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Legal Protection of the Missing and Their Relatives: The Example of Bosnia and Herzegovina

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Abstract

More than a decade after the end of the conflict in Bosnia and Herzegovina, the issue of missing persons remains a major obstacle to reconciliation. With a focus on Bosnia and Herzegovina, this article looks at the phenomenon of missing persons and reviews the scope of the legal protection available to the victims and their family members, as well as some of the institutional efforts to shed light on their fate. The article describes the progressive development of the jurisprudence of the Human Rights Chamber for Bosnia and Herzegovina, a court modelled on the procedures of the European Court of Human Rights, which held that Bosnian authorities who are withholding from family members information about missing persons are violating their right not to be subjected to inhuman or degrading treatment and their right to respect for private and family life. It further illustrates the positive effects on politicians and lawmakers which can emanate from transitional justice.

Key words

European Convention on Human Rights; Human Rights Chamber for Bosnia and Herzegovina; missing persons; transitional justice

1. Introduction

'Gone missing'. 'Disappeared'. These words are often heard in Bosnia and Herzegovina, where the 1992–5 conflict left approximately 30,000 persons unaccounted for.[1] More than a decade after the fighting ceased, the whereabouts of nearly half of the missing remains unclear.[2] As a dismal legacy of the war, unresolved cases of missing persons are among the most pressing human rights issues facing Bosnia and Herzegovina today, and a major impediment to inter-ethnic

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1. As of 1 May 2005, some 21,500 tracing requests had been opened with the International Committee of the Red Cross (ICRC) in Bosnia and Herzegovina (see press release of 21 June 2005, available at www.icrc.org), but the actual number of persons believed to have gone missing is estimated to be around 30,000 (see J. Cutileiro, Report to Examine the Situation of Human Rights in Bosnia and Herzegovina and the Federal Republic of Yugoslavia, UN Doc. E/CN.4/2003/38 (2003), para. 9). This number, reflecting four years of armed conflict, is particularly high when compared with the fewer than 50,000 cases of missing persons that were transmitted to governments around the world between 1980 and 2000 by the UN Working Group on Enforced or Involuntary Disappearances (see Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. E/CN.4/2001/68 (2000), para. 3).
2. ICRC press release of 21 June 2005 (see *supra* note 1), according to which there are currently 14,444 pending tracing requests.

reconciliation. Despite the outward restoration of peace and gradual recovery from years of vicious fighting, the conflict is not yet over for those who still wait to learn the fate of their relatives. In the absence of new information, they live in continued anguish. While the passing of time makes it increasingly unlikely that a missing person will reappear, those who await the missing want nothing more than to discover the truth, no matter how distressing it may be, and carry on with their lives.

Confronted with authorities unwilling to take action, relatives who enquire about missing persons in Bosnia and Herzegovina frequently face a wall of silence. Tracing requests, particularly when concerning persons of another ethnic group, are simply left unanswered and responsibility for a person gone missing is frequently denied.[3] This comes as no surprise because accountability for crimes committed during the war remains highly politicized. Moreover, tackling missing persons cases is not considered a priority, and hence the plight of the victims risks being written off as an inevitable by-product of the war.[4] Yet reducing the number of these unresolved cases is critical for the success of reconciliation efforts and for achieving an enduring peace in the region.[5] While it is crucial to end impunity of those responsible for these events,[6] providing information to and rehabilitation of relatives of missing persons is equally important. Acknowledgment of this sort can help vindicate and show respect for those who suffered.[7]

This article begins with a general consideration of the phenomenon of missing persons. When the former Yugoslavia broke up, the international legal framework in place already afforded certain protection to missing persons. Post-conflict Bosnia and Herzegovina, where numerous international actors are vested with extraordinary powers, is a good case to exemplify the speedy development of the law on missing persons since then. After discussing some of the activities undertaken by domestic and international bodies in Bosnia and Herzegovina to determine the status of those unaccounted for, this note analyses the contribution to this development made by the Human Rights Chamber for Bosnia and Herzegovina (Chamber), a special court established by the 1995 General Framework Agreement[8] competent to adjudicate ongoing human rights violations in the country. It will become apparent that not only did the Chamber's jurisprudence lay the foundations for codifying a number of rights of missing persons and their relatives in Bosnia and Herzegovina, but that also the Chamber initiated a process aimed at acknowledging and establishing the truth about the Srebrenica massacre, arguably the worst single atrocity committed during the Bosnian conflict.

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3. Cutileiro, *supra* note 1, Addendum, UN Doc. E/CN.4/2003/38 Add.1 (2003), para. 28.
4. Amnesty International, 'Bosnia and Herzegovina: Honouring the Ghosts – Challenging Impunity for Disappearances' (Report EUR 63/004/2003), March 2003, at 1.
5. 'Persons Unaccounted for as a Result of Armed Conflicts or Internal Violence in the Balkans', Council of Europe, Resolution No. 1414 (2004), para. 4.
6. This article will not dwell on issues of criminal responsibility for missing persons cases. Suffice it to say that according to Art. 7(i) of the Rome Statute of the International Criminal Court (1998), the 'enforced disappearance of persons' constitutes a crime against humanity.
7. See W. Punyasena, 'The Façade of Accountability: Disappearances in Sri Lanka', (2003) 23 *B.C. Third World Law Journal* 115, at 149.
8. General Framework Agreement for Peace in Bosnia and Herzegovina (hereafter Dayton Peace Agreement), signed in Paris on 14 December 1995, UN Doc. S/1995/999, reprinted in (1996) 35 ILM, at 89.

2. The phenomenon of missing persons

The concept of making individuals disappear is not new in the history of human rights violations. However, its systematic use to create a general state of anguish, insecurity, and fear is a relatively recent phenomenon. Although this practice was already resorted to by the Nazis,[9] the term 'disappearances' (*desaparecido*) was coined by Latin American human rights groups only during the large-scale crackdown on political opponents. In the decades following 1960, tens of thousands of persons in countries such as Argentina, Chile, Peru, or Colombia 'were not killed by officials or at identifiable places, such as police stations, military headquarters, or death camps. They were kidnapped, tortured, and killed in secluded places by people who wore no uniforms'.[10] A central element to this policy is the denial or even active concealment by the authorities of what happened, resulting in complete uncertainty and helplessness of family members regarding the fate of their relatives.[11]

The impact of a person going missing is twofold: first, the direct victims are kept ignorant of their own fate and placed outside the protection of the law, and, second, family members are left in the dark as to the whereabouts and condition of their relatives.[12] In addition, families often suffer from the loss of the household breadwinner, leading to extreme economic hardship and poverty, and ultimately the denial of access to pensions, social welfare benefits, and inheritance. Sadly, in most instances, the victimized relatives lack effective legal tools to compel authorities to release information about missing persons, not to mention bringing the perpetrators to justice.[13]

In Latin America, typically, highly specialized units of the security forces, directed through a clandestine chain of command and acting under some form of governmental acquiescence, targeted individuals who were perceived opponents.[14] The situation appears to be different when a person goes missing in the midst of an armed conflict, as in the former Yugoslavia. A deliberate, state-sponsored plan to let individuals disappear may be less obvious when resort to armed violence is made, and especially when the civilian population flees en masse from the site of the hostilities.

In the former Yugoslavia, warfare and the accompanying chaos certainly brought about many cases of missing persons. Nonetheless, it will become clear from the

9. Under Hitler's infamous 'Night and Fog Decree', persons who committed offences in occupied territories were to be taken secretly to Germany for punishment. 'Effective and enduring intimidation can only be achieved . . . by measures by which the relatives of the criminal and the population do not know the fate of the criminal', 'The Trial of Major German War Criminals at Nuremberg – Proceedings of the International Military Tribunal sitting at Nuremberg, Germany' (1949), Vol. 22, at 453.
10. R. Goldstone, 'Exposing Human Rights Abuses – A Help or Hindrance to Reconciliation?', (1995) 22 *Hastings Constitutional Law Quarterly* 607, at 611.
11. One of the best-known entities representing relatives of missing persons is the Association of Mothers of Plaza de Mayo from Buenos Aires, Argentina (www.madres.org).
12. On the various social and psychological consequences faced by families of missing persons, see P. Sarčević, 'War and Disintegration of the Family', (1999) 1 *Journal of Law and Family Studies*, at 109.
13. See also 'Enforced or Involuntary Disappearances', Fact Sheet No. 6 Rev. 2, published by the Office of the High Commissioner for Human Rights, available at www.unhchr.ch.
14. J. Mendez and J. Miguel, 'Disappearances and the Inter-American Court: Reflections on a Litigation Experience', (1990) 13 *Hamline Law Review* 507, at 511.

facts of the cases discussed in this note that the bulk of missing persons cases from Bosnia and Herzegovina needs to be viewed as implementing a systematic policy which has become known to the world as 'ethnic cleansing'.[15] That the overwhelming majority of persons unaccounted for are Bosnian Muslim male civilians supports this finding.[16] Viewed in that context, there is no doubt that this practice constituted an essential tool in the hands of the warring factions to terrorize and intimidate the enemy population, and to bring about dramatic changes in ethnic composition.[17]

3. Legal protection of missing persons and their relatives in international law

The phenomenon of missing persons is a complex form of human rights violation which may violate one or more rights protected by international treaty law, such as the right to liberty and security of the person, the right not to be subjected to torture and other inhuman or degrading treatment, and ultimately, the right to life.[18] As the systematic occurrence of missing persons in the context mentioned above is relatively new, none of the main international human rights instruments considers it as a specific violation. For this reason, human rights courts and institutions in the past have had to rely on provisions contained in existing human rights treaties when examining individual complaints on behalf of missing persons.[19] Only over the years have legal responses to this human rights violation been developed.

In 1980 the UN Commission on Human Rights established a permanent 'Working Group on Enforced or Involuntary Disappearances' to assist families in determining the fate and whereabouts of their missing relatives and to act as a channel of communication between families and governments.[20] But it was not until late 1992, only months after the war in Bosnia and Herzegovina had begun, that the UN General Assembly proclaimed a Declaration on the Protection of All Persons from Enforced Disappearance[21] (UN Declaration) as a body of principles applicable to all states.

15. 'The objective . . . was to create a Serb-dominated western extension of Serbia. . . . However, among the obstacles in the way were the very large Muslim and Croat populations native to and living in Bosnia and Herzegovina. To deal with that problem the practice of ethnic cleansing was adopted'. (ICTY, *Prosecutor v. Duško Tadić*, Judgment, Case No. IT-94-1-T, 7 May 1997, para. 84). See also Amnesty International, *supra* note 4, at 2.
16. Special Process on Missing Persons in the Territory of the Former Yugoslavia, Report submitted to Mr. Manfred Nowak, Expert Member of the Working Group on Enforced or Involuntary Disappearances, UN Doc. E/CN.4/1997/55, 15 January 1997, paras. 97, 104–5.
17. ICTY, *Prosecutor v. Mitar Vasiljević*, Judgment, Case No. IT-98-32-T, 29 November 2002, paras. 53–6.
18. These rights are protected, *inter alia*, by the International Covenant on Civil and Political Rights (1966), 999 UNTS 171, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), 213 UNTS 222 (hereafter European Convention), and the American Convention on Human Rights (1969), 1144 UNTS 123.
19. See, e.g., UN Human Rights Committee in *Laureano v. Peru*, Communication No. 540/1993, 25 March 1996.
20. UN GA Res. 33/173 (1979) and UN Human Rights Commission Resolution 20 (XXXVI) (1980). See www.ohchr.org for more information on the practice of the Working Group.
21. Declaration on the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/47/133 (1992).

Although it is not legally binding,[22] the UN Declaration reflects the determination of the member states to prevent and combat 'enforced disappearances', defined in the following terms:

> [P]ersons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organised groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.[23]

No circumstances whatsoever, not even a state of war, may be used to justify an enforced disappearance.[24] Furthermore, the UN Declaration also demands that accurate information on the detention of such persons and their place of detention shall be made promptly available to their family members.[25] State authorities are bound to investigate impartially and effectively any case of enforced disappearance.[26] Acts of enforced disappearance shall also be considered continuing offences as long as perpetrators conceal the fate and the whereabouts of the missing persons.[27] Finally, the UN Declaration provides that victims of disappearances and their family members shall have a right to compensation and redress.[28]

In 1994 the first legally binding treaty was adopted on the subject of missing persons, albeit on a regional scale: the Inter-American Convention on the Forced Disappearance of Persons (Inter-American Convention).[29] In terms similar to those of the UN Declaration, it defines a 'forced disappearance' as

> [an] act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.[30]

According to the Inter-American Convention, states parties undertake to punish forced disappearances and to take jurisdiction over or extradite perpetrators.[31] No statutes of limitation apply to their criminal prosecution.[32] States are also bound to

22. The contents of General Assembly declarations may, nonetheless, be considered evidence of both state practice and *opinio juris* when determining customary international law: R. Porotsky, 'Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-Five-Year-Old Embargo Against Cuba', (1995) 28 *Vanderbilt Journal of Transnational Law* 901, at 922.
23. UN Declaration, Preamble.
24. Ibid., Art. 7.
25. Ibid., Art. 10.
26. Ibid., Art. 13.
27. Ibid., Art. 17.
28. Ibid., Art. 19.
29. Inter-American Convention on Forced Disappearance of Persons, (1994) 33 ILM 1429. The Inter-American Convention entered into force on 28 March 1996 and has to date been ratified by 12 states (see www.oas.org/juridico/English/Sigs/a-60.html).
30. Ibid., Art. II.
31. Ibid., Arts. I, IV, V, VI.
32. Ibid., Art. VII.

maintain records of all individuals in their custody and disclose them to relatives.[33] Importantly, the Inter-American Convention refers to the procedures of the Inter-American Court of Human Rights (Inter-American Court) to resolve disputes over alleged forced disappearances.[34]

The jurisprudence of both the Inter-American Court and the European Court of Human Rights (ECtHR) deals with cases of missing persons.[35] Already, in 1988, the Inter-American Court had issued a landmark judgment in the case of Manfredo Velasquez, a Honduran citizen who was kidnapped by armed men and never seen again. The Inter-American Court established that Velasquez had shared the fate of many others who ultimately died in the course of a systematic campaign carried out by the armed forces. Honduras was found to be in breach of the right to personal liberty, the right to humane treatment, and the right to life, as protected by the American Convention on Human Rights.[36] In the *Blake* judgment, which was issued several years later, the Inter-American Court recognized that relatives of a missing person may also be the victims of inhuman treatment by virtue of their own suffering. The relevant authorities were ordered to investigate the whereabouts of the missing person concerned and punish the perpetrators.[37]

In contrast to human rights law, international humanitarian law emphasizes the exchange of information and co-operation between the contracting parties regarding missing persons. Aimed specifically at the protection of victims of international armed conflict, Additional Protocol No. I to the Geneva Conventions (Protocol No. I)[38] stipulates that, as a general rule governing the contracting parties' dealings with missing and dead persons, their activities 'shall be prompted mainly by the right of family members to know the fate of their relatives'.[39] To that end, the parties are under an obligation to facilitate to the greatest extent possible and, if need be, to carry out search activities and to transmit information concerning persons who have been reported missing during the conflict. This information is to be transmitted to the adverse party either directly or through the facilities and mechanisms provided by the International Committee of the Red Cross (ICRC).[40] Moreover, the parties are obliged to facilitate the return of the remains of deceased persons.[41]

33. Ibid., Art. XI.
34. Ibid., Arts. XIII–XIV. The Inter-American Court of Human Rights adjudicates human rights disputes arising from the American Convention on Human Rights (see http://www.corteidh.or.cr/index_ing.html).
35. The jurisprudence of the ECtHR is discussed in section 4.3.2, *infra*.
36. Case of *Velasquez-Rodríguez v. Honduras*, Judgment of 29 July 1988, (1989) 28 ILM 291, paras. 147–8, 194. Whether this judgment, beyond the violations found, also establishes a 'duty to prosecute' the perpetrators responsible for the fate of a missing person has been subject to different interpretation: M. Scharf, 'Accountability for International Crime and Serious Violations of Fundamental Human Rights', (1996) *Law and Contemporary Problems* 41, at 50.
37. Case of *Blake v. Guatemala*, Judgment of 24 January 1998, paras. 112–16, 124.
38. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977. The Socialist Federal Republic of Yugoslavia ratified Additional Protocol No. I in 1979; Bosnia and Herzegovina deposited a Declaration of Succession on 31 December 1992 (see notifications of the Swiss Federal Council issued on 17 February 1993).
39. Ibid., Art. 32.
40. Ibid., Art. 33.
41. Ibid., Art. 34.

4. Legal protection of missing persons and their relatives in Bosnia and Herzegovina

4.1. The Dayton Peace Agreement

The 1995 Dayton Peace Agreement[42] which ended the armed conflict in Bosnia and Herzegovina obliges the three former warring factions (Parties) to 'release and transfer without delay all combatants and civilians held in relation to the conflict'.[43] Like Protocol No. I, the Dayton Peace Agreement obliges the Parties to grant access to grave sites where individuals on the other side of the conflict, whether military or civilian, are buried and to allow the recovery and evacuation of the mortal remains.[44] Furthermore, the Parties are required to provide information through the tracing mechanisms of the ICRC on all persons unaccounted for and to co-operate fully with the ICRC to determine the identity, whereabouts, and fate of the unaccounted for.[45]

4.2. Commissions on missing persons

Given the magnitude of the number of individuals unaccounted for in the Bosnian war,[46] the Parties to the conflict moved rapidly to establish separate commissions to trace missing persons and assist affected family members.[47] Although mandated to perform searches in a non-discriminatory fashion and obliged to co-operate with each other, these domestic commissions mainly collected information concerning missing persons almost exclusively of their own ethnic group, and only reluctantly shared records in their possession with the former enemy side.[48]

Under international humanitarian law, the ICRC is the principal agency authorized to collect information about missing persons, and all parties to an armed conflict are bound to provide all necessary information at their disposal to trace missing persons, whether combatant or civilian, in order to satisfy the right of family members to know the fate of their relatives.[49] In March 1996 the ICRC, the state of Bosnia and Herzegovina, and its two entities, the Republika Srpska and the Federation of Bosnia and Herzegovina, 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' (Process).[50] This Process was intended to serve as a channel through which tracing

42. See *supra* note 8.
43. Dayton Peace Agreement, Annex 1A, Art. IX(1).
44. Ibid., Art. IX (2).
45. Ibid., Annex 7, Art. V.
46. See *supra* note 1.
47. At the level of Bosnia and Herzegovina, the 'State Commission on Tracing Missing Persons' (see Official Gazette of the Republic of Bosnia and Herzegovina, no. 9/1996) was founded, which institutionally overlaps with the 'Federal Commission for Missing Persons' (see Official Gazette of the Federation of Bosnia and Herzegovina, no. 15/1997) established at the entity level. The second commission at the entity level is the 'Commission for Tracing Missing and Detained Persons of the Republika Srpska' (see Official Gazette of the Republika Srpska, no. 26/1996).
48. Resolution adopted by the General Assembly of the United Nations, UN Doc. A/RES/51/116 (1996), para. 30; Conclusions of the Peace Implementation Council Main Meeting in Bonn (1997), at I.3 (available at www.ohr.int).
49. See section 3, *supra*.
50. See 1996 Annual Report on Bosnia and Herzegovina by the ICRC, available at www.icrc.org.

requests would be submitted to the relevant authorities and answers on missing persons cases would be communicated.[51] To date, representatives of all Parties have met on 17 occasions, although in 1999 the ICRC suspended the Process for some time due to a lack of inter-Party co-operation.[52]

Specifically to assist the Parties in meeting their obligations with regard to clarifying the fate of missing persons, the United States at the 1996 G7 summit initiated the creation of an intergovernmental agency later renamed the International Commission on Missing Persons (ICMP). According to its mission statement, the ICMP endeavours to secure the co-operation of the Parties and other authorities in locating and identifying persons missing as a result of the armed conflict and to assist them in doing so. The ICMP also supports the work of other organizations in their efforts, encourages public involvement in its activities and contributes to the development of appropriate expressions of commemoration of, and tribute to, the missing.[53] The forensic unit of the ICMP provides assistance in developing, implementing, and managing the technical process of exhumations, examinations, and identifications of missing persons. The ICMP also encourages the engagement of family members in victims' groups and their links with the activities of other non-governmental organizations.[54] In 2000, on the initiative and with the support of all domestic missing persons commissions, the ICMP founded an independent Missing Persons Institute (MPI) at the domestic level to maintain a central database on missing persons.[55]

Ten years after the end of the Bosnian war and despite considerable international assistance, 14,700 missing persons still remain unaccounted for. The only reasonable conclusion to be drawn from this is that the Parties have largely failed to meet their obligations under international law with respect to tracing the fate of missing persons regardless of ethnicity and to co-operate with one another and with international agencies to exchange information indispensable for tracing the fate of missing persons.

4.3. The Human Rights Chamber for Bosnia and Herzegovina

The Dayton Peace Agreement obliged the state of Bosnia and Herzegovina and its two entities, the (Muslim–Croat) Federation of Bosnia and Herzegovina and the (Serb) Republika Srpska, to 'ensure the highest level of internationally recognised human rights and fundamental freedoms'.[56] To that end, 'The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These

51. Ibid.
52. ICRC press release, *supra* note 1; US Department of State, Bureau of Democracy, Human Rights, and Labour, 'Country Report on Human Rights Practices – Bosnia and Herzegovina 2001', at b; available at http://www.state.gov/g/drl/rls/hrrpt/2001/eur/8236.htm.
53. See mission statement of the ICMP, available at www.ic-mp.org.
54. Ibid.
55. Ibid. Initially an institution at the level of the two entities, the MPI was relaunched at state level in August of 2005.
56. Dayton Peace Agreement, Annex 4, Art. II(1).

shall have priority over all other law'.[57] To ensure fulfilment of these obligations, the Human Rights Chamber for Bosnia and Herzegovina was established.[58] This court was composed of 14 international and domestic judges and had final and binding jurisdiction over complaints alleging a violation of human rights by either the state of Bosnia and Herzegovina or one of its two entities.[59] Between its first session in March 1996 and the expiry of its mandate in December 2003, the Chamber rendered decisions on approximately 6,200 applications,[60] among them a considerable number of cases involving missing persons.

4.3.1. The mandate and practice of the Chamber

According to the Dayton Peace Agreement, the Chamber had jurisdiction over 'alleged or apparent violations of human rights as provided in the European Convention'.[61] If an application alleging a human rights violation was sufficiently substantiated, the eight international and six domestic judges of the Chamber could either transmit the case to the respondent party for its observations or hold a public hearing.[62] However, in the scope of its examination the Chamber was not limited to the complaints made by the applicant.[63] Unless an application was declared inadmissible or struck out, a decision on the merits of the case was final and binding on all governmental powers of a respondent party.[64] Having far broader powers than the ECtHR in that respect, the Chamber could oblige the respondent party to take specific action to remedy the human rights violation that had occurred, including the payment of monetary relief for pecuniary or non-pecuniary damages.[65]

In accordance with generally accepted principles of international law, the Chamber was only competent *ratione temporis* to consider alleged human rights violations that had occurred or continued after entry into force of the Dayton Peace Agreement on 14 December 1995. As many violations had their origin in events prior to 14 December 1995 but extended beyond that date, only the latter portion of the violation would fall within the Chamber's jurisdiction, constituting a continuing violation. By the same token, evidence of earlier events could, along with other evidence, provide relevant background to human rights violations that occurred after the Agreement's entry into force. Furthermore, the Chamber was bound to consider whether effective remedies existed and, if so, it could declare an application inadmissible on grounds that these remedies had not been exhausted.[66]

57. Ibid., Art. II(2).
58. Ibid., Annex 6, Art. II(1). The Human Rights Chamber is the judicial part of the 'Human Rights Commission' which also includes the Office of the Ombudsman (see Annex 6, at Arts. IV–VI).
59. Ibid., Art. XI.
60. Statistical information as well as all decisions of the Chamber are available at www.hrc.ba.
61. Dayton Peace Agreement, Annex 6, Art. II(2)(a).
62. Ibid., Art. X.
63. Ibid., Art. VIII(1): 'The Chamber shall receive . . . applications concerning alleged or *apparent* violations of human rights' (emphasis added).
64. Ibid., Art. XI(3).
65. Ibid., Art. XI(1). Art. XI(6) provides, 'The Parties shall implement fully decisions of the Chamber'.
66. Ibid., Art. VIII.

The functioning of the Chamber was modelled to a large extent on the ECtHR, and the Chamber continuously relied on case law of the Strasbourg court for deciding the cases before it.[67] Against this background, it is instructive to review three ECtHR cases regarding missing persons and the right to receive information which laid out the basis on which the Chamber developed its jurisprudence.

4.3.2. ECtHR cases regarding missing persons and the right to obtain information

The case of *Çakıcı* v. *Turkey*[68] involved the disappearance of a Turkish citizen of Kurdish descent. In November 1993 Ahmet Çakıcı was taken into unacknowledged custody by Turkish security forces during an operation against the Workers' Party of Kurdistan (PKK) in the south-eastern region of the country. Although the authorities claimed that Ahmet Çakıcı died during a clash with security forces in 1995, this was never confirmed and his whereabouts remained uncertain.[69] In due course, Ahmet Çakıcı's brother and father made numerous petitions and enquiries to the district prosecutor which resulted in nothing more than a half-hearted investigation.[70] Ahmet Çakıcı's brother subsequently brought an application before the ECtHR on his own behalf and on behalf of his sibling, alleging a series of human rights violations by the respondent state.[71] Although Turkey denied that he was taken into custody by state authorities, the ECtHR was satisfied beyond reasonable doubt that Ahmet Çakıcı died while in detention and found that his right to life, protected under Article 2 of the European Convention on Human Rights, had been violated.[72] With regard to his brother, the court held that whether the treatment experienced by him from the authorities amounted to inhuman or degrading treatment pursuant to Article 3 of the European Convention[73] depended on various factors: the proximity of the family tie and 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.[74] In the case at hand, these factors did not militate in favour of finding a violation because the applicant's father bore the brunt of the task of making petitions to the competent authorities, and the applicant himself had not been present when his brother was taken into custody.[75] No violation of Article 3 of the European Convention was found.[76]

67. See generally J. D. Yeager, 'The Human Rights Chamber for Bosnia and Herzegovina: A Case Study in Transitional Justice', (2004) 14 *International Legal Perspectives* 44.
68. *Çakıcı v. Turkey*, Judgment of 8 July 1999, ECtHR 1999-IV.
69. Ibid., paras. 45–52, 75.
70. Ibid., paras. 53–5.
71. Ibid., para. 70.
72. Ibid., paras. 20, 85.
73. Art. 3 of the European Convention provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.
74. *Çakıcı v. Turkey* (see *supra* note 68), para. 98.
75. Ibid., para. 99.
76. In a partly dissenting opinion, Judges Thomassen, Jungwiert, and Fischbach interpreted the facts of the case differently and concluded that, contrary to the majority's finding, Art. 3 of the European Convention had been infringed.

In *Cyprus* v. *Turkey*,[77] the grand chamber of the ECtHR heard one of the rare inter-state applications brought before the court. The applicant state Cyprus alleged that since the start of Turkey's military operations in the northern part of the island in July 1974, there had been a violation of, *inter alia*, the right to life of approximately 1,500 Greek Cypriot persons who had disappeared under unclear circumstances. In addition, it was alleged that Turkey had violated the right of the missing persons' relatives not to be subjected to inhuman or degrading treatment in that they had not received any information about their family members' fate and whereabouts.[78] As Turkey had effective overall control over northern Cyprus at the time, the ECtHR observed that Turkey's responsibility extended to the disappearance of individuals who were detained by Turkish or Turkish Cypriot forces when the conduct of military operations was accompanied by arrests and killings on a large scale.[79] On account of the authorities' failure to conduct an effective investigation into the large number of disappearances in life-threatening circumstances, the ECtHR found that there had been a continuing violation of the missing persons' right to life, as protected under Article 2 of the European Convention.[80] Turning to the rights of the relatives, the court reiterated the criteria previously articulated in the *Çakıcı* case, but concluded that these relatives had indeed been subject to inhuman or degrading treatment. In contrast to the *Çakıcı* judgment, the ECtHR did not attribute much weight to the fact that certain of the relatives might not have actually witnessed the detention of family members or did not file complaints to the competent authorities. The court found that

> [T]he 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.[81]

From the judgments in the *Çakıcı* and *Cyprus* cases, it appears that the threshold for finding a violation of Article 3 of the European Convention with regard to the relatives is somewhat lower where the disappearance occurs during times of strife or in large combat operations, as opposed to isolated and sporadic incidents of conflict.

The judgment in *Gaskin* v. *United Kingdom*,[82] although concerned with underlying facts unrelated to missing persons, is a landmark case of the ECtHR, establishing

77. *Cyprus v. Turkey*, Judgment of 10 May 2001, ECtHR 2001-IV. See also F. Hoffmeister, 'International Decision: Cyprus *v.* Turkey', (2002) 96 AJIL 445.
78. Ibid., paras. 18, 119.
79. Ibid., paras. 77, 121, 133.
80. Ibid., para. 136.
81. Ibid., paras. 156–7.
82. *Gaskin v. United Kingdom*, Judgment of 7 July 1989, ECtHR, Ser. A no. 160.

a respondent state's obligation under Article 8 of the European Convention[83] to release information pertaining to a person's private and family life. In that case, the applicant was received into public care as a child and grew up in various foster families. According to the applicable laws, certain records concerning Graham Gaskin and his care were to be kept confidential. Gaskin contended that he was ill-treated while in care and, having reached majority, he wished to obtain details of where he was kept and by whom and in what conditions in order to learn about his past.[84] Gaskin alleged that the authorities' refusal to grant access to his case records was in breach of his right to respect for his private and family life pursuant to Article 8 of the European Convention.[85] The ECtHR reiterated that although the prime objective of Article 8 of the European Convention is to protect the individual against arbitrary interference by the public authorities, there may also arise positive obligations on a state to ensure an effective 'respect' for family life:[86] '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'.[87] Although the ECtHR recognized a public interest in keeping these records confidential, the court was not satisfied that the legislation in place struck a fair balance between the competing interests involved.[88] Article 8 of the European Convention was not considered in the *Çakıcı* and *Cyprus* cases,[89] yet its interpretation in the *Gaskin* case appears to be of direct relevance to those cases where family members seek information regarding their relatives who have disappeared.

4.3.3. The early cases of the Human Rights Chamber: applications declared inadmissible ratione temporis

The very first case before the Chamber, *Matanović* v. *Republika Srpska*,[90] was introduced by a non-governmental organization on behalf of a Roman Catholic priest from Prijedor and his parents. In August 1995 the family was held under house arrest by Bosnian Serb police and later detained at the local police station. By September 1995 there were no traces of their whereabouts. The authorities of the Republika Srpska twice offered to exchange the Matanović family, once on 21 December 1995 and again on 23 March 1996, for Bosnian Serb prisoners of war held by the Federation

83. Art. 8 of the European Convention provides, '(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) 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'.
84. *Gaskin v. United Kingdom*, *supra* note 82, paras. 10–12.
85. Ibid., para. 31.
86. Ibid., para. 39, citing *Johnston and Others v. Ireland*, Judgment of 18 December 1986, Ser. A no. 112, para. 55.
87. *Gaskin v. United Kingdom*, *supra* note 82, para. 49.
88. Ibid., para. 49.
89. Art. 8 of the European Convention was not invoked by the applicant nor considered by the ECtHR in *Çakıcı v. Turkey*, *supra* note 68. In *Cyprus v. Turkey*, the court found it unnecessary to separately examine complaints formulated under Art. 8 of the European Convention (see Judgment, *supra* note 77, para. 161).
90. *Josip, Božana and Tomislav Matanović v. Republika Srpska*, CH/96/1, Decision on Admissibility, 13 September 1996 and Decision on the Merits, 11 July 1997; see also M. Nowak, 'The Human Rights Chamber for Bosnia and Herzegovina Adopts Its First Judgments', (1997) 18 *Human Rights Law Journal* 244.

of Bosnia and Herzegovina. However, the Matanović family was never released or exchanged. Noting that the alleged victims were deprived of their liberty before entry into force of the Dayton Peace Agreement, the Chamber found that it could examine the merits of the case only with respect to the detention, if any, of the applicants after 14 December 1995, since the human rights guarantees of the Dayton Peace Agreement could not be applied retroactively. In its decision on the merits, the Chamber was satisfied beyond reasonable doubt that the applicants' detention by the respondent party continued after 14 December 1995. Holding that there was a presumption of responsibility for the fate of the applicants since they had disappeared while in the custody of the respondent party, the Chamber found the Republika Srpska in violation of the applicants' right to liberty and security of person, guaranteed by Article 5 of the European Convention. The Chamber ordered the respondent party to take all necessary steps to ascertain the whereabouts of the Matanović family and to secure their release if still alive.[91]

In *Ratko Grgić* v. *Republika Srpska*,[92] which also involved the disappearance of a Roman Catholic priest, the Chamber found that no violation of the applicant's rights had been established. Grgić was last seen alive in 1992, more than three years before the entry into force of the Dayton Peace Agreement, and the Chamber concluded that considering the intercommunal strife that prevailed during that period, there was insufficient evidence to support the conclusion that Grgić continued to be alive after 14 December 1995.

The application in *Džemal Balić* v. *Republika Srpska*[93] was introduced by Izmeta Balić, the wife of Džemal Balić, a Bosnian Muslim last seen detained by Bosnian Serb police in May 1992. In 1997 Izmeta Balić applied to the Chamber, requesting that the Republika Srpska be ordered to release her husband immediately or otherwise inform her of his fate. The Chamber interpreted the application as brought on behalf of Džemal Balić, and relying on the principles applied in the *Matanović* and *Grgić* cases, declared it inadmissible due to a lack of evidence establishing that Džemal Balić continued to be held in detention after 14 December 1995.

A.M. and V.M. v. *Republika Srpska*[94] was the first case in which the Chamber distinguished between complaints raised in an application on behalf of the missing person and those made on behalf of that person's relative. In early June 1992, A.M., a Bosnian Muslim from Rogatica, was captured by Bosnian Serb paramilitaries, tortured, and eventually killed. In 2000 his mother, V.M., applied to the Chamber alleging a violation of her son's rights as well as her own. Specifically, she complained that the Republika Srpska had not provided her with sufficiently reliable information about the mortal remains of her son. In accordance with its earlier rulings, the Chamber declared inadmissible *ratione temporis* the part of the application

91. Judge Nowak attached a concurring opinion in which he argued that the Chamber should have found, in addition to a violation of Art. 5, a violation of the Matanović family's right not to be exposed to inhuman treatment and their right to life under Arts. 3 and 2 of the European Convention.
92. *Ratko Grgić v. Republika Srpska*, CH/96/15, Decision on the Merits, 5 August 1997.
93. *Džemal Balić v. Republika Srpska*, CH/97/74, Decision on Admissibility, 10 September 1998.
94. *A.M. & V.M v. Republika Srpska*, CH/00/3577, Decision on Admissibility, 5 July 2000. On request by V.M., her identity and that of A.M. were not disclosed to the public, in accordance with the Chamber's Rules of Procedure.

in which V.M. raised complaints on A.M.'s behalf. However, in a majority vote, the Chamber also declared inadmissible as ill-founded V.M.'s own complaint regarding her state of uncertainty in not knowing the whereabouts of the remains of her son. The Chamber noted that

> It might raise an issue under Article 8 of the [European] Convention if there was evidence that the respondent Party is in possession of such information which is arbitrarily withheld from her. V.M. has not made an allegation in this respect.[95]

Two judges dissented from the majority opinion. Referring to the *Gaskin* case, in which the ECtHR recognized that the right to respect for private and family life may entail a positive obligation to take action, depending on the fair balance struck between the public interest and that of the individual concerned,[96] they found that there was no legitimate public interest in withholding information about missing persons from their family members. Thus, the dissenting judges concluded,

> If the applicant provides evidence that the missing person was taken into custody by forces or authorities under the responsibility of the respondent party, then an assumption arises that records were taken in case of his death and on the location of his mortal remains.[97]

4.3.4. The Human Rights Chamber's cases examining the merits of complaints of missing persons and their relatives

The application in *Avdo and Esma Palić* v. *Republika Srpska*[98] dealt with the fate of Colonel Avdo Palić, the military commander of the army of Bosnia and Herzegovina in the eastern Bosnian Muslim enclave of Žepa. In July 1995, shortly after the fall of the Srebrenica enclave, the Bosnian Serb army launched a massive attack on Žepa. On 27 July 1995, while Colonel Palić was negotiating the evacuation of civilians on UN premises and under UN safety guarantees, he was taken away by Bosnian Serb soldiers towards the command position of General Ratko Mladić, the commander of the Bosnian Serb army, and never again seen alive. Five years after the end of the conflict, his wife Esma filed an application with the Chamber stating that she had been living in agony since the disappearance of her husband, not knowing whether he was still alive. Esma Palić had previously exhausted all possible avenues to determine his fate, including filing a claim with the relevant commission and writing letters to various authorities of the Republika Srpska, but these efforts were to no avail. Having heard numerous witnesses at a public hearing, the Chamber declared the application admissible, finding that there was strong circumstantial evidence that Colonel Palić had been held in detention and was still alive after 14 December 1995. Furthermore, since no remedies were available to the applicant through her previous efforts, there were none which she had failed to exhaust.

95. Ibid., para. 9.
96. See *supra* note 82.
97. *A.M. & V.M. v. Republika Srpska*, CH/00/3577, Dissenting Opinion of Judge Rauschning, joined by Judge Grasso, para. 5.
98. *Avdo and Esma Palić v. Republika Srpska*, CH/99/3196, Decision on Admissibility and Merits, 9 December 2000.

On the merits, the Chamber found that Colonel Palić was a victim of enforced disappearance within the meaning of the UN Declaration on the Protection of All Persons from Enforced Disappearance.[99] With respect to Colonel Palić, it was found that the respondent party had violated his right to life, his right to liberty and personal security, and his right not to be subjected to inhuman or degrading treatment.[100] Addressing Esma Palić's complaints, the Chamber examined whether the withholding of information from her regarding the fate and whereabouts of her husband for five years amounted to inhuman or degrading treatment within the meaning of Article 3 of the European Convention. The Chamber considered that the nature and context of the treatment, the manner and method of its execution, its duration, its physical and mental effects, and, additionally, the age, sex, and state of health of the victim needed to be taken into account. Having done so, it found that there had indeed been a violation of Article 3.[101] Holding that Esma Palić's right to respect for private and family life as guaranteed by Article 8 of the European Convention had also been violated, the Chamber took the view that

> the respondent Party is arbitrarily withholding from her information, *which must be in its possession*, concerning the fate of her husband, including information concerning her husband's body, if he is no longer alive.[102]

As to remedies, the Chamber ordered the Republika Srpska authorities to conduct a full investigation into the facts surrounding Colonel Palić's disappearance with a view to bringing the perpetrators to justice, to release him, if still alive, or else to make available his mortal remains to his wife. The respondent party was ordered to pay to the applicant 65,000 Bosnian convertible marks (KM) (approximately €33,000) as compensation for her own suffering in addition to that of her husband.[103] Thus, in the *Palić* decision, the Chamber modified its earlier position in *A.M. and V.M.* requiring that an applicant must demonstrate that the respondent party is in actual possession of relevant information. The prominence of Colonel Palić may have been taken as an indication that his disappearance and subsequent whereabouts could not have gone unrecorded by the respondent party. In fact, in a letter dated October 2001 (months after the Chamber had rendered its decision), the Republika Srpska Minister of Defence acknowledged that Colonel Palić had been held in captivity in a Bosnian Serb military prison until 5 September 1995.[104] In January 2006 the High Representative for Bosnia and Herzegovina, being the chief civilian peace implementation agency pursuant to Annex 10 of the Dayton Peace Agreement, condemned the lack of progress made by the Republika Srpska authorities in resolving the *Palić* case.[105]

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99. Ibid., para. 66. Cf. section 3, *supra*.
100. Ibid., paras. 54–74. The Chamber also referred to the case of *Velasquez-Rodriguez v. Honduras*, *supra* note 36, para. 67.
101. Ibid., para. 76, referring to *Cruz Varas and Others v. Sweden*, Judgment of 20 March 1991, ECtHR Ser. A no. 201, at 31, and to *Kurt v. Turkey*, Judgment of 25 May 1998, ECtHR 1998-III, para. 133.
102. Ibid., para. 84 (emphasis added).
103. Ibid., paras. 89–90.
104. See information provided by the US section of Amnesty International, available at http://www.geocities.com/pvlwright/Developments.html.
105. Transcript of press conference of 20 Jan. 2006, available at www.ohr.int.

Thereafter, the Chamber's decision in *Đorđo Unković* v. *The Federation of Bosnia and Herzegovina*[106] responded to complaints by a Bosnian Serb concerning the fate of his daughter and her family. In summer 1992, at a time when Unković had already lost contact with them due to the ongoing fighting, the family was abducted by a group of armed men from their apartment in Konjic, near Sarajevo, taken to the outskirts of town, and executed. Throughout the war Unković sent messages to the Konjic authorities seeking information as to the whereabouts of his daughter and her family, but did not receive any replies. It was only in January 1999 that Unković learned from a newspaper article that two men had been arrested under suspicion of having killed his daughter and her family. Unković was eventually allowed to participate as an injured party in the trial of the alleged perpetrators, which in 2000 resulted in murder convictions. Before the Chamber, Unković's main complaint was that the respondent party had withheld from him for seven years all information concerning the fate of his daughter and her family, causing him mental suffering and emotional distress.[107] As to the prohibition of inhuman or degrading treatment, the Chamber noted that the ECtHR had not established a principle whereby the family member of a disappeared person is a priori a victim of treatment contrary to Article 3 of the European Convention, but rather, such a finding depends 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.[108]

Based on ECtHR case law, the Chamber considered that the primary consideration among these 'special factors' was the dimension and character of the emotional distress caused to the family member, distinct from and going beyond that which would be inevitable for all relatives of victims of serious human rights violations. Other important factors were the proximity of the family tie, with weight attached to the parent–child relationship; the particular circumstances of the relationship between the missing person and the family member; the extent to which the family member witnessed the events resulting in the disappearance (although the absence of this factor does not necessarily deprive the family member of victim status); the overall context of the disappearance – state of war, breadth of armed conflict, extent of loss of life; the amount of anguish and stress caused to the family member as a result of the disappearance; the involvement of the family member in attempts to obtain information about the missing person (although again, the absence of complaints may not necessarily deprive the family member of victim status); and, finally, the persistence of the family member in making complaints.[109]

Furthermore, the Chamber considered that the response, reactions, and attitude of the authorities to the complaints and enquiries for information about the fate of the missing person were crucial factors to be considered when examining the conduct of the respondent Party. Complacency, intimidation, and harassment by authorities

106. *Đorđo Unković v. The Federation of Bosnia and Herzegovina*, CH/99/2150, Decision on Review, 6 May 2002.
107. Ibid., paras. 11–42.
108. Ibid., para. 106; ECtHR, *Cyprus v. Turkey*, *supra* note 77, paras. 154–8; *Çakıcı v. Turkey*, *supra* note 68, para. 98.
109. *Đorđo Unković v. The Federation of Bosnia and Herzegovina*, *supra* note 106, para. 114.

may be considered aggravating circumstances. Other important factors with respect to the conduct of the respondent Party were the extent to which the authorities conducted a thorough and meaningful and full investigation into the disappearance; the amount of credible information provided to the authorities to assist in their investigation; the extent to which the authorities provided a credible, substantiated explanation for a missing person last seen in the custody of the authorities; the duration of lack of information (a prolonged period of uncertainty for the family member may be an aggravating circumstance); and, lastly, the involvement of the authorities in the disappearance.[110]

Applying these factors, the Chamber noted that the applicant was the father of one of the missing persons, but that he was not a witness to the events in question. Moreover, as the respondent Party argued, Unković had made few efforts to obtain information pertaining to the fate of his daughter and her family. Concerning the respondent Party's conduct, the Chamber noted that despite repeated delays in the criminal proceedings, the Federation of Bosnia and Herzegovina did in fact pursue an investigation during which Unković was able to discover the fate of the victims, and the perpetrators were eventually convicted of murder. Notwithstanding that Unković had 'suffered greatly from his apprehension, distress, and sorrow over the fate of his daughter and her family', the Chamber found that the actions of the respondent Party towards the applicant did not rise to the level of severe ill-treatment necessary to amount to inhuman or degrading treatment for the purposes of Article 3 of the European Convention.[111] Similarly, with regard to Unković's right to respect for his private and family life, the Chamber did not come to a finding that the respondent Party had arbitrarily and unjustifiably failed to disclose private and family information to the applicant. Instead, it acknowledged 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 [European] Convention.

In a dissenting opinion, three judges took the view that the mere conduct of criminal proceedings could not exonerate the respondent Party from its responsibility to the applicant, especially in view of the 'numerous irregularities' which occurred during the course of the trial. Furthermore, according to the minority, the facts underlying the *Unković* case revealed myriad instances of obstruction by the respondent Party, resulting in inhuman or degrading treatment of the applicant. The dissenting judges also considered that the applicant made 'enormous and continuous efforts' to learn the fate of his relatives, while the authorities of the Federation of Bosnia and Herzegovina 'arbitrarily and unjustifiably failed to disclose private and family information to the applicant'.[112]

110. Ibid., para. 115.
111. Ibid., paras. 116–19.
112. *Đorđo Unković v. The Federation of Bosnia and Herzegovina*, CH/99/2150, Dissenting Opinion of Judge Massenko-Mavi, joined by Judges Grasso and Aybay.

In 2001 and 2002, when it became widely known to the public that the Chamber had recognized the right of family members of missing persons to be informed by the authorities, some 2,000 applications were filed by the immediate family members of Bosnian Muslim men and boys presumed killed in mass executions by the Bosnian Serb army in and around Srebrenica in 1995. All these applicants alleged human rights violations committed by the authorities due to the lack of specific information provided on the fate and the whereabouts of their missing loved ones.[113] In response to these complaints, the Republika Srpska offered no arguments. Instead, it stated that the factual situation was incomplete, unclear, and self-contradictory and that crucial facts were missing in the applications.[114] In 2002 a 'Srebrenica report' commissioned by the government of Republika Srpska was published, commenting on the events in question in the following terms:

> Taking into consideration the huge loss of Bosnian Serb forces under the favourable conditions for them, it can be estimated that Muslim forces must have suffered the loss of nearly 2,000 soldiers from military perspectives. However, it must be noted that this combat might look like mass killings to the eye of frightened Muslim soldiers although they carried weapons and shot at Bosnian Serb soldiers randomly.[115]

In March 2003 the Chamber's evolving jurisprudence on missing persons culminated in a decision on the applications of *Ferida Selimović and 48 Others* v. *Republika Srpska*. No allegations had been made in these complaints that the missing persons might still have been alive after 14 December 1995. Consequently the Chamber declared inadmissible any part of the applications concerning possible violations of the rights of the Bosnian Muslim men from Srebrenica.[116] With respect to the surviving family members, the Chamber first considered whether the respondent Party had violated their rights to respect for private and family life under Article 8 of the European Convention. Recalling that Additional Protocol No. I to the Geneva Conventions[117] was referred to in the constitution of Bosnia and Herzegovina as a directly applicable instrument, the Chamber found that Article 32 of Protocol No. I reinforces the

> positive obligation under Article 8 of the European Convention for the Republika Srpska to search for and to share all relevant information with the families about their relatives who have been reported missing from Srebrenica since July 1995.[118]

As described in the judgments of the International Criminal Tribunal for the former Yugoslavia (ICTY), the Bosnian Serb Army separated men of military age from the women, children, and elderly, before summarily executing those men and

113. *Ferida Selimović and 48 Others v. Republika Srpska*, CH/01/8365 et al., Decision on Admissibility and Merits, 3 March 2003.
114. Ibid., para. 137.
115. Ibid., para. 91, citing page 28 of the said report.
116. Ibid., para. 146.
117. See section 3, *supra*.
118. *Selimović and Others v. Republika Srpska*, *supra* note 113, para. 175.

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burying their bodies in mass graves.[119] From these underlying facts the Chamber concluded that the authorities of the Republika Srpska had within their possession or control information about the Bosnian Muslim men who were executed:

> Despite attempts by the RS Army to cover up or to destroy information about the Srebrenica events, there still must have been some information accessible after 14 December 1995 for the authorities of Republika Srpska to draw upon to respond to the requests for information from the families of the missing Bosniak men from Srebrenica. . . . And in any event, the fact that members of the Bosnian Serb Army may have destroyed this evidence does not relieve the respondent Party of its obligations under Article 8 of the [European] Convention.[120]

The Chamber also noted that the competent authorities had not interviewed any witnesses involved in or observing the massacre, and that no meaningful investigation had been conducted into these events, all in breach of the respondent Party's international obligations. This inaction and passivity caused a 'catastrophic impact on the lives of the applicants', who in the absence of further information were 'unable to achieve any sense of closure, to recover psychologically, or to move forward with their lives'. The Chamber therefore found that there was a violation of the applicants' right to respect for private and family life under Article 8 of the European Convention.[121]

Next, the Chamber examined whether the respondent Party's conduct violated the rights of the applicants not to be subjected to inhuman or degrading treatment pursuant to Article 3 of the European Convention. Applying the 'special criteria' spelled out in *Unković*, the Chamber found that the 'Srebrenica report' commissioned by the respondent Party could in no way be considered a thorough and meaningful investigation into the disappearance of Bosnian Muslim men from Srebrenica. Moreover, it was obvious that the authorities of the Republika Srpska were directly involved in the disappearances and the destruction of evidence of those disappearances.[122] As the respondent Party was under a positive obligation to investigate and prosecute the alleged perpetrators of the Srebrenica events, regardless of whether these crimes might also be investigated and prosecuted by the ICTY, the Chamber found that the Republika Srpska was in no way relieved of its own obligation to pursue justice with regard to the perpetrators of these crimes.[123] Given the apparent complacency or indifference of the authorities of the Republika Srpska, the Chamber held that there was a particular egregious violation of the applicants' rights under Article 3 of the European Convention, for which the respondent party was responsible.[124]

As remedies for these violations, the Chamber ordered the Republika Srpska to release all information presently within its possession, control, and knowledge with respect to the missing persons' fate and whereabouts and with respect to the location

119. *Prosecutor v. Krstić*, Judgment, Case No. IT-98-33-T, 2 August 2001, paras. 53–79; *Prosecutor v. Blagojević and Jokić*, Judgment, Case No. IT-02-60-T, 17 January 2005, paras. 168–206.
120. *Selimović and Others v. Republika Srpska, supra* note 113, para. 178.
121. Ibid., paras. 178–81.
122. Ibid., para. 189.
123. Ibid., para. 190.
124. Ibid., para. 191.

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of any gravesites of the victims of the Srebrenica events. The Chamber also ordered the Republika Srpska to conduct a thorough and meaningful investigation into the events, with results to be disclosed to national and international authorities, and to publish the entire text of the Chamber's decision in the Republika Srpska Official Gazette. Although the Chamber recognized that the applicants personally suffered both pecuniary and non-pecuniary damages, it decided not to order individual compensation. Instead, for the collective benefit of all the applicants and other Srebrenica victims' families, the Chamber ordered the Republika Srpska to pay the amount of 4 million KM (approximately €2 million) to the Foundation of the Srebrenica-Potočari Memorial and Cemetery, where the Srebrenica victims are buried in accordance with their traditions and beliefs.[125]

In compliance with the Chamber's order, the Republika Srpska government in September 2003 released a report purporting to disclose information about the missing persons from Srebrenica and their whereabouts, which indeed showed a marked change in tone by the authorities, but not yet a change in substance.[126] It was not until October 2004 that the government of the Republika Srpska adopted a special commission's final report of an investigation into the Srebrenica events, in which it for the first time acknowledged the magnitude of the crimes committed.[127]

During the last months of its mandate, the Chamber rendered six more major decisions on missing persons from Foča, Višegrad, Vlasenica, Rogatica, Bratunac, and Mostar.[128] In each case, a violation of the family members' right not to be subjected to inhuman or degrading treatment and of their right to respect for private and family life was found. The Republika Srpska in five cases and the Federation of Bosnia and Herzegovina in one case were ordered to pay 100,000 KM (approximately €50,000) to the MPI, to be used for the purpose of collecting information on the fate and the whereabouts of missing persons from the respective municipalities under consideration.

5. Conclusion

In the rapid and result-driven normalization process which Bosnia and Herzegovina is currently undergoing, the vast number of persons who remain missing inhibits the achievement of progress in other areas. In this context, the ultimate failure of the three domestic missing persons commissions in Bosnia and Herzegovina

125. Ibid., paras. 211–19.
126. 25th Report by the High Representative for Implementation of the Peace Agreement to the Secretary-General of the United Nations (2004), para. 42, available at www.ohr.int.
127. 27th Report by the High Representative for Implementation of the Peace Agreement to the Secretary-General of the United Nations (2005), para. 23, available at www.ohr.int.
128. *Pašović and Others v. Republika Srpska* (Foča Missing Persons cases), CH/01/8569 et al., Decision on Admissibility and Merits, 7 November 2003; *Smajić and Others v. Republika Srpska* (Višegrad Missing Persons cases), CH/02/8879 et al., Decision on Admissibility and Merits, 5 December 2003; *Malkić and Others v. Republika Srpska* (Vlasenica Missing Persons cases), CH/02/9358 et al., Decision on Admissibility and Merits, 22 December 2003; *M.Ć. and Others v. Republika Srpska* (Rogatica Missing Persons cases), CH/02/9851 et al., Decision on Admissibility and Merits, 22 December 2003; *Mujić and Others v. Republika Srpska* (Bratunac Missing Persons Cases), CH/02/10235 et al., Decision on Admissibility and Merits, 22 December 2003; *Husković and Others v. Federation of Bosnia and Herzegovina* (Mostar Missing Persons Cases), CH/02/12551 et al., Decision on Admissibility and Merits, 22 December 2003.

illustrates a lack of political will to clarify the fate of *all* missing persons. In spite of this, international actors such as the Chamber, the ICRC, and the ICMP, in their respective domains, have considerably assisted over the last decade in clarifying the fate of the missing, also by putting pressure on the authorities when necessary. It is doubtful whether this would have been achieved without external assistance. However, in the process of transferring responsibility back to the national level, in the future it will primarily be the Bosnian domestic institutions dealing with all aspects of missing persons cases.[129]

The Chamber's decisions on missing persons have made a significant contribution to restoring the rule of law and bringing the country into line with European standards of human rights protection.[130] Building on the case law of the ECtHR, the Chamber has, after an initial period of reluctance, repeatedly found violations of the family members' rights not to be subjected to inhuman or degrading treatment and to respect for their private and family life. Towards the end of its mandate the Chamber frequently used its powers to impose considerable financial sanctions, mainly on the Republika Srpska for continuous and large-scale violations of the rights of missing persons' relatives. Moreover, the Chamber has been the only international body vested with judicial authority to order an investigation by Bosnian Serb authorities into the Srebrenica massacre.[131] In the Chamber's decisions the grievances of hundreds of victims and their family members have been publicly acknowledged in judicial decisions, often for the very first time. At present there are indications that the persistence with which the issue of missing persons is denounced is gradually leading to a shift in public opinion and in the responsible authorities' approach towards the events at issue.

In November 2004 a major milestone – attributed to the Chamber's legacy – was reached when, in Bosnia and Herzegovina, the world's first Law on Missing Persons entered into force.[132] This legislation regulates, among other matters, the status of missing persons, the maintenance of central records with the MPI, and the right to social benefits for family members of missing persons. The Law on Missing Persons grants family members of the missing the right to be informed of the fate of their loved one.[133] Correspondingly, all competent organs in Bosnia and Herzegovina are obliged, under threat of sanctions, to provide assistance and available information to family members searching for the missing.[134] A decade after the conflict, the rights of the family members of the missing are finally recognized by the Bosnian legislature and embodied in a law which will undoubtedly serve as the model for other countries needing to cope with the consequences of large-scale disappearances.

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129. See *supra* note 55. With the expiry of the Chamber's mandate on 31 December 2003, all pending cases as well as new applications involving human rights complaints are decided by a Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina (see www.hrc.ba).
130. In 2002 Bosnia and Herzegovina became a member of the Council of Europe and thereupon ratified the European Convention (see www.coe.int).
131. On 30 September 2005 the government of Republika Srpska presented the Office of the High Representative with a further report considered to be 'a serious attempt to comprehensively catalogue all persons implicated in the crimes in the Srebrenica area in the period from 11–19 July 1995. The . . . RS Government [has] finally met the requirements placed upon [it]', OHR press release of 4 Oct. 2005, available at www.ohr.int.
132. Law on Missing Persons, Official Gazette of Bosnia and Herzegovina, no. 50/2004.
133. Ibid., Art. 3.
134. Ibid., Arts. 4, 5, 25.