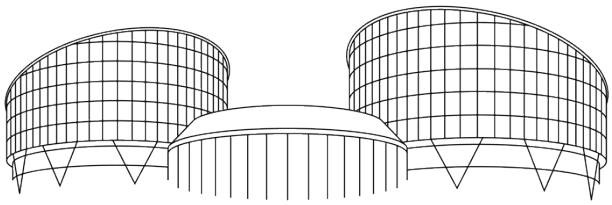

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF PALIĆ v. BOSNIA AND HERZEGOVINA

(Application no. 4704/04)

JUDGMENT

STRASBOURG

15 February 2011

FINAL

15/09/2011

This judgment has become final under Article 44 § 2 (c) of the Convention.
It may be subject to editorial revision.

In the case of Palić v. Bosnia and Herzegovina,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Nicolas Bratza, *President,*
Lech Garlicki,
David Thór Björgvinsson,
Ján Šikuta,
Päivi Hirvelä,
Mihai Poalelungi, *judges,*
Faris Vehabović, ad hoc *judge,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 18 January 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 4704/04) against Bosnia and Herzegovina lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a citizen of Bosnia and Herzegovina, Ms Esma Palić ("the applicant"), on 27 January 2004.

2. The applicant, who had been granted legal aid, was represented by Mr N. Mulalić and Ms L. Sijerčić, lawyers practising in Sarajevo, and Mr P. Troop, a lawyer practising in London. The Government of Bosnia and Herzegovina ("the Government") were represented by their Deputy Agent, Ms Z. Ibrahimović.

3. Ljiljana Mijović, the judge elected in respect of Bosnia and Herzegovina, was unable to sit in the case (Rule 28). The Government accordingly appointed Faris Vehabović to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1).

4. The case is about the applicant's husband's disappearance during the 1992-95 war in Bosnia and Herzegovina. It raises issues under Articles 2, 3 and 5 of the Convention.

5. On 9 January 2007 a Chamber of the Fourth Section of the Court decided to give notice of the application to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Relevant background

6. After its declaration of independence on 6 March 1992, a brutal war started in Bosnia and Herzegovina. It would appear that more than 100,000 people were killed and more than two million people were displaced. It is estimated that almost 30,000 people went missing and that one third of them is still missing[1]. The major parties to the conflict were the ARBH (mostly made up of Bosniacs[2] and loyal to the central authorities of Bosnia and Herzegovina), the HVO (mostly made up of Croats) and the VRS (mostly made up of Serbs). The conflict came to an end on 14 December 1995 when the General Framework Agreement for Peace ("the Dayton Peace Agreement") entered into force. In accordance with that Agreement, Bosnia and Herzegovina consists of two Entities: the Federation of Bosnia and Herzegovina and the Republika Srpska. The Dayton Peace Agreement failed to resolve the Inter-Entity Boundary Line in the Brčko area, but the parties agreed to a binding arbitration in this regard under UNCITRAL rules (Article V of Annex 2 to the Dayton Peace Agreement). The Brčko District, under the exclusive sovereignty of the State and international supervision, was formally inaugurated on 8 March 2000.

7. In response to atrocities then taking place in Bosnia and Herzegovina, on 25 May 1993 the United Nations Security Council passed resolution 827 establishing the International Criminal Tribunal for the former Yugoslavia ("the ICTY") headquartered in The Hague. Although the ICTY and national courts have concurrent jurisdiction over serious violations of international humanitarian law committed in the former Yugoslavia, the ICTY can claim primacy and may take over national investigations and proceedings at any stage if this proves to be in the interest of international justice. It can also refer its cases to competent national authorities in the former Yugoslavia. More than 60 individuals have been convicted and currently more than 40 people are in different stages of proceedings before the ICTY. Two accused are still at large (Mr Goran Hadžić and Mr Ratko Mladić).

8. Furthermore, the International Commission on Missing Persons ("the ICMP") was established at the initiative of United States President Clinton in 1996. It is currently headquartered in Sarajevo. In addition to its work in the former Yugoslavia, the ICMP is now actively involved in helping governments and other institutions in various parts of the world address

1. See the Press Release of the United Nations Working Group on Enforced or Involuntary Disappearances of 21 June 2010 on its visit to Bosnia and Herzegovina.

2. Bosniacs were known as Muslims until the 1992-95 war. The term "Bosniacs" (*Bošnjaci*) should not be confused with the term "Bosnians" (*Bosanci*) which is commonly used to denote citizens of Bosnia and Herzegovina irrespective of their ethnic origin.

social and political issues related to missing persons and establish effective identification systems in the wake of conflict or natural disaster. Reportedly, the ICMP has so far identified by DNA around 13,000 missing persons in Bosnia and Herzegovina, whereas local authorities have identified by traditional methods around 7,000 missing persons.

9. After the war, the ARBH, HVO and VRS forces merged into the Armed Forces of Bosnia and Herzegovina.

B. The present case

10. The applicant was born in 1967 and lives in Sarajevo.

11. The applicant's husband, Mr Avdo Palić, was a military commander of the ARBH forces in the United Nations "safe area" of Žepa[3] during the war. On 27 July 1995, shortly after the VRS forces had taken control of that area, Mr Palić went to negotiate the terms of surrender with the VRS forces and disappeared.

12. Following many fruitless attempts to obtain any official news about her husband, on 18 November 1999 the applicant lodged an application against the Republika Srpska with the Human Rights Chamber, a domestic human-rights body set up by Annex 6 to the Dayton Peace Agreement.

13. On 5 September 2000 the Human Rights Chamber held a public hearing and heard several witnesses, including Mr Abdurahman Malkić and Mr Sado Ramić who had been detained together with Mr Palić in a military prison in Bijeljina in August 1995. The Republika Srpska maintained at the hearing that it had no knowledge of the arrest and detention of Mr Palić.

14. In its decision of 9 December 2000, the Human Rights Chamber held that Mr Palić had been a victim of "enforced disappearance" within the meaning of the Declaration on the Protection of All Persons from Enforced Disappearance[4] and found a breach of Articles 2, 3 and 5 of the Convention in respect of Mr Palić and Articles 3 and 8 of the Convention in respect of the applicant. The Republika Srpska was ordered: (a) to carry out immediately a full investigation capable of exploring all the facts regarding the fate of Mr Palić with a view to bringing the perpetrators to justice; (b) to release Mr Palić, if still alive, or to make available his mortal remains to the applicant; and (c) to make all information about the fate and whereabouts of Mr Palić known to the applicant. The applicant was awarded, for non-pecuniary damage, 15,000 convertible marks (BAM – 7,669 euros (EUR)) and, in respect of her husband (which sum was to be held by the applicant for her husband or his heirs), BAM 50,000 (EUR 25,565). The decision was delivered on 11 January 2001 and entered into force on 8 March 2001 when the full Chamber rejected the Republika Srpska's request for review.

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3. In 1993 the United Nations Security Council, acting under Chapter VII of the Charter, demanded that all the parties concerned treat Srebrenica, Sarajevo, Tuzla, Žepa, Goražde and Bihać, as well as their surroundings, as "safe areas" which should be free from armed attacks and any other hostile act (resolutions 819 of 16 April 1993 and 824 of 6 May 1993).
4. See United Nations General Assembly resolution 47/133 of 18 December 1992.

15. On 14 November 2001 the Republika Srpska acknowledged that Mr Palić had been held in Vanekov mlin, a military prison in Bijeljina administered by the VRS forces, between 4 August and 5 September 1995 and that on the latter date Mr Dragomir Pećanac, Security Officer of the Main Staff of the VRS, had taken Mr Palić from that prison.

16. Having found that Mr Pećanac had meanwhile settled in Serbia, in February 2002 the Republika Srpska authorities issued a domestic arrest warrant against him. In March and April 2002 they interviewed the entire war-time personnel of Vanekov mlin, including its governor.

17. On 12 June 2003 the Bijeljina District Prosecutor (answerable to the Prosecutor of the Republika Srpska) asked the State Prosecutor to take over this case. On 25 December 2003 the latter decided that the case should remain with the Bijeljina District Prosecutor and returned the case file.

18. On 7 September 2005 the Human Rights Commission, which had replaced the Human Rights Chamber, rendered another decision in this case: while noting that the monetary award had been paid, it held that the decision of 9 December 2000 had not yet been fully enforced. The Republika Srpska was given an additional three-month period in which to do so.

19. From October until December 2005 the authorities of the Republika Srpska and Serbia, at the request of the Republika Srpska, interviewed eighteen people in connection with this case, including Mr Pećanac.

20. On 16 January 2006 the Human Rights Commission repeated in another decision that the core element of the decision of 9 December 2000 had not been enforced: the Republika Srpska had not released Mr Palić, if still alive, or otherwise had not made available his mortal remains to the applicant and no prosecution had been brought. This decision was submitted to the State Prosecutor (non-enforcement of the decisions of the Human Rights Chamber constitutes a criminal offence, see paragraph 36 below).

21. On 25 January 2006 the Republika Srpska, at the request of the High Representative[5], established an *ad hoc* commission to investigate this case. It included Mr Milorad Bukva who had allegedly attended the meeting of 27 July 1995 mentioned in paragraph 11 above (see paragraph 61 below). The applicant appointed her representative to that commission.

22. On 17 March 2006 the Sarajevo Municipal Court, at the applicant's request, issued a declaration of presumed death with respect to Mr Palić (see paragraph 39 below).

23. On 20 April 2006 the *ad hoc* commission adopted a report. Having interviewed numerous people, it established that Mr Palić had been captured by the VRS forces (that is, by Mr Radomir Furtula of the Rogatica Brigade) and handed over to Mr Zdravko Tolimir, Assistant Commander for Intelligence and Security of the Main Staff of the VRS. By order of

5. Following the war in Bosnia and Herzegovina, the United Nations Security Council authorised the establishment of an international administrator for Bosnia and Herzegovina (High Representative) by an informal group of States actively involved in the peace process (Peace Implementation Council) as an enforcement measure under Chapter VII of the United Nations Charter (see, for more detailed information, *Berić and Others v. Bosnia and Herzegovina* (dec.), nos. 36357/04 *et al.*, ECHR 2007-XII).

Mr Mladić, the Commander of the VRS, he was held in a private flat in Rogatica (belonging to Mr Zoran Čarkić, Security Officer of the Rogatica Brigade) for a week or so and then in Vanekov mlin, the military prison mentioned above. He was interrogated daily by security officers of the VRS. It was also established that Mr Pećanac and his driver, Mr Željko Mijatović, had taken Mr Palić from that prison on the night of 4/5 September 1995. While questioned by the Serbian authorities, at the request of the Republika Srpska, Mr Pećanac and Mr Mijatović said that they had taken Mr Palić to Han Pijesak and handed him over to the late Mr Jovo Marić. However, the report established that Mr Marić had not been in Han Pijesak at that time.

24. On 13 December 2006 the Prime Minister of the Republika Srpska established another *ad hoc* commission to investigate this case. He also met the applicant who appointed her representative to that commission.

25. On 20 December 2006 the Court of Bosnia and Herzegovina issued international arrest warrants against Mr Pećanac and Mr Mijatović on suspicion of having committed an enforced disappearance as a crime against humanity.

26. In March 2007 the second *ad hoc* commission established that Mr Palić had been buried in a mass grave in Rasadnik near Rogatica and, having searched the area in vain, that he could have been transferred to a secondary mass grave in Vragolovi near Rogatica (where nine unidentified bodies had been exhumed on 12 November 2001) or elsewhere in that area.

27. On 31 May 2007 the authorities of Bosnia and Herzegovina arrested Mr Tolimir and transferred him to the custody of the ICTY.

28. On 5 August 2009 the ICMP established that one of the unidentified bodies from the mass grave in Vragolovi (which had been exhumed on 12 November 2001 and reburied in a nameless grave in Visoko on 14 March 2002) was that of Mr Palić. The Sarajevo Cantonal Court then ordered that the body be exhumed. On 20 August 2009 the ICMP confirmed through DNA tests that the body indeed belonged to Mr Palić.

29. On 26 August 2009 Mr Palić was finally buried on the grounds of the Ali Pasha's Mosque in Sarajevo with military honours.

30. On 16 December 2009 the ICTY amended the indictment against Mr Tolimir. He is charged with the participation in joint criminal enterprise to forcibly transfer and deport the Muslim populations of Srebrenica and Žepa, a natural and foreseeable consequence of which was the killing of Mr Palić and two other Muslim leaders from Žepa by the VRS (the third category of joint criminal enterprise[6]). His trial commenced on 26 February 2010.

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6. A definition of the third category of joint criminal enterprise is set out in the ICTY judgment in the *Tadić* case, IT-94-1-A, § 204, 15 July 1999: "The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect 'ethnic cleansing') with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common

31. Mr Pećanac and Mr Mijatović live in Serbia. They were granted Serbian citizenship on 4 January 1999 and 17 September 1998, respectively.

II. RELEVANT INTERNATIONAL AND DOMESTIC LAW

A. Relevant international law

1. Missing persons

32. Armed conflicts often lead to the disappearance of hundreds or even thousands of people. Pursuant to Articles 32-34 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, families have the right to be informed of the fate of missing relatives; the parties to a conflict must search for persons reported missing by an adverse party and facilitate enquiries made by members of families dispersed as a result of the conflict so as to help them restore contact with one another and try to bring them together again; and lists showing the exact location and markings of the graves, together with particulars of the dead interred therein, must be exchanged. The International Committee of the Red Cross (ICRC), with the assistance of its Central Tracing Agency, has long experience in searching for soldiers and combatants who go missing during military operations ("missing in action") and for civilians who are reported missing as a consequence of armed conflict.

2. Enforced disappearance

33. This is a much narrower concept. A recent definition of "enforced disappearance" is set out in Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006[7]:

> "For the purposes of this Convention, 'enforced disappearance' is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."

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design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk."

7. The Convention entered into force on 23 December 2010. Both Bosnia and Herzegovina and Serbia signed it on 6 February 2007, but they have not yet ratified it.

34. The widespread or systematic practice of enforced disappearance is described as a crime against humanity in Article 7 of the Rome Statute of the International Criminal Court of 17 July 1998.

3. Mutual assistance between Bosnia and Herzegovina and Serbia

35. The Agreement between Bosnia and Herzegovina and Serbia on Mutual Assistance in Civil and Criminal Matters (published in Official Gazette of Bosnia and Herzegovina, International Treaty Series, no. 11/05 of 8 December 2005, amendments published in Official Gazette no. 8/10 of 29 July 2010) entered into force on 9 February 2006. Under Article 39 thereof, when a citizen or resident of one Contracting State is suspected of having committed an offence in the territory of the other Contracting State, the latter may request the former to take proceedings in the case. While such a request is pending, the requesting State may not prosecute the suspected person for the same offence. Moreover, a person in respect of whom a final criminal judgment has been rendered in the requested State may not be prosecuted for the same offence in the requesting State if he or she has been acquitted or if the sanction imposed has been enforced or the subject of a pardon or amnesty (Article 41 of the Agreement). Lastly, when one State intends to request the transfer of proceedings, it may also request the other State to provisionally arrest the suspected person (Article 40a of the Agreement).

B. Relevant domestic law

1. Bosnia and Herzegovina

(a) Criminal legislation

36. The 2003 Criminal Code (published in Official Gazette of Bosnia and Herzegovina nos. 3/03 of 10 February 2003 and 37/03 of 22 November 2003, amendments published in Official Gazette nos. 32/03 of 28 October 2003, 54/04 of 8 December 2004, 61/04 of 29 December 2004, 30/05 of 17 May 2005, 53/06 of 13 July 2006, 55/06 of 18 July 2006, 32/07 of 30 April 2007 and 8/10 of 2 February 2010) entered into force on 1 March 2003.

The relevant part of Article 172 of the Code provides as follows:

> "1. Whoever, as part of a widespread or systematic attack directed against any civilian population, with knowledge of such an attack perpetrates any of the following acts:
>
> ...
>
> i) enforced disappearance of persons;
>
> ...

shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

2. For the purpose of paragraph 1 of this Article the following terms shall have the following meanings:

...

h) Enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with an aim of removing them from the protection of the law for a prolonged period of time.

..."

Furthermore, in accordance with Article 239 of the Code, non-enforcement of a decision of the Human Rights Chamber is an offence:

"An official of the State, the Entities or the Brčko District who refuses to enforce a final and enforceable decision of the Constitutional Court of Bosnia and Herzegovina, the Court of Bosnia and Herzegovina, the Human Rights Chamber or the European Court of Human Rights, or who prevents the enforcement of any such decision, or who frustrates the enforcement of any such decision in some other way, shall be punished by imprisonment for a term between six months and five years."

37. The 2003 Code of Criminal Procedure (published in Official Gazette of Bosnia and Herzegovina nos. 3/03 of 10 February 2003 and 36/03 of 21 November 2003, amendments published in Official Gazette nos. 32/03 of 28 October 2003, 26/04 of 7 June 2004, 63/04 of 31 December 2004, 13/05 of 9 March 2005, 48/05 of 19 July 2005, 46/06 of 19 June 2006, 76/06 of 25 September 2006, 29/07 of 17 April 2007, 32/07 of 30 April 2007, 53/07 of 16 July 2007, 76/07 of 15 October 2007, 15/08 of 25 February 2008, 58/08 of 21 July 2008, 12/09 of 10 February 2009, 16/09 of 24 February 2009 and 93/09 of 1 December 2009) entered into force on 1 March 2003.

Article 247 of the Code reads as follows:

"An accused may never be tried *in absentia*."

(b) War Crimes Sections within the Court of Bosnia and Herzegovina

38. War Crimes Sections of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina have been set up pursuant to the Court of Bosnia and Herzegovina Act 2000 (a consolidated version thereof published in Official Gazette of Bosnia and Herzegovina no. 49/09 of 22 June 2009, amendments published in Official Gazette nos. 74/09 of 21 September 2009 and 97/09 of 15 December 2009).

(c) Declaration of presumed death

39. Any person or body demonstrating a legitimate interest may lodge a request for a declaration of presumed death with respect to those who went missing during the 1992-95 war as from the expiry of the waiting period, which is one year from the cessation of the hostilities (the Non-Contentious

Procedure Act 1989, published in Official Gazette of the Socialist Republic of Bosnia and Herzegovina no. 10/89 of 23 March 1989, which was in force in the Federation of Bosnia and Herzegovina until 28 January 1998 and in the Republika Srpska until 15 May 2009; the Non-Contentious Procedure Act 1998, published in Official Gazette of the Federation of Bosnia and Herzegovina no. 2/98 of 20 January 1998, amendments published in Official Gazette nos. 39/04 of 24 July 2004 and 73/05 of 28 December 2005; and the Non-Contentious Procedure Act 2009, published in Official Gazette of the Republika Srpska no. 36/09 of 7 May 2009).

Pursuant to section 27(1) of the Missing Persons Act 2004, a declaration of presumed death will automatically be issued with respect to all those recorded as missing in the Central Records (see paragraph 40 below).

(d) Missing Persons Act 2004

40. The Missing Persons Act 2004 (published in Official Gazette of Bosnia and Herzegovina no. 50/04 of 9 November 2004) entered into force on 17 November 2004. It provides, in so far as relevant, as follows:

Article 3 (The right to know)

> "Families of missing persons have the right to know the fate of their missing family members and relatives, their place of (temporary) residence, or if dead, the circumstances and cause of death and location of burial, if such location is known, and to receive the mortal remains."

Article 9 (Termination of status)

> "The status of missing person is terminated on the date of identification, and the process of tracing the missing person is concluded.
>
> In the event that a missing person is proclaimed dead, but the mortal remains have not been found, the process of tracing shall not be terminated."

The Missing Persons Institute and, within that Institute, the Central Records have been set up as domestic institutions pursuant to that Act. The Missing Persons Fund, although envisaged, has not yet been set up.

2. Serbia

(a) War Crimes Act 2003

41. The War Crimes Act 2003 (published in Official Gazette of the Republic of Serbia no. 67/03, amendments published in Official Gazette nos. 135/04, 61/05, 101/07 and 104/09) entered into force on 9 July 2003. The War Crimes Prosecutor, the War Crimes Police Unit and the War Crimes Sections within the Belgrade Higher Court and the Belgrade Court of Appeal have been set up pursuant to this Act. They have jurisdiction over serious violations of international humanitarian law committed anywhere in the former Yugoslavia (see section 3 of this Act). A number of persons have been convicted in Serbia for war crimes committed during the 1992-95 war

in Bosnia and Herzegovina. As an example, at the request of Bosnia and Herzegovina, the Serbian authorities have taken proceedings and convicted Mr Nenad Malić of war crimes committed against Bosniacs in Stari Majdan in 1992 and sentenced him to 13 years' imprisonment. As another example, they have recently convicted Mr Slobodan Medić, Mr Branislav Medić, Mr Pero Petrašević and Mr Aleksandar Medić of war crimes committed against Bosniacs in Trnovo in 1995 and sentenced them to 20, 15, 13 and 5 years' imprisonment respectively.

(b) Mutual Assistance in Criminal Matters Act 2009

42. The Mutual Assistance in Criminal Matters Act 2009 (published in Official Gazette of the Republic of Serbia no. 20/09) entered into force on 27 March 2009. Under section 16 of this Act, Serbian citizens may not be extradited. This Act repealed the corresponding provision of the Code of Criminal Procedure 2001 (published in Official Gazette of the Federal Republic of Yugoslavia no. 70/01, amendments published in Official Gazette of the Federal Republic of Yugoslavia no. 68/02 and Official Gazette of the Republic of Serbia nos. 58/04, 85/05, 115/05, 49/07, 20/09 and 72/09) which was in force between 28 March 2002 and 27 March 2009.

THE LAW

43. The applicant complained, on behalf of her husband, that Bosnia and Herzegovina had failed to fulfil its procedural obligation to investigate the disappearance and death of her husband. This complaint falls to be examined under Articles 2 and 5 of the Convention.

Article 2 of the Convention provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

Article 5 of the Convention provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

She further complained, under various Articles of the Convention, about the authorities' reactions to her quest for information. This complaint falls to be examined under Article 3 of the Convention, which reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

I. ADMISSIBILITY

A. Compatibility *ratione temporis*

44. The Government claimed that the Court lacked temporal jurisdiction to deal with this case, given that Mr Palić had disappeared and died before the ratification of the Convention by Bosnia and Herzegovina on 12 July 2002.

45. The applicant disagreed, relying on the concept of a "continuing situation" (she referred, among other authorities, to *Cyprus v. Turkey* [GC], no. 25781/94, §§ 136, 150 and 158, ECHR 2001-IV).

46. It is beyond dispute that in accordance with the general rules of international law (see, in particular, Article 28 of the Vienna Convention on the Law of Treaties of 23 May 1969) the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party (see *Blečić v. Croatia* [GC], no. 59532/00, § 70, ECHR 2006-III). That being said, the Court has held that the procedural obligation arising from a disappearance will generally remain as long as the whereabouts and fate of the person are unaccounted for and it is thus of a continuing nature (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, §§ 147-49, ECHR 2009-...). Furthermore, that obligation does not come to an end even on discovery of the body or the presumption of death. This only casts light on one aspect of the fate of the missing person and the obligation to account for the disappearance and death, as well as to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain (ibid., § 145).

47. The Court thus rejects the Government's objection under this head.

B. Six-month rule

48. Although the respondent Government did not raise any objection under this head, this issue calls for the Court's consideration *proprio motu*.

49. While it is true that the six-month time-limit does not apply as such to continuing situations, the Court has held that, where disappearances are concerned, applicants cannot wait indefinitely before coming to Strasbourg (see *Varnava and Others*, cited above, § 161). Indeed, with the lapse of time, memories of witnesses fade, witnesses may die or become untraceable, evidence deteriorates or ceases to exist, and the prospects that any effective investigation can be undertaken will increasingly diminish; and the Court's own examination and judgment may be deprived of meaningfulness and effectiveness. Applicants must therefore make proof of a certain amount of diligence and initiative and introduce their complaints without undue delay. The following passage from the *Varnava and Others* judgment (§ 165) indicates what this involves:

> "Nonetheless, the Court considers that applications can be rejected as out of time in disappearance cases where there has been excessive or unexplained delay on the part of applicants once they have, or should have, become aware that no investigation has been instigated or that the investigation has lapsed into inaction or become ineffective and, in any of those eventualities, there is no immediate, realistic prospect of an effective investigation being provided in the future. Where there are initiatives being pursued in regard to a disappearance situation, applicants may reasonably await developments which could resolve crucial factual or legal issues. Indeed, as long as there is some meaningful contact between families and authorities concerning complaints and requests for information, or some indication, or realistic possibility, of

> progress in investigative measures, considerations of undue delay will not generally arise. However, where there has been a considerable lapse of time, and there have been significant delays and lulls in investigative activity, there will come a moment when the relatives must realise that no effective investigation has been, or will be provided. When this stage is reached will depend, unavoidably, on the circumstances of the particular case."

50. The Court went on to conclude that by the end of 1990 it must have become apparent that the mechanisms set up to deal with disappearances in Cyprus no longer offered any realistic hope of progress in either finding bodies or accounting for the fate of the missing persons in the near future (see *Varnava and Others*, cited above, § 170). It has since rejected as out of time a number of cases because there was no evidence of any activity post-1990 which could have provided to the applicants some indication, or realistic possibility, of progress in investigative measures in relation to the disappearance of their relatives (see *Orphanou and Others v. Turkey* (dec.), nos. 43422/04 *et al*., 1 December 2009; *Karefyllides and Others v. Turkey* (dec.), no. 45503/99, 1 December 2009; and *Charalambous and Others v. Turkey* (dec.), nos. 46744/07 *et al*., 1 June 2010).

51. The situation in Bosnia and Herzegovina is different. While it is true that the domestic authorities made slow progress in the years immediately after the war, they have since made significant efforts to locate and identify persons missing as a consequence of the war and combat the impunity. To start with, Bosnia and Herzegovina has carried out comprehensive vetting of the appointment of police and judiciary: the United Nations Mission vetted approximately 24,000 police officers between 1999 and 2002 and the High Judicial and Prosecutorial Councils screened the appointments of approximately 1,000 judges and prosecutors between 2002 and 2004. Secondly, the domestic Missing Persons Institute was set up pursuant to the Missing Persons Act 2004 (see paragraph 40 above). It has so far carried out many exhumations and identifications; for example, in seven months of 2009 the Missing Persons Institute identified 883 persons[8]. Thirdly, the creation of the Court of Bosnia and Herzegovina in 2002 and its War Crimes Sections in 2005 gave new impetus to domestic prosecutions of war crimes. That court has so far sentenced more than 40 people. Moreover, the number of convictions by the Entity and District courts, which retain jurisdiction over less sensitive cases, has considerably increased. Fourthly, in December 2008 the domestic authorities adopted the National War Crimes Strategy which provides a systematic approach to solving the problem of the large number of war crimes cases. It defines the time-frames, capacities, criteria and mechanisms for managing those cases, standardisation of court practices, issues of regional cooperation, protection and support to victims and witnesses, as well as financial aspects, and supervision over the implementation of the Strategy. One of its objectives is to process the most complex and top priority cases within seven years (that is, by the end of 2015) and other war crimes cases within fifteen years (that is, by the end of 2023), a not unreasonable period of time considering the

8. Human Rights Committee's document CCPR/C/BIH/CO/1/Add.4 of 8 June 2010, § 21.

numbers involved. Lastly, domestic authorities contribute to the successful work of the international bodies set up to deal with disappearances and other serious violations of international humanitarian law committed in Bosnia and Herzegovina (see paragraphs 7-8 above).

52. In view of the above and having regard to the initiatives pursued in this particular case at the relevant time, the applicant could still realistically expect that an effective investigation would be carried out when she lodged her application in 2004. Accordingly, she acted with reasonable expedition for the purposes of the six-month rule.

C. Exhaustion of domestic remedies

53. The Government objected that the applicant had failed to exhaust domestic remedies by failing to seize the Constitutional Court of Bosnia and Herzegovina.

54. The applicant did not respond to this objection.

55. The Court has held that when an appeal before the Human Rights Chamber has been pursued, the applicant is not required to pursue an appeal before the Constitutional Court of Bosnia and Herzegovina concerning the same matter (see *Jeličić v. Bosnia and Herzegovina* (dec.), no. 41183/02, ECHR 2005-XII). There is no reason to depart from that jurisprudence.

56. Accordingly, this objection of the Government is also rejected.

D. Victim status

57. The Government maintained that the decision of the Human Rights Chamber in this case had been implemented, namely the mortal remains of Mr Palić had been identified, a full investigation had been carried out and all information had been communicated to the applicant. Since the applicant had obtained an acknowledgment of a breach of her human rights from the domestic authorities and appropriate and sufficient redress (see paragraph 14 above), the Government contended that she had lost victim status.

58. The applicant disagreed.

59. The Court considers that this objection goes to the very heart of the questions whether the authorities discharged their procedural obligation to investigate the disappearance and death of Mr Palić, as required by Articles 2 and 5 of the Convention, and whether their reactions to the applicant's quest for information amounted to a breach of Article 3 of the Convention (see paragraph 43 above). It would thus be more appropriately examined at the merits stage.

E. Conclusion

60. Since the application is neither manifestly ill-founded within the meaning of Article 35 § 3 of the Convention nor inadmissible on any other grounds, the Court declares the application admissible and, in accordance

with its decision to apply Article 29 § 1 of the Convention (see paragraph 5 above), it will immediately consider its merits.

II. MERITS

A. Article 2 of the Convention

61. The applicant criticised the investigation into the disappearance and death of her husband. First of all, she complained of the ineffectiveness of the investigation and about its pace, relying on the findings of the Human Rights Commission (see paragraph 18 above). Secondly, she argued that the *ad hoc* commissions were not independent. In particular, she alleged that one of their members, Mr Bukva, had attended the notorious meeting of 27 July 1995 (see paragraphs 11 and 21 above). Thirdly, she claimed that one of the main suspects, Mr Pećanac, had received some information concerning this case from the State Prosecutor's Office. Fourthly, she submitted that the ICTY proceedings against Mr Tolimir could not absolve the respondent State of its procedural obligation under Article 2, in particular because Mr Tolimir had not been charged as a direct perpetrator (see paragraph 30 above). Lastly, she argued that Serbia should extradite Mr Pećanac and Mr Mijatović to Bosnia and Herzegovina and she referred in this connection to the case of Mr Veselin Vlahović who had been extradited from Spain to Bosnia and Herzegovina to stand trial on war crimes charges.

62. The Government denied the applicant's claims and maintained that the investigation had complied with all the requirements of Article 2.

63. The Court reiterates that Article 2 requires the authorities to conduct an official investigation into an arguable claim that a person, who was last seen in their custody, subsequently disappeared in a life-threatening context. The investigation must be independent and effective in the sense that it is capable of leading to the identification and punishment of those responsible, afford a sufficient element of public scrutiny, including being accessible to the victim's family, and carried out with reasonable promptness and expedition (see *Varnava and Others*, cited above, § 191).

64. In the present case, the Court first needs to examine whether the investigation could be regarded as effective. It notes that notwithstanding initial delays (see paragraph 70 below) the investigation finally led to the identification of the mortal remains of Mr Palić. Given that almost 30,000 people went missing as a result of the war in Bosnia and Herzegovina (see paragraph 6 above), this is in itself a significant achievement. The procedural obligation under Article 2 nevertheless did not come to an end with the discovery of the body (see paragraph 46 above) and the Court will next examine whether the investigation made it possible to establish the identity of the persons responsible for the disappearance and death of Mr Palić and whether those persons were eventually brought to justice.

65. The Court notes that between October 2005 and December 2006 the domestic authorities took various investigative steps which led to

international arrest warrants being issued against Mr Pećanac and Mr Mijatović on suspicion of having committed an enforced disappearance as a crime against humanity (see paragraph 25 above). The investigation, it is true, has been at a standstill ever since because the main suspects live in Serbia and, as Serbian citizens, cannot be extradited (see paragraph 42 above), but Bosnia and Herzegovina cannot be held liable for that. Bosnia and Herzegovina could have requested Serbia to take proceedings in this case (see paragraph 35 above). However, the Court considers that it is not necessary to examine whether there was an obligation under the Convention to do so (see, in that connection, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 330-31, ECHR 2004-VII) given that the applicant could have reported this case herself to the Serbia's War Crimes Prosecutor who has jurisdiction over serious violations of international humanitarian law committed anywhere in the former Yugoslavia (see paragraph 41 above). Moreover, it is open to the applicant to lodge an application against Serbia if she considers that she is the victim of a breach by Serbia of her Convention rights. The applicant also referred to the case of Mr Vlahović (see paragraph 61 above). However, Mr Vlahović is not a Spanish citizen and there were accordingly no obstacles to his extradition. In these circumstances, the Court finds that the domestic criminal investigation was effective in the sense that it was capable of leading to the identification and punishment of those responsible for the disappearance and death of Mr Palić, notwithstanding the fact that there have not yet been any convictions in this connection. The procedural obligation under Article 2 is indeed not an obligation of result, but of means (see, among many authorities, *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 107, ECHR 2001-III).

66. The Court further notes that the respondent State arrested Mr Tolimir at the request of the ICTY and that it cooperates with the ICTY in this regard. The trial against Mr Tolimir is, however, still pending and, more importantly, he was not charged as a direct perpetrator (see paragraph 30 above). It is therefore uncertain to what extent the trial against Mr Tolimir will contribute to the identification and punishment of those directly responsible for the killing of Mr Palić.

67. As regards the requirement of independence, the Court sees no reason to doubt that the State Prosecutor's Office acted independently. The applicant alleged that information had leaked from the domestic criminal investigation to Mr Pećanac, but there is no proof that Mr Pećanac obtained the impugned information from the State Prosecutor's Office. It is equally possible that he could have obtained this information from anyone on the *ad hoc* commissions or from any other source. In any event, since it transpires from the material in the case file that the relevant authorities were instantly warned of the possibility of a leak and that necessary measures were taken, the Court does not consider this factor sufficient in itself to conclude that the domestic criminal investigation is not independent.

68. Turning to the *ad hoc* commissions, the Court acknowledges their important contribution to the establishment of the facts of this difficult and troubling case. That being said, it is of great concern that one of the

members of the *ad hoc* commissions allegedly played a role, no matter how minor, in the actual disappearance of the applicant's husband (see paragraph 61 above). While there is no proof that Mr Bukva had indeed attended the impugned meeting, it is regrettable that the respondent Government did not respond to these allegations. Nevertheless, given that in the circumstances of this case an effective and independent criminal investigation was the key requirement to ensure the respondent State's compliance with the procedural obligation under Article 2 (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 93, ECHR 2004-XII, and contrast *Branko Tomašić and Others v. Croatia*, no. 46598/06, § 64, ECHR 2009-...) and the commissions had no influence on the conduct of the ongoing criminal investigation, it is not necessary to examine the question of their independence (see *McKerr v. the United Kingdom*, no. 28883/95, § 156, ECHR 2001-III).

69. There is no indication that the criminal investigation is not open to public scrutiny and/or that it is insufficiently accessible to the applicant.

70. As to the requirement of promptness, the Court has not overlooked that the Republika Srpska authorities acknowledged that Mr Palić had been held in a military prison administered by the VRS forces, one of the predecessors of the present Armed Forces of Bosnia and Herzegovina, and identified the officer who had taken Mr Palić from that prison only in November 2001. Some steps were then taken in early 2002, but the criminal investigation effectively started only in late 2005. It is nevertheless the case that the Court is only competent *ratione temporis* to look at the period after the ratification of the Convention by Bosnia and Herzegovina (that is, after 12 July 2002), while taking into consideration the state of the case at that date. It should also be reiterated that the obligations under Article 2 must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities (see, although in a different context, *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports of Judgments and Decisions* 1998-VIII). The Court takes into account the complex situation in Bosnia and Herzegovina, notably in the first ten years following the war. In such a post-conflict situation, what amounts to an impossible and/or disproportionate burden must be measured by the very particular facts and context. In this connection, the Court notes that more than 100,000 people were killed, almost 30,000 people went missing and more than two million people were displaced during the war in Bosnia and Herzegovina. Inevitably choices had to be made in terms of post-war priorities and resources. Furthermore, after a long and brutal war, Bosnia and Herzegovina underwent fundamental overhaul of its internal structure and political system: Entities and Cantons were set up pursuant to the Dayton Peace Agreement, power-sharing arrangements were introduced in order to ensure effective equality between the "constituent peoples" in the post-conflict society (see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, ECHR 2009-...), new institutions had to be created and the existing ones had to be restructured. Some reluctance on the part of the former warring parties to work with those new institutions could be expected in the post-war period, as evidenced in the present case. While

it is difficult to pinpoint when exactly this process ended, the Court considers that the domestic legal system should have become capable of dealing effectively with disappearances and other serious violations of international humanitarian law by 2005, following comprehensive vetting of the appointment of police and judiciary and the establishment of the War Crimes Sections within the Court of Bosnia and Herzegovina (see paragraph 51 above). All this considered and since there has been no substantial period of inactivity post-2005 on the part of the domestic authorities in the present case, the Court concludes that, in the circumstances obtaining at the material time, the domestic criminal investigation can be considered to have been conducted with reasonable promptness and expedition.

71. In brief, the domestic authorities eventually identified the mortal remains of Mr Palić and carried out an independent and effective criminal investigation into his disappearance and death. There has been no substantial period of inactivity after 2005 on the part of the domestic authorities. Furthermore, the applicant received substantial compensation in connection with her husband's disappearance (although for the period 1995-2000, see paragraph 14 above). The Court concludes that, taking into account the special circumstances prevailing in Bosnia and Herzegovina up until 2005 and indeed the particular circumstances of the present case, there has been no violation of Article 2 of the Convention.

B. Article 3 of the Convention

72. The applicant further argued that the authorities had, for many years, refused to engage, acknowledge or assist in her efforts to find out what had happened to her husband. She relied on Article 3 of the Convention.

73. The Government contested that argument.

74. The phenomenon of disappearances imposes a particular burden on the relatives of missing persons who are kept in ignorance of the fate of their loved ones and suffer the anguish of uncertainty. The Court's case-law therefore recognised from very early on that the situation of the relatives may disclose inhuman and degrading treatment contrary to Article 3. The essence of the violation is not that there has been a serious human rights violation concerning the missing person; it lies in the authorities' reactions and attitudes to the situation when it has been brought to their attention. Other relevant factors include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, and the involvement of the family member in the attempts to obtain information about the disappeared person. The finding of such a violation is not limited to cases where the respondent State has been held responsible for the disappearance, but can arise where the failure of the authorities to respond to the quest for information by the relatives or the obstacles placed in their way, leaving them to bear the brunt of the efforts to uncover any facts, may be regarded as disclosing a flagrant, continuous and callous disregard of an obligation to account for the

whereabouts and fate of a missing person (see *Varnava and Others*, cited above, § 200, and the authorities cited therein).

75. In the present case, the Court notes that the applicant obtained first official information about the fate of her husband more than five years after his disappearance. The domestic Human Rights Chamber held that Mr Palić had indeed been a victim of an enforced disappearance and found numerous violations of the Convention in this connection. Furthermore, the applicant received compensation for non-pecuniary damage (see paragraph 14 above). Some weight must also be attached to the fact that the mortal remains of Mr Palić were eventually identified and that an independent and effective criminal investigation was eventually carried out, although with some delays. Therefore, while there is no doubt that the applicant suffered and continues to suffer because of this case, the Court finds that the authorities' reactions cannot be categorised as inhuman and degrading treatment.

76. Accordingly, there has been no violation of Article 3 of the Convention.

C. Article 5 of the Convention

77. Lastly, the applicant invited the Court to find a violation of Article 5 of the Convention for the reasons outlined in paragraph 61 above.

78. The Government maintained that the investigation had complied also with the requirements of Article 5 of the Convention.

79. The Court reiterates that Article 5 requires the authorities to conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since (see *Kurt v. Turkey*, 25 May 1998, § 124, *Reports of Judgments and Decisions* 1998-III; *Cyprus v. Turkey*, cited above, § 147; and *Varnava and Others*, cited above, § 208).

80. For the detailed reasons outlined in paragraphs 64-71 above in the context of Article 2, the Court finds that there has been no violation of Article 5 of the Convention.

D. Conclusion on the Government's preliminary objection

81. The Court finds that in the light of its conclusion under Articles 2, 3 and 5 it is not necessary to decide on the Government's challenge to the applicant's victim status (see paragraphs 57-59 above).

FOR THESE REASONS, THE COURT

1. *Joins to the merits* the Government's preliminary objection concerning the applicant's victim status and *declares* the application admissible unanimously;

2. *Holds* by five votes to two that there has been no violation of Article 2 of the Convention;

3. *Holds* unanimously that there has been no violation of Article 3 of the Convention;

4. *Holds* by five votes to two that there has been no violation of Article 5 of the Convention;

5. *Holds* by five votes to two that in the light of its conclusions under points 2-4 it is not necessary to decide on the Government's preliminary objection mentioned in point 1.

Done in English, and notified in writing on 15 February 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Bratza and Vehabović is annexed to this judgment.

N.B.
T.L.E.

JOINT PARTLY DISSENTING OPINION OF JUDGES BRATZA AND VEHABOVIĆ

We are unable to share the view of the majority of the Chamber that the applicant's rights under Article 2 of the Convention were not violated in the present case. In our view, the procedural requirements of that Article were not complied with by the national authorities, who failed to carry out a prompt and effective investigation into the disappearance of the applicant's husband.

The relevant procedural requirements of Article 2 are well-established in the Court's case-law and are set out in the leading judgment of the Grand Chamber in the case of *Varnava and Others v. Turkey*, which is cited in the present judgment. National authorities are obliged to conduct an official investigation into an arguable claim that a person last seen in their custody subsequently disappeared in a life-threatening context. The investigation must be independent and effective, in the sense that it is capable of leading to the discovery of the whereabouts and fate of the person concerned and to the identification and punishment of those responsible; it must afford a sufficient element of public scrutiny, including being accessible to the victim's family; and it must be carried out with reasonable promptness and expedition.

We accept that certain of these requirements were eventually fulfilled in the present case. In August 2009, the International Commission on Missing Persons established that one of the unidentified bodies from the mass grave in Vragolovi, which had been exhumed in November 2001 and re-interred in a nameless grave in Visoko in March 2002, was that of Mr Palić and, later in the same month, DNA tests confirmed the body to be his. In addition, the investigation ultimately led to the identification of persons suspected of having been responsible for the enforced disappearance of Mr Palić: a domestic arrest warrant was issued by the authorities of the Republika Srpska in February 2002 against Mr Pećanac, a security officer of the main staff of the VRS who had taken Mr Palić from Vanekov mlin prison; in April 2006, the report of the second *ad hoc* commission established that on capture Mr Palić had been handed over to Mr Tolimir, Assistant Commander for Intelligence and Security of the Main Staff of the VRS and that Mr Pećanac and his driver, Mr Mijatović, had taken Mr Palić from the prison on the night of 4-5 September 1995; in December 2006, international arrest warrants were issued against Mr Pećanac and Mr Mijatović by the Court of Bosnia and Herzegovina; and in December 2009 Mr Tolomir was charged before the ICTY with the murder of Mr Palić as part of a joint criminal enterprise.

These achievements, significant as they are, must however be seen against their factual and historical background. The identification of the body of Mr Palić occurred over fourteen years after his disappearance and

some three years after the applicant had requested the respondent Government to examine the mortal remains discovered at the same site to determine if they were those of her husband. The international arrest warrants against two of those suspected of direct involvement in the disappearance were issued eleven and a half years after the disappearance and neither of the suspects has, as yet, been brought to justice, both having moved to Serbia where they currently live. These very substantial periods of delay would of themselves call into question whether the investigation satisfied the requirements of promptness in Article 2. These doubts are, in our view, strongly reinforced when seen in the context of the assessments made of the effectiveness of the investigation by the national tribunals and other official bodies of the respondent State.

It was in December 2000 that the Human Rights Chamber held that Mr Palić had been a victim of an enforced disappearance in breach of Articles 2, 3 and 5 of the Convention and ordered the Republika Srpska, *inter alia*, to carry out immediately a full investigation capable of exploring all the facts regarding the fate of Mr Palić, with a view to bringing the perpetrators to justice. Nearly a year elapsed before the authorities of the Entity, which had in the proceedings before the Chamber continued to deny any knowledge of the arrest of Mr Palić, eventually acknowledged in November 2001 that he had been held in Vanekov mlin, a military prison administered by the VRS forces and that he had been taken from that prison by Mr Pećanac. It took a further three months for a domestic arrest warrant to be issued against Mr Pećanac, who had by then settled in Serbia. In the subsequent months, the entire war-time personnel of Vanekov mlin, including the governor were interviewed. However, the questions put to the personnel of the prison were subsequently found by the Human Rights Commission to have been inappropriate and irrelevant in the context of the investigation, being questions of a general nature and not directed to the events of the relevant days when Mr Palić had been detained there.

These measures apart, it would appear that no other steps were taken to implement the decision of the Human Rights Chamber or to move the investigation forward for a further 3 years. In July 2005, the High Representative wrote to the Prime Minister of the Republika Srpska to complain that the applicant had never received any results of a satisfactory investigation, let alone her husband's mortal remains. In September of that year, the Human Rights Commission, which had replaced the Human Rights Chamber, rendered a further decision in the case, holding that the judgment of 9 December 2000 had not yet been fully enforced and granting the Republika Srpska an additional three-months period in which to do so. This led to the interviewing of 18 people in connection with the case, including Mr Pećanac, by the authorities of the Republika Srpska and by those of Serbia, at the request of the Entity. However, on 16 January 2006 the Commission repeated that the core element of the decision of December

2000 had still not been complied with: Mr Palić had not been released if he was still alive and, if he had been killed, his mortal remains had not been made available and no prosecution had been brought. In a letter written three days later, the High Representative once again complained of the failure of the Republika Srpska to comply with the Chamber's decision and required the establishment of a Government commission to implement the decision and assemble the facts necessary to provide the applicant with the information she had been denied.

An *ad hoc* commission was duly established on 25 January 2006. However, the independence of the commission is open to serious doubt, not least because it included among its members Mr Milorad Bukva, who had allegedly attended the meeting of 27 July 1995 at which Mr Palić sought to negotiate the terms of surrender with the VRS forces and, following which, he had disappeared. The first *ad hoc* commission adopted its report on 20 April 2006, in which it established that Mr Palić had been captured by the VRS forces and handed over to Mr Tolimir, that he had been held in Vanekov mlin and interrogated daily by security officers of the VRS and that he had been removed by Mr Pećanac from the prison on the night of 4-5 September 1995. Doubts were cast on the veracity of the account given by Mr Pećanac that Mr Palić had been taken to Han Pijesak and there handed over to Mr Jovo Marić, since the report established that Mr Marić had not been in Han Pijesak at that time.

The investigation carried out by the commission was not accepted as having sufficiently implemented the Chamber's decision by the new High Representative, who, in a letter of 22 June 2006 to the Prime Minister of the Republika Srpska, deplored that to date the investigation had not yielded any tangible results and stated that he remained unconvinced that the Government of the Entity had exhausted its capacity or its cooperation with the international institutions to implement the Chamber's decision. A second *ad hoc* commission was created in December 2006, six years after the Chamber's decision, which in March 2007 established for the first time that Mr Palić had been buried in a mass grave in Rasadnik and that, since a search of that area had proved fruitless, his body might have been transferred to a secondary mass grave in Vragolovi, where nine unidentified bodies had been exhumed in November 2001. A further 18 months elapsed before one of the bodies from that mass grave was identified as that of Mr Palić.

In assessing the respondent State's compliance with the procedural requirements of Article 2, the principal focus of the judgment has been on the question of the independence and promptness of the investigation. As to the requirement of independence, despite the doubts which are raised in paragraph 66 of the judgment, we are willing to accept that the State Prosecutor's Office acted independently. However, the independence of the *ad hoc* commissions is open to serious doubt and we share the concern of

the majority that the respondent Government have failed to respond to the allegation that one of the members of the commission played a role in the actual disappearance of the applicant's husband. Where we cannot agree with the majority is in their view that it is not necessary to examine the question of the independence of the commissions since they had no influence on the conduct of the ongoing criminal investigation which was in their view the "key requirement" to ensure compliance with the procedural obligations under Article 2. This, in our view, is to place too narrow an interpretation on the requirements of that Article in the case of enforced disappearances, which are not confined to the conduct of criminal investigations but include other forms of investigation designed to establish the circumstances of the disappearance and the fate of the person concerned. The independence of the *ad hoc* commissions, which the judgment accepts played an important role in the establishment of the facts of the case, is, we consider, of evident importance in assessing the effectiveness of the investigation.

But it is on the requirement of promptness that we principally part company with the majority of the Chamber. The judgment acknowledges that there were "initial delays" in the investigation, the admission that Mr Palić had been held in a military prison and removed from there having only been made in November 2001 and the criminal investigation having only effectively started in late 2005. It is also acknowledged that, although the Court is only competent *ratione temporis* to examine the period after the ratification of the Convention by the respondent State on 12 July 2002, it is entitled to take into consideration the state of the case at that date. However, in concluding that the domestic criminal investigation could be considered to have been conducted with reasonable promptness and expedition, reliance is placed in the judgment on the fact that Article 2 must be interpreted in a way which does not impose an impossible or disproportionate burden on the national authorities. It is said that the situation in Bosnia and Herzegovina, notably in the 10 years following the war, was a complex one and that in a post-conflict situation in which many thousands had been killed or had disappeared and two million had been displaced, choices had inevitably to be made in terms of post-war priorities and resources. It is the view of the majority that it was only in 2005 that the domestic legal system should have become capable of dealing effectively with disappearances and that there had been no substantial period of inactivity post-2005 on the part of the national authorities in the present case.

We do not underestimate the immense problems which confronted the national authorities in the aftermath of a long and brutal war or the grave difficulties faced by the Entities in carrying out investigations into the disappearance of many thousands of persons. We accept, too, that what would amount to an impossible or disproportionate burden must be measured in the light of the particular facts and context, which in the present

case differ in their nature and complexity from those examined by the Court in other cases, including that of *Varnava and Others*. However, as pointed out in that case (paragraph 191), even where there may be obstacles which prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts .In the present case, we are unable to ignore not only the serious delays which had occurred in the investigation in the years prior to 2006, which may well have prejudiced the possibility of bringing those responsible to justice, but the fact that the authorities remained virtually supine despite the clear findings and orders of the national tribunals which had been set up with the specific purpose of ensuring the effective protection of human rights. The case of Mr Palić was no ordinary case. His disappearance in the circumstances in which it had occurred was an incident of particular notoriety and the urgency and importance of its investigation (whether criminal or otherwise) was underlined by the repeated decisions of the Human Rights Chamber and Commission, as well as by the letters of the successive High Representatives. It may well be, as suggested in the judgment, that part of the explanation for the lack of activity was the reluctance of the former warring parties to work with the new institutions. But, while this may explain, it cannot justify, non-compliance with the orders of such institutions. Nor, in our view, can such non-compliance be justified by the need to make choices in terms of priorities or resources. We would, in any event, find it difficult to accept that the carrying out of a prompt and effective investigation into Mr. Palic's disappearance could be said to have imposed an impossible or disproportionate burden on the national authorities, when the national tribunals of the respondent State itself considered this to be not only possible but essential.

In these circumstances, we would, unlike the majority, reject the Government's preliminary objection that the applicant has lost her victim status. While the mortal remains of Mr Palić have eventually been identified and while the applicant has obtained a finding of a violation of Article 2 and received compensation in respect of the disappearance of her husband in the Human Rights Chamber, this does not affect the question whether the authorities effectively and promptly discharged their procedural obligations under that Article, reinforced by the decision of the Chamber itself, to investigate the disappearance and death of Mr Palić. In our view, they did not do so for the reasons given and consequently there has been a violation of that Article. This being so, we have not found it necessary to go on to consider additionally whether there has been a violation of Article 5 of the Convention.

As to the complaint under Article 3 of the Convention, while we have no doubt as to the suffering which was caused to the applicant by the lack of

effectiveness of the investigation and the delay in providing her with official information as to the fate of her husband, we do not find that in all the circumstances Article 3 has been violated. In this regard we accept the conclusion and reasoning of the majority of the Chamber.