Rights has decided similar cases, it has considered as relevant the degree to which the family member was an eye witness to the events at issue, the involvement of the family member in attempts to gain information about the fate of the missing person, and the manner in which the respondent Party responded to those attempts. Taking into consideration the fact that the respondent Party prosecuted and sentenced the murderers of the Golubović family, it submits that it did not show the requisite minimum level of cruelty toward the applicant in order to be found responsible for a violation of Article 3 of the Convention. Moreover, according to the respondent Party, the applicant was not a witness to the events and he made no efforts to obtain information from any competent bodies. The respondent Party distinguishes this case from *Avdo and Esma Palić v. the Republika Srpska* (case no. CH/99/3196, decision on admissibility and merits of 9 December 2000, Decisions January-June 2001), where the competent authorities refused to investigate the disappearance of Colonel Palić and provided Mrs. Palić with no information about his fate. Different from other cases, here the respondent Party did eventually prosecute and sentence the murderers of the Golubović family.

105. The Chamber notes that in January 1999 the applicant learned from *Oslobodenje* some of the facts surrounding the killing of the Golubović family and the authorities' pursuit of the men suspected in the murder. Thereafter, on 5 May 1999, the applicant applied to and was acknowledged by the Cantonal Court as an injured party in the main criminal case against the three men charged with murdering the Golubović family. Thus, the Chamber examines whether the applicant's rights protected by Article 3 of the Convention were violated because he lived for approximately six and one half years, from July 1992 through January 1999, without information, official or unofficial, on the fate of his daughter and her family, who, it was later conclusively established, were murdered by uniformed and armed men who were members of the Reserve Police Force of the Republic of Bosnia and Herzegovina. The Chamber may consider events prior to 14 December 1995, when the Agreement entered into force, as background information, but it may only find a violation of the applicant's human rights for actions or omissions by the respondent Party occurring after 14 December 1995 (see paragraph 95 above).

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

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

107. However, when applying these factors to the applicant in *Cakici*, the Court pointed out that the applicant was the brother of the missing person and that he was not present when his brother was captured. In addition, while he was involved in making petitions and inquiries to the authorities, “he did not bear the brunt of this task” because his father took the primary initiative. The Court found no other “aggravating features arising from the response of the authorities”. “Consequently, the Court perceives no special features existing in this case which would justify finding an additional violation of Article 3 of the Convention in relation to the applicant himself” (*Cakici* at paragraph 99). Three judges delivered a dissenting opinion specifically disagreeing with the application of the criteria for a violation of Article 3 with respect to the applicant. They argued that “a brother can also suffer deeply in face of the uncertainty of the fate of a sibling” and that it is not persuasive to rely upon the fact that he was not present at the time of his brother’s capture or that he did not bear primary responsibility for submitting petitions and inquiries to the authorities (Partly dissenting opinion of Judge Thomassen joined by judges Jungwiert and Fischbach). Although the Court found no violation of the rights of the applicant with respect to Article 3, it concluded that “he undoubtedly suffered damage in respect of the violations found by the Court and may be regarded as an ‘injured party’ for the purposes of Article 41.”<sup>2</sup> Therefore, the applicant was awarded compensation (one-tenth the amount awarded to the heirs of the brother) (*Cakici* at paragraph 130).

108. On the other hand, the Chamber recalls the practice of the UN Human Rights Committee in the case of *Elena Quinteros v. Uruguay* where inhuman treatment was found with respect to the applicant whose daughter had disappeared. The UN Human Rights Committee stated that it “understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts”. It found that the mother of the victim had “the right to know what has happened to her daughter”. The Committee then concluded that, in these respects, the mother too was a victim of the violation of Article 7 of the International Covenant on Civil and Political Rights (right not to be subjected to cruel, inhuman or degrading treatment) suffered by her daughter (*Elena Quinteros v. Uruguay*, Communication No. 107/1981 of 17 September 1981, Reports of the Human Rights Committee (1983), paragraph 14).

109. In *Hasnija Demirović, Nura Berbić and Džemil Berbić v. the Republika Srpska* (application no. 7/96, Report of the Ombudsperson of 30 September 1998), the Human Rights Ombudsperson for Bosnia and Herzegovina similarly recognized a violation of the applicant’s rights protected by Article 3. In that case, the applicant was provided with no official information, despite repeated and persistent requests to domestic authorities, about the fate of his wife and mother-in-law, who were forcibly abducted from their apartment in Banja Luka by police officers in August 1995 and thereafter remained missing persons. The authorities made no efforts whatsoever to discover the fate of the abducted persons, and they threatened, intimidated, and harassed the applicant when he tried to pursue the investigation. Citing the case law of the European Court of Human Rights (Eur. Court HR, *Kurt v. Turkey*, judgment of 25 May 1998, Reports of Judgments and Decisions 1998-III, paragraphs

<sup>2</sup> Article 41 of the Convention regarding just satisfaction provides: “If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

133-134), the Ombudsperson noted that the Court found “that the effect on the mother of the disappearance of her son combined with a complete absence of official information as to his subsequent fate or investigation by the authorities, constituted treatment contrary to Article 3 of the Convention”. In this respect, the Ombudsperson considered that “an obligation is incumbent under Article 3 of the Convention on the authorities to investigate thoroughly into allegations of arbitrary deprivations of liberty... .” Not finding “any acceptable justification for the complete inactivity of the authorities in respect of a complaint of such gravity and in the presence of so detailed allegations,” the Ombudsperson found that the applicant “was the victim of inhuman and degrading treatment on account of the competent authorities’ complacency, immediately after 14 December 1995, in the face of his anguish and distress”. Therefore, the Ombudsperson concluded that the respondent Party violated the applicant’s rights protected by Article 3 of the Convention.

110. The Chamber also recalls that in *Avdo and Esma Palić v. the Republika Srpska* (case no. CH/99/3196, decision on admissibility and merits of 9 December 2000, Decisions January-July 2001), the Chamber considered whether the wife of Colonel Palić had a claim under Article 3 for the uncertainty, doubt, and apprehension she suffered for over five years with no official information on the fate of her husband, who had been abducted by Bosnian Serb forces in July 1995 and remains a missing person. Noting the “complacency” of the authorities who refused to investigate the disappearance of Colonel Palić and to provide Mrs. Palić with any information on his fate, the Chamber found that the respondent Party violated Mrs. Palić’s rights protected by Article 3 of the Convention (*id.* at paragraphs 75-80).

111. The most recent case to be considered by the European Court of Human Rights concerning the rights of family members to be protected from lack of information on the fate and whereabouts of missing persons is *Cyprus v. Turkey*, which arose out of Turkish military operations in northern Cyprus in July and August 1974 and Turkey’s continued occupation of that area. The Court expressly limited “its inquiry to ascertaining the extent, if any, to which the authorities of the respondent State have clarified the fate or whereabouts of the missing persons” (*Cyprus v. Turkey*, judgment of 10 May 2001, Reports of Judgments and Decisions 2001-IV, paragraph 121). Nearly 1500 Greek-Cypriots remain missing twenty years after the cessation of hostilities. These missing persons were last seen alive in Turkish custody, but Turkey has never accounted for their whereabouts or fate. The Commission concluded that there was no proof that any of the missing persons were killed under circumstances for which Turkey could be held responsible; however, Turkey also had not clarified the facts surrounding the fate of the missing persons or notified the victims’ relatives (*id.* at paragraph 26).

112. The European Court of Human Rights, sitting as a Grand Chamber, first considered whether there was a violation under Article 2 of the Convention, which protects the right to life. With respect to the substantive protections of Article 2, the Court noted “that the evidence given of killings carried out directly by Turkish soldiers or with their connivance relates to a period which is outside the scope of the present application” by reason of application of the six months rule (*id.* at paragraphs 104, 130). None the less, the Court proceeded to examine whether there was a “procedural violation” to protect the right to life contained in Article 2 with respect “to the continuing failure of the authorities of the respondent State to conduct any investigation whatsoever into the fate of the missing persons” (*id.* at paragraphs 123-124). The Court noted that the missing persons disappeared after detention by Turkish security forces during military operations accompanied by arrests and killings on a large scale. “That the missing persons disappeared against this background cannot be denied. The Court cannot but note that the authorities of the respondent State have never undertaken any investigation into the claims made by the relatives of the missing persons that the latter had disappeared after being detained in circumstances in which there was real cause to fear for their welfare.” No attempt was made to identify the names of released persons or to inquire into the whereabouts of disposed bodies (*id.* at paragraph 134). Consequently, the Court concluded “that there has been a continuing violation of Article 2 on account of the failure of the authorities of the respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances” (*id.* at paragraph 136). The Court found a similar continuing violation of the procedural obligations required by Article 5 of the Convention, although it was not established that any missing persons were detained during the period under consideration (*id.* at paragraph 150-151).

113. Next the Court examined whether the relatives of the Greek-Cypriot missing persons suffered from a continuing and aggravated violation of Article 3 of the Convention. The Court recalled its earlier decision in *Cakici v. Turkey* in which it stated that such a claim depends upon “the existence of special factors” (*Cyprus v. Turkey*, judgment of 10 May 2001, Reports of Judgments and Decisions 2001-IV, paragraph 156; see also paragraph 106 above). Applying these factors, the Court observed as follows:

“[T]he authorities of the respondent State have failed to undertake any investigation into the circumstances surrounding the disappearance of the missing persons. In the absence of any information about their fate, the relatives of persons who went missing during the events of July and August 1974 were condemned to live in a prolonged state of acute anxiety which cannot be said to have been erased with the passage of time. The Court does not consider, in the circumstances of this case, that the fact that certain relatives may not have actually witnessed the detention of family members or complained about such to the authorities of the respondent State deprives them of victim status under Article 3. It recalls that the military operation resulted in a considerable loss of life, large-scale arrests and detentions and enforced separation of families. The overall context must still be vivid in the minds of the relatives of persons whose fate has never been accounted for by the authorities. They endure the agony of not knowing whether family members were killed in the conflict or are still in detention or, if detained, have since died. ... The provision of such information is the responsibility of the authorities of the respondent State. This responsibility has not been discharged. For the Court, the silence of the authorities of the respondent State in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3.” (*Cyprus* at paragraph 157).

Thus, the Court found that for the period under consideration (after 22 May 1994 as a result of application of the six-month rule), the relatives of the missing persons were victims of a continuing violation of Article 3 (*id.* at paragraphs 104, 158).

114. Based on the applicable caselaw described above, the special factors considered with respect to the applicant family member claiming an Article 3 violation for inhuman treatment due to lack of official information on the whereabouts of a loved one are the following:

- primary consideration is the dimension and character of the emotional distress caused to the family member, distinct from that which would be inevitable for all relatives of victims of serious human rights violations;
- proximity of the family tie, with weight attached to parent-child relationships;
- particular circumstances of the relationship between the missing person and the family member;
- extent to which the family member witnessed the events resulting in the disappearance—however, the absence of this factor may not deprive the family member of victim status;
- overall context of the disappearance, *i.e.*, state of war, breadth of armed conflict, extent of loss of life;
- amount of anguish and stress caused to the family member as a result of the disappearance;
- involvement of the family member in attempts to obtain information about the missing person—however, the absence of complaints may not necessarily deprive the family member of victim status;
- persistence of the family member in making complaints, seeking information about the whereabouts of the missing person, and substantiating his or her complaints.

115. As explained in the applicable caselaw discussed above, the essential characteristic of the family member’s claim under Article 3 is the reaction and attitude of the authorities when the disappearance is brought to their attention. In this respect, the special factors considered as to the respondent Party are the following:

- response, reactions, and attitude of the authorities to the complaints and inquiries for information about the fate of missing person—complacency, intimidation, and harassment by authorities may be considered aggravating circumstances;
- extent to which the authorities conducted a meaningful and full investigation into the disappearance;
- amount of credible information provided to the authorities to assist in their investigation;
- extent to which the authorities provided a credible, substantiated explanation for a missing person last seen in the custody of the authorities;
- duration of lack of information—a prolonged period of uncertainty for the family member may be an aggravating circumstance;
- involvement of the authorities in the disappearance.

116. Applying these factors to the applicant, the Chamber notes that the applicant is a poor, elderly, disabled pensioner. The applicant did not witness the events in question, but the members of the Golubović family were his daughter, son-in-law, and two grandsons. He stated repeatedly in his submissions to the Chamber that he suffered tremendously as a result of the loss of the Golubović family and his prolonged uncertainty into their fate and whereabouts. This suffering appears to the Chamber to be genuine, and the applicant has further suffered because his daughter can no longer assist him financially. As found by the Cantonal Court in its verdict in the main criminal case against the men who murdered the Golubović family (and confirmed by the judgment of the Supreme Court), the Golubović family went missing in July 1992 in connection with hostilities in Konjic, and they were the victims of aggression as a result of their Serb origin. The applicant did not obtain any information about the fate of the Golubović family until 1999, six and one-half years after their disappearance, and this information came from the media. He claimed that he could not gain information about their disappearance because he feared domestic authorities and lacked the financial resources to make a private investigation. The Chamber has confirmed that the applicant made repeated requests for assistance from the Red Cross, but the Chamber has been unable to confirm that the applicant made any official complaints or inquiries regarding the disappearance to organs of the respondent Party, in particular the State Commission for Tracing Missing Persons (see paragraphs 30-31 above). None the less, the Chamber notes that the Red Cross shares its information on missing persons with the competent organ of the respondent Party.

117. Applying the relevant factors to the actions of the respondent Party, the Chamber highlights the critical fact that the respondent Party did, in July 2000, convict three men for the murder of the Golubović family. The members of the Golubović family were civilians who were abducted and killed on account of their Serb origin by armed and uniformed men of the Reserve Police Force of the Republic of Bosnia and Herzegovina. The investigation and later criminal proceedings were pursued primarily by Public Prosecutor Ibro Bulić, who performed his duties admirably and diligently in the face of repeated procedural delays and obstacles by other authorities of the respondent Party. The Chamber cannot overlook the long period of delay and numerous interruptions in the investigative and criminal proceedings. The criminal trial did not in fact commence and proceed in a meaningful way until February 2000, nearly six years after Public Prosecutor Ibro Bulić officially requested on 9 April 1994 that the Konjic Court commence investigative proceedings into the killing of the Golubović family and over seven years after the underlying criminal acts. The reasons for the delays were numerous and varied. None the less, in the course of the criminal trial, the whereabouts and fate of the Golubović family, as well as the location of their burial, was fully disclosed. Moreover, when the applicant did request to be recognised as an injured party to the case in 1999, the respondent Party granted such standing immediately. That this response also coincided with the applicant's application to the Chamber does not in the context of this case discredit the respondent Party's efforts to successfully prosecute the men responsible for the abduction and murder of the Golubović family and to recognise the applicant as an injured party to that case. Thus, unlike the cases cited above, here the authorities, albeit after repeated delays and obstructions, did pursue the criminal investigation, did discover the fate of the victims, and did successfully prosecute and punish the men who committed the crime.

118. However, prior to 1999, the applicant was not provided with any information concerning the investigation or criminal proceedings, but he also did not officially request such information directly from an organ of the respondent Party. The respondent Party points out that it did not know of his existence as he has a different last name than the victims and lives in a different city. However, the

Chamber notes that under the Agreement on Refugees and Displaced Persons, the respondent Party agreed to “provide information through the tracing mechanisms of the ICRC” and to “cooperate fully with the ICRC in its efforts to determine the identities, whereabouts and fate of the unaccounted for” (see paragraph 43 above). Had the respondent Party fulfilled these responsibilities, the applicant likely would have learned the fate and whereabouts of the Golubović family from the Red Cross prior to the conclusion of the main criminal trial against the murderers of the Golubović family.

119. In the view of the Chamber, it is obvious that the applicant has suffered greatly from his apprehension, distress, and sorrow over the fate of his daughter and her family. However, taking all of the relevant factors into account, in particular the successful completion of the main criminal trial against the murderers of the Golubović family, as well as the difficult post-war circumstances in Bosnia and Herzegovina, the Chamber concludes that the actions of the respondent Party toward the applicant do not rise to the level of severe ill-treatment necessary to be considered “inhuman or degrading treatment”. Therefore, the Chamber finds that the respondent Party did not violate the rights of the applicant protected by Article 3 of the Convention.

## **2. Article 8 (Right to respect for Private and Family Life)**

120. The Chamber recalls that it transmitted the case to the respondent Party with respect to Article 8 of the Convention. Given that it has not found a violation of Article 3 of the Convention, the Chamber will now consider whether the respondent Party violated the rights of the applicant protected by Article 8 of the Convention as a result of the respondent Party’s alleged failure to timely investigate and inform the applicant about the fate of the Golubović family.

121. 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.”

122. The Chamber recalls that in *Cyprus v. Turkey* (Eur. Court HR, judgment of 10 May 2001, Reports of Judgments and Decisions 2001-IV), the applicant Government submitted that “the persistent failure of the authorities of the respondent State to account to the families of the missing persons constituted a grave disregard for their right to respect for family life and, in addition, a breach of their right to receive information” (*Cyprus* at paragraph 159). However, the European Court of Human Rights found it unnecessary to separately examine the complaints under Article 8 of the Convention “[i]n view of its conclusion under Article 3, with its emphasis on the effect which the lack of information had on the families of missing persons” (*id.* at paragraph 161).

123. The Chamber also recalls its jurisprudence in which it has recognised that an application on behalf of a family member of a disappeared person seeking information on the fate of the disappeared person and the location of the body, if deceased, “might raise an issue under Article 8” of the Convention, provided the applicant can establish that the respondent Party was arbitrarily withholding the body of the disappeared person or information concerning his whereabouts from the applicant (case no. CH/00/4820, *Čajević*, decision on admissibility of 12 October 2000, paragraph 9, Decisions July—December 2000). In *Avdo and Esma Palić v. the Republika Srpska*, the Chamber found that Mrs. Palić met this burden of proof required by Article 8 by showing that her husband had been arrested by the respondent Party and never released and that the competent organs of the respondent Party failed to respond to her various requests for information on the whereabouts of her husband (case no. CH/99/3196, *Palić*, decision on admissibility and merits of 9 December 2000, paragraphs 83-84, Decision January—June 2001). Accordingly, the Chamber concluded that the respondent Party violated the right of Mrs. Palić to respect for her family life under Article 8 of the Convention (*id.* at paragraph 84).

124. In *Gaskin v. the United Kingdom* (Eur. Court HR, judgment of 7 July 1989, Series A no. 160), the European Court of Human Rights considered the positive obligations of a State under Article 8.

In that case, the applicant had been boarded with various foster parents under the care of the Liverpool City Council until he reached the age of majority (*i.e.*, 18 years old). In accordance with its statutory duties under domestic law, the local authorities maintained various records in respect of the child care provided to the applicant. The applicant felt he had been mistreated and sought to bring proceedings against the local authorities for damages for negligence. Accordingly, he requested discovery of his case records. The authorities, however, objected to this discovery on the ground that disclosure and production of case records, which were kept in strictest confidence, would be contrary to the public interest of maintaining an effective child care system. The Court considered whether “the applicant’s continuing lack of access to the whole of his case-file held by Liverpool City Council” gave rise to a violation of Article 8 of the Convention (*id.* at paragraph 33). The Court agreed with the earlier finding of the Commission that the case records “no doubt contained information concerning highly personal aspects of the applicant’s childhood, development and history and thus could constitute his principal source of information about his past and formative years” (*id.* at paragraphs 36-37). However, the Court expressly limited this finding to the facts of the specific case: “This finding is reached without expressing any opinion on whether general rights of access to personal data and information may be derived from Article 8 [paragraph 1] of the Convention” (*id.* at paragraph 37).

125. In analysing whether Article 8 contained a positive obligation and whether the Government had violated that obligation in respect of Mr. Gaskin, the Court explained as follows:

“In the Court’s opinion, persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development. On the other hand, it must be borne in mind that confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons. Under the latter aspect, a system like the British one, which makes access to records dependent on the consent of the contributor, can in principle be considered to be compatible with the obligations under Article 8, taking into account the State’s margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent. No such procedure was available to the applicant in the present case” (*id.* at paragraph 49).

Therefore, the Court concluded that there had been a violation of Article 8 of the Convention because “the procedures followed failed to secure respect for Mr. Gaskin’s private and family life” (*id.* at paragraph 49).

126. Taking all of this caselaw into account, the Chamber considers that information concerning the fate and whereabouts of a family member falls within the ambit of “the right to respect for his private and family life”, protected by Article 8 of the Convention. When such information exists within the possession or control of the respondent Party and the respondent Party arbitrarily and without justification refuses to disclose it to the family member, upon his or her request, properly submitted to a competent organ of the respondent Party or the Red Cross, then the respondent Party has failed to fulfil its positive obligation to secure the family member’s right protected by Article 8.

127. Applying these principles to the application before it, the Chamber concludes that the applicant’s claim that the respondent Party failed to timely inform him about the fate of the Golubović family, who, it was established, were killed by armed and uniformed men of the Reserve Police Force of the Republic of Bosnia and Herzegovina, falls within the scope of Article 8 of the Convention. However, considering that the respondent Party did successfully prosecute the men responsible for the murder of the Golubović family and did recognise the applicant as an injured party to those proceedings, the Chamber cannot conclude that the respondent Party arbitrarily and unjustifiably failed to disclose private and family information to the applicant. The Chamber recognises that there was a long delay and many procedural obstacles before all the relevant information was made known to the applicant and the criminal trial was concluded, but the fact remains that the information was eventually disclosed to the applicant. In this manner the respondent Party fulfilled its positive

obligation to secure respect for the applicant's rights protected by Article 8 of the Convention. Therefore, on the record before it, the Chamber concludes that the respondent Party did not violate Article 8 of the Convention.

### **3. Article 13 (Right to an Effective Remedy)**

128. 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.”

129. The Chamber notes that in this particular case, the authorities of the Federation of Bosnia and Herzegovina did conduct an investigation and criminal proceedings into the killing of the Golubović family. Moreover, as of 1999, the applicant was afforded the opportunity to participate in the criminal proceedings as an injured party. In the course of those criminal proceedings, the applicant learned the tragic fate of his relatives, including the specific location of their burial in the Orthodox Cemetery in Konjic. Therefore, in the context of this case, the applicant obtained, albeit after a long delay and numerous procedural obstacles, the information he sought from the competent authorities.

130. The Chamber therefore decides that there has been no violation of Article 13 of the Convention by the respondent Party.

## **VIII. REMEDIES**

131. Since the Chamber has not found any violation of the applicant's rights protected by the Convention, the Chamber considers that no issue arises with respect to remedies.

## **IX. CONCLUSIONS**

132. For the above reasons, the Chamber decides:

1. by 11 votes to 3, that the decision on admissibility and merits of 9 November 2001 is set aside in its entirety;

2. unanimously, that the applicant's claims under Articles 3, 8, and 13 of the Convention are admissible;

3. by 11 votes to 3, that the remainder of the application, including the applicant's claim under Article 6 of the Convention, is inadmissible;

4. by 10 votes to 4, that the respondent Party did not violate Article 3 of the Convention;

5. by 9 votes to 5, that the respondent Party did not violate Article 8 of the Convention;  
and

6. by 13 votes to 1, that the respondent Party did not violate Article 13 of the Convention.

(signed)  
Ulrich GARMS  
Registrar of the Chamber

(signed)  
Michèle PICARD  
President of the Chamber

Annex I      Dissenting opinion of Mr. Viktor Masenko-Mavi, joined by Messrs. Giovanni Grasso and Rona Aybay

**ANNEX I**

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Viktor Masenko-Mavi, joined by Messrs. Giovanni Grasso and Rona Aybay.

**DISSENTING OPINION OF MR. VICTOR MASENKO-MAVI,  
JOINED BY MESSRS. GIOVANNI GRASSO AND RONA AYBAY**

1. I cannot follow the opinion of the majority that there has been no violation of the European Convention on Human Rights (the "Convention") in the present case, especially in light of the facts made available to the Chamber during the proceedings on review. The crime committed against the Golubović family is one of the most serious ones that occurred in Bosnia and Herzegovina during the recent war-time conflict. In fact, it was a crime of genocide, aimed at exterminating an entire family, including the children, just because its members belonged to another ethnic group. The simple fact that there were proceedings against the perpetrators of this crime, and that finally they were sentenced, in this particular case cannot exonerate the respondent Party from its responsibility to the applicant. In these types of cases, apart from the end-results of the actions taken by the respondent Party, one must take into account the particular situation of the applicant (the father of murdered Vlasta Golubović and the grandfather of murdered Petar and Pavle Golubović), the diligence of the authorities of the respondent Party in dealing with the case, the nature and amount of suffering caused to the applicant, a close family member of the victims, and the treatment of the applicant in the ensuing proceedings.

2. The facts of the case show that there were numerous irregularities in the criminal proceedings against the men who murdered the Golubović family, which proceedings the applicant joined, upon his request, as an injured party. Those proceedings lasted for more than seven years, and the judgment in the case became effective only on 8 February 2001. This case has never been a typical case of missing persons, because the authorities were well-informed of the crime committed and the fate of the victims already on 20 December 1993, when the criminal investigators from the local police inspected the site of the killing. Neither the law enforcement nor the judicial authorities made any effort whatsoever to involve the applicant in the commenced proceedings, despite the applicant's persistent efforts aimed at clarifying the fate of the Golubović family. The applicant became aware of the proceedings against the suspects through a newspaper article, and following this information, upon his request, he was admitted to the criminal proceedings as an injured party on 5 May 1999. However, the applicant was never able to exercise his rights connected with the injured party notion set out in the domestic legal system, which notion is very similar to the *partie civile* concept existing in many other countries. According to the case file, the applicant, as a close relative and victim in his own right, had a claim of compensation for the injury caused by the crime, including some vaguely formulated property law claims. He also pointed out these claims in his application lodged with the Chamber. The provisions of the domestic law related to the injured party concept set out clearly that during the proceedings, the judicial authorities should have informed the applicant about the possibility of realising this type of claims. This was never done.

3. The majority is of the opinion that Article 6 of the Convention is not applicable to the type of proceedings in which the applicant participated. I think that court proceedings where an injured party is involved should be covered by Article 6, because this party, according to the domestic law, in fact joins the criminal prosecution as a civil party who is entitled to compensation for the injury caused by the crime at issue. In other words, in these types of proceedings, "civil rights and obligations" are being determined. The claims of *partie civile* according to the caselaw of the European Court of Human Rights in Strasbourg are within the ambit of Article 6 (see Eur. Court HR, *Moreira de Azevedo v. Portugal*, judgment of 23 October 1990, Series A no. 189; Eur. Court HR, *Tomasi v. France*, judgment of 27 August 1992, Series A no. 241-A).

4. The applicability of Article 6 to the underlying proceedings of the case has direct relevance to the issue of inhuman and degrading treatment of the applicant under Article 3 of the Convention. I refer not only to the simple issue of the delay of the proceedings, but also to the attitude of the authorities to the case before them and to the applicant himself. In my opinion, this attitude can result in inhuman and degrading treatment if there is a clear obstruction of justice by the actions of the authorities presiding over the proceedings. In this case, the authorities have done their utmost to obstruct justice. The investigation, despite the efforts of the public prosecutor, were unreasonably

protracted due to failing to observe legally prescribed time-limits and changing the qualification of the crime committed. In addition, the court proceedings were interrupted and postponed several times for no valid reason whatsoever, not to mention that there were three main proceedings and in all of them the case was considered from the very beginning. The applicant, an elderly invalid, even after his admission to the proceedings as an injured party, was provided neither with the possibility of speaking before the court, nor with the possibility of presenting evidence, questioning witnesses, etc., (even though all such possibilities are explicitly provided for in the domestic law). It is a minor but telling fact that when the authorities finally established the burial place of the murdered Golubović family, they carried out the exhumation for identification at the expense of the applicant. Justice should be done in a reasonable and dignified manner; there should be no signs of degrading treatment in the course of rendering it. This applies to everybody, and especially to the victims of a crime.

5. The conclusion of the majority with respect to Article 8 of the Convention goes far beyond the margin of unblinking acceptability for several reasons. It was already the omission of the Second Panel not to consider the case under the provisions of this Article. For the sake of truth, it is necessary to point out that the Panel, at the time of considering the case, had some justification for this omission: in the case file there was no clear evidence of the applicant's efforts aimed at obtaining information on the fate of the Golubović family. However, in the course of the proceedings on review, the Chamber has obtained additional information in this respect which shows that the applicant made enormous and continuous efforts to obtain information on the fate of his close relatives. The authorities never responded to his inquiries. In light of these efforts, the argument of the Agent of the respondent Party that the authorities were not aware of the applicant's existence seems to be, to put it bluntly, dishonest. The majority, unfortunately, seemingly has been convinced to some extent by this dishonesty. Moreover, probably the attempt of the Agent of the respondent Party to blackmail the Chamber for its initial decision in some newspaper articles (which contained threats about directing to the Chamber thousands of new applicants whose family members are still missing) might have also influenced the majority's opinion. This could not happen if the case were not considered as a pure case of a missing person. As I stated above, however, this is not a case of missing persons, but a case of murders committed in cold-blood, and the authorities were aware of these murders since 1993. The applicant is correct that the respondent Party failed to timely inform him about the fate of the Golubović family. The right of a close family member to be informed about the fate and whereabouts of other family members is covered by the provisions of Article 8 of the Convention. This has been properly recognised by the majority in paragraph 126 of the present decision on review, which, by the way, also corresponds to the Chamber's caselaw (see *Palić*, case no. CH/99/3196, decision on admissibility and merits of 9 December 2000, Decisions January-June 2001). However, the majority is of the opinion that the successful prosecution of the perpetrators and the recognition of the applicant as an injured party in those proceedings prevent the Chamber from concluding that the respondent Party arbitrarily and unjustifiably failed to disclose private and family information to the applicant (see paragraph 127 above). One can only wonder what has prevented the respondent Party from disclosing this information to the applicant in the years from 1993 through 1999 (when he was persistently trying to obtain it, including requesting it from the International Committee of the Red Cross also). And was there not any arbitrariness in the manner in which the authorities treated the applicant as an injured party, all the while completely neglecting him in the proceedings? I cannot follow this reasoning; therefore, I respectfully dissent.

(signed)  
Viktor Masenko-Mavi

(signed)  
Giovanni Grasso

(signed)  
Rona Aybay