DECISION ON ADMISSIBILITY AND MERITS
(delivered on 12 April 2002)

Cases nos. CH/99/1900 and CH/99/1901

D.Š. and N.Š.

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 6 March 2002 with the following members present:

Ms. Michèle PICARD, President
Mr. Rona AYBAY, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Želimir JUKA
Mr. Miodrag PAJIĆ
Mr. Andrew GROTRIAN

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

Having considered the admissibility and merits of the aforementioned application introduced pursuant to Article VIII(1) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

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

I. INTRODUCTION

1. On 23 September 1995 the applicants, both officers of the armed forces of the Serbs in Bosnia and Herzegovina, the "Army of the Republika Srpska" ("VRS"), were arrested and then detained by members of the Army of the Republic of Bosnia and Herzegovina ("BH Army"). They were held in detention until their release on 4 August 1997. The applicants allege that during their detention they were severely and repeatedly maltreated. The cases were referred to the Chamber on 13 April 1999 by the Human Rights Ombudsperson for Bosnia and Herzegovina (hereinafter "the Ombudsperson") under Article V paragraph 7 of the Agreement, after an attempt to reach a friendly settlement promoted by the Ombudsperson had failed on 23 September 1998.

2. The cases mainly raise issues under Article 5 paragraph 1 of the European Convention on Human Rights ("the Convention").

II. PROCEEDINGS BEFORE THE CHAMBER

3. The applications were submitted to the Ombudsperson on 9 September 1997 by N.Š. and on 22 September 1997 by D.Š.. The Ombudsperson opened an investigation on 19 November 1997. On 23 September 1998 the Ombudsperson unsuccessfully attempted to negotiate a friendly settlement and on 13 April 1999 decided to refer the applications to the Chamber.

4. On 16 April 1999 both applicants submitted application forms to the Chamber. Those applications were registered the same day.

5. On 25 May 1999 the applicants submitted additional information to the Chamber.

6. On 16 June 1999 the applications were transmitted to the respondent Party for its observations regarding Articles 3, 4, 5, 9 and 13 of the Convention and Article II(2)(b) of the Agreement.

7. "Preliminary observations" were received from the respondent Party on 24 August 1999, the respondent Party claiming that it had not yet received all information necessary to respond.

8. The applicants' response to these observations was received on 21 September 1999.

9. "Further Written Observations" were received from the respondent Party on 23 October 1999.

10. On 30 November 1999 the applicants submitted a request to have the applications joined. The applicants also requested that all proceedings of the Chamber that involve a personal appearance of the applicants should be held in the Republika Srpska.

11. "Further Written Observations" were received from the respondent Party on 5 December 1999. The respondent Party objected to the suggestion that the Chamber hold any proceedings in this matter in the Republika Srpska.

12. On 16 October 2001 the Chamber decided to request further information from the Ombudsman and both parties.

13. On 18 October 2001 the Chamber received further information from the Ombudsman's office, including a copy of the written decision to open an investigation of 19 November 1997.

14. On 9 November 2001 the Chamber received further information from the applicants which included medical records documenting the medical consequences of the detention for the applicants.

15. On 26 November 2001, 10 December 2001 and 8 January 2002 the Chamber received further information from the respondent Party with respect to the related criminal investigations against two prison guards who allegedly had abused the applicants during their detention.

16. The Chamber deliberated on the admissibility and merits of the cases on 7 June 1999, 12 October 2001, 9 January 2002 and 6 March 2002. Also on 6 March 2002 the Chamber decided to join the applications and adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

A. Particular facts of the cases

17. On 23 September 1995 the applicants were captured by the Army of the Republic of Bosnia and Herzegovina while serving as officers in the VRS. Until 25 September 1995 the applicants were detained in the Military Prison in Zenica. They shared a room with twelve other persons. They claim that the conditions of detention were poor and that they were maltreated.

18. On 25 December 1995 the applicants were moved to the Military Investigation Unit within the Zenica Prison, where they were detained in what they claim were poor conditions.

19. On 27 January 1996, pursuant to the intervention of the International Committee of the Red Cross ("ICRC"), all persons detained together with the applicants in the Military Investigation Unit within the Zenica Prison were released, except the applicants. They allege that they were kept in detention because a certain general of the Army of the Republic of Bosnia and Herzegovina wanted to use them in a prisoner exchange for his brothers.

20. On 5 February 1996 the new governor of the Military Investigation Unit within the Zenica Prison informed the applicants that there were no more grounds for keeping them detained and moved them back to the Military Prison in Zenica where they first had been detained. The applicants allege that the conditions of their detention were very poor. They also claim that they were hidden during the visit of international representatives so that the fact of their detention would not be discovered.

21. Between 1 March and 1 April 1996 the applicants were moved to Raspotočje Mine, ostensibly to be hidden from inspections by representatives of international organisations. There the applicants were allegedly maltreated and forced to confess to certain crimes that they claim they did not commit.

22. On 1 April 1996 the applicants were returned to the Military Prison in Zenica, where they were detained until their release. From 5 February 1996 until their release, the applicants were allegedly forced to perform manual labour and subjected to humiliating treatment. They also claim that they were denied medical treatment on a number of occasions.

23. The applicants claim that they were repeatedly severely beaten in the period from 11 July 1996 to 11 November 1996 and that they suffered serious injuries as a result of the beatings. They further claim that they were handcuffed permanently during that period and were unable to leave their cell. From 5 February 1996 until the day of their release they were allegedly forced to wear the uniform of the Army of the Republic of Bosnia and Herzegovina.

24. The applicants were found by the International Police Task Force on 3 August 1997 and released the next day, on 4 August 1997.

25. At no time, it appears, have the applicants been brought before any judicial authority. The applicants were also never informed whether their detention had been ordered by any such authority, nor were they given the chance to challenge the legality of their detention.

26. According to the medical documents submitted by the applicants, the applicant N.Š. was diagnosed with post-traumatic stress disorder resulting from the time he spent in detention, including symptoms of nightmares, anxiety and depression. He further until today suffers from disabilities resulting from pain in his neck, shoulders and back. D.Š. was also diagnosed with post- traumatic stress disorder resulting from the time he spent in detention. His symptoms include difficulty sleeping and tenseness. He further until today suffers from disabilities resulting from pain in his right hand and from heart problems.

B. Relevant legislation

1. Annex 1A Agreement on the Military Aspects of the Peace Settlement to the General Framework Agreement for Peace in Bosnia and Herzegovina

27. The Dayton Peace Agreement and its Annexes came into force on 14 December 1995. Its Annex 1A regulates the military aspects of the peace agreement which include provisions on the release and transfer of prisoners of war.

28. Article 1, paragraph 1 sets out the general obligations and reads as follows:

"The Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republika Srpska (hereinafter the "Parties") have agreed as follows:

Article I: General Obligations

1. The Parties undertake to recreate as quickly as possible normal conditions of life in Bosnia and Herzegovina. They understand that this requires a major contribution on their part in which they will make strenuous efforts to cooperate with each other and with the international organizations and agencies which are assisting them on the ground. They welcome the willingness of the international community to send to the region, for a period of approximately one year, a force to assist in implementation of the territorial and other militarily related provisions of the agreement as described herein.
    a. The United Nations Security Council is invited to adopt a resolution by which it will authorize Member States or regional organizations and arrangements to establish a multinational military Implementation Force (hereinafter "IFOR"). The Parties understand and agree that this Implementation Force may be composed of ground, air and maritime units from NATO and non-NATO nations, deployed to Bosnia and Herzegovina to help ensure compliance with the provisions of this Agreement (hereinafter "Annex"). The Parties understand and agree that the IFOR will begin the implementation of the military aspects of this Annex upon the transfer of authority from the UNPROFOR Commander to the IFOR Commander (hereinafter "Transfer of Authority"), and that until the Transfer of Authority, UNPROFOR will continue to exercise its mandate. ..."

The Transfer of Authority from the UNPROFOR Commander to the IFOR Commander took place at the beginning of February 1996.

29. Article IX of Annex 1A to the Dayton Peace Agreement deals with the question of prisoners of war. It reads as follows:

"Prisoner Exchanges

1. The Parties shall release and transfer without delay all combatants and civilians held in relation to the conflict (hereinafter "prisoners"), in conformity with international humanitarian law and the provisions of this Article.
    a. The Parties shall be bound by and implement such plan for release and transfer of all prisoners as may be developed by the ICRC, after consultation with the Parties.
    b. The Parties shall cooperate fully with the ICRC and facilitate its work in implementing and monitoring the plan for release and transfer of prisoners.

c. No later than thirty (30) days after the Transfer of Authority, the Parties shall release and transfer all prisoners held by them.
d. In order to expedite this process, no later than twenty-one (21) days after this Annex enters into force, the Parties shall draw up comprehensive lists of prisoners and shall provide such lists to the ICRC, to the other Parties, and to the Joint Military Commission and the High Representative. These lists shall identify prisoners by nationality, name, rank (if any) and any internment or military serial number, to the extent applicable.
e. The Parties shall ensure that the ICRC enjoys full and unimpeded access to all places where prisoners are kept and to all prisoners. The Parties shall permit the ICRC to privately interview each prisoner at least forty-eight (48) hours prior to his or her release for the purpose of implementing and monitoring the plan, including determination of the onward destination of each prisoner.
f. The Parties shall take no reprisals against any prisoner or his/her family in the event that a prisoner refuses to be transferred.
g. Notwithstanding the above provisions, each Party shall comply with any order or request of the International Tribunal for the Former Yugoslavia for the arrest, detention, surrender of or access to persons who would otherwise be released and transferred under this Article, but who are accused of violations within the jurisdiction of the Tribunal. Each Party must detain persons reasonably suspected of such violations for a period of time sufficient to permit appropriate consultation with Tribunal authorities. …. "

2. Geneva Convention relative to the Treatment of Prisoners of War (Geneva Convention III)

30. The Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 regulates the treatment of prisoners of war (hereinafter "the Geneva Convention III").

31. Article 4 defines the notion of prisoners of war. In the relevant part it reads as follows:
"A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces. ..."

32. Part II of the Geneva Convention III sets out the general rules for the protection of prisoners of war.

33. Article 12 states:
"Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them… ."

34. Article 13 states as a basic rule, that is then explained in more detail further on in the Convention:
"Prisoners of war must at all times be humanely treated."

35. Articles 118 and 119 regulate the release of prisoners of war at the close of the hostilities. Article 118, paragraphs 1 and 2 read:
"Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph."

3. The Law on Criminal Procedure

36. The Law on Criminal Procedure (OG SFRY nos. 26/86, 74/87, 57/89 and 3/90 and OG RBiH nos. 2/92, 9/92, 16/92 and 13/94) governed criminal procedure in the Federation at the time of the applicants' detention. This law has been replaced by the new Law on Criminal Procedure (Official Gazette of the Federation of Bosnia and Herzegovina, no. 43/98) which entered into force on 28 November 1998. The following provisions, quoted from the old law, were taken over without substantive changes.

37. Article 542(2) provides that before submitting to the court a claim for compensation for damages as set out in Article 545, the person concerned is obliged to address his request to the administrative authority of the Republic which is competent for such legal matters.

38. Article 543(1) reads as follows:
"If a claim for compensation for damages is not accepted or no decision by the relevant organ has been made within three months since the date of making it, the person concerned may submit a complaint to the competent court for compensation for damages suffered. If an agreement has been reached concerning part of the claim, the damaged person may submit a complaint regarding the remainder of the claim."

39. Article 545, paragraph 1, subparagraph 3 reads as follows:
"The right to compensation for damage belongs also to a person who is, because of a mistake or the illegal act of an organ, deprived of his or her freedom or kept for a longer period of time under custody or in prison than would otherwise have been the case."

40. The application of the above provisions was suspended from 2 June 1992 to 23 December 1996 by the Law on Application of the Law on Criminal Procedure (OG RBiH nos. 6/92, 9/92, 13/94 and 33/95). On 23 December 1996 the above provisions returned into force.

IV. COMPLAINTS

41. In their original applications submitted to the Ombudsperson on 9 and 22 September 1997 the applicants only complain about their unlawful detention which lasted until 4 August 1997. They claim that this detention violated their right to liberty and security of person as protected by Article 5 of the Convention. The applicants further complain that they were subjected to discrimination in the enjoyment of their rights under Article 5 of the Convention since they were held in custody for the purpose of being exchanged as war prisoners, thereby being subject to discrimination.

42. In their application to the Chamber of 16 April 1999, the applicants in addition complain of a violation of their rights under Article 3 with regard to alleged inhuman treatment while in custody. Further, they complain of a violation of Article 8, right to home, as they could not live at home with their families. They further allege a violation of Article 9, freedom of thought, on the grounds that, whilst in detention, they were allowed to read Islamic literature only. The applicants also name Article 12 as they could not be with their families and Article 13 claiming that during the detention they did not have access to domestic remedies. Finally, the applicants allege a violation of Article 14 as they were subjected to discrimination on the grounds of their national origin.

V. SUBMISSIONS OF THE PARTIES

A. The respondent Party

43. With respect to admissibility, the respondent Party states that the Chamber is not competent to consider any matter regarding the release of prisoners of war, nor to consider any matters occurring prior to 14 December 1995, and that the Chamber would have to do so in order to consider any portion of the

applications. In addition, the respondent Party claims that the Chamber is not competent to consider any claims brought under the Geneva Conventions. In the written observations of 5 December 1999 the respondent Party notes that criminal proceedings had been initiated in August 1999 against two of the soldiers accused of abusing the applicants, and that the applicants had failed to cooperate with that investigation or to assist in the prosecution, which could include a compensation claim, thereby failing to exhaust domestic remedies.

44. With respect to the merits, the respondent Party states that no proof of any violations was provided.

B. The applicants

45. The applicants maintain their complaints.

VI. OPINION OF THE CHAMBER

A. Admissibility

46. Before considering the merits of the applications the Chamber must decide whether they are admissible, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement.

1. Regarding the events before 14 December 1995

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

48. The respondent Party argues that the Chamber is not competent to deal with the applications *rationae temporis* as the applicants were taken as prisoners of war already on 23 September 1995. All further alleged violations would only be a consequence of this act.

49. The Chamber finds that the arrest of the applicants on 23 September 1995 relates to a period prior to 14 December 1995, the date on which the Agreement entered into force. The Chamber also notes, however, that the detention of the applicants lasted on until 4 August 1997, a time subsequent to the entry into force of the Agreement. This detention constitutes an ongoing interference with the applicants' rights to personal liberty.

50. It follows that the applications, in so far as they concern the arrest and the detention until 14 December 1995, are incompatible *ratione temporis* with the provisions of the Agreement, within the meaning of Article VIII(2)(c). The Chamber therefore decides to declare this part of the applications inadmissible. The alleged violations in the time subsequent to the entry into force of the Agreement on 14 December 1995, however, are within the Chamber competence *ratione temporis.*

2. Regarding the respondent Party's claim that the applicant's did not exhaust domestic remedies

51. Under Article VIII(2)(a) the Chamber must consider whether effective remedies exist and whether the applicants have demonstrated that they have been exhausted.

52. The Federation claims that it was open to the applicants to seek compensation for alleged illegal detention under the Law on Criminal Procedure. The applicants deny that this remedy would have been effective in their cases and refer to the jurisprudence of the European Court of Human Rights, stating that the effectiveness of domestic remedies must be looked at in the light of the prevailing

circumstances. They claim that they had no prospect of achieving justice before the organs of the Federation.

53. In regard to the respondent Party's claim that it was open to the applicants to seek compensation for alleged illegal detention under the domestic law, it does not appear to the Chamber that the domestic provisions provide a sufficient remedy to the applicants. As the Chamber noted in case no. CH/98/1374, *Pržulj*, decision on admissibility and merits, delivered on 13 January 2000, at paragraphs 120-124, the provisions of both the old and new laws on criminal procedure do not provide a sufficient remedy in that the noted laws had no definitive provision for the award of non-pecuniary damage. In addition, in cases nos. CH/98/1027, *R.G.*, and CH/99/1842, *Matković*, decision on admissibility and merits, delivered on 9 June 2000, at paragraphs 116-118, the Chamber found the laws on criminal proceedings to be insufficient for compensation in that they do not explicitly provide for compensation for actions predating the re-instatement of the law on 23 December 1996.

54. The Chamber notes that the Federation has failed to specifically demonstrate the efficacy of these provisions. In particular, neither in the present case nor in any similar cases has the Federation provided any court decisions in which individuals claiming to have been unlawfully arrested or detained were granted compensation in a domestic court proceeding.

55. The Chamber therefore finds that the remedies apparently available to the applicants in the legal system of the Federation offered no prospect of success and therefore they cannot be required to exhaust them. The applications are therefore not inadmissible on the ground of non-exhaustion of domestic remedies.

3. Regarding all claims which were not included in the original application to the Ombudsperson of September 1997

56. In accordance with Article VIII(2) of the Agreement, "the Chamber shall decide which applications to accept ... and shall take into account the following criteria: (a) ... that the application has been filed with the Commission within six months from such date on which the final decision was taken."

57. As noted above, the applicants had no effective domestic remedy available which they could have been required to exhaust. In accordance with the well established jurisprudence of the Chamber in cases where applicants have not availed themselves of domestic remedies and the Chamber finds that they could not be required to do so, the six-months time limit starts to run from the day on which the alleged violation ended (see e.g. cases nos. CH/98/706 *et al. Šećerbegović et al.,* decision on admissibility and merits of 7 April 2000, paragraph 76, Decisions January - June 2000). In the present case the relevant date is the day when the applicants were released from their detention, 4 August 1997. Hence, the Chamber must examine whether the applicants submitted their claims within six months from the 4 August 1997, and if so, which were the claims submitted within this six months time-limit.

58. The Chamber notes that the applications were lodged with the Office of the Human Rights Ombudsperson on 9 and 22 September 1997. The applications were thus filed with the Commission within less than two months from the date relevant for the purposes of Article VIII(2)(a). However, in their application to the Ombudsperson, the applicants only complained of their unlawful detention and of discrimination in the enjoyment of the right to liberty of person under Article 14 in conjunction with Article 5 of the Convention.

59. In their applications to the Chamber of 16 April 1999, the applicants, in addition to the original complaints, allege a violation of their rights under Article 3 of the Convention. In great detail the applicants describe circumstances and events during their detention and allege inhuman treatment while in custody. In addition, the applicants state that they were only allowed to read Islamic literature, a fact, which in their opinion gives rise to a violation of Article 9 of the Convention. They further claim violations of their rights under Articles 8, 12 and 13 of the Convention.

60. The Chamber notes that the date of the applications to the Chamber, 16 April 1999, is more than one year after the expiry of the six months period. The Chamber hence finds that all claims which were not part of the original applications of September 1997 but only introduced in 1999 are inadmissible in accordance with Article VIII(2)(a) of the Agreement.

d) Conclusion

61. The Chamber concludes that the applications are admissible in regard to the claim of a violation of Article 5 stemming from the detention after 14 December 1995. The applications are further admissible in regard to the claim that the applicants were subject to discrimination in the enjoyment of their rights as protected under Article 5 of the Convention in violation of Article II(2)(b) of the Agreement. The Chamber decides that the remainder of the applications is inadmissible.

B. Merits

62. Under Article XI of the Agreement the Chamber must next address the question whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement.

63. Under Article II of the Agreement the Chamber has competence to consider (a) alleged or apparent violations of human rights as provided in the Convention and its Protocols and (b) alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the 16 international agreements listed in the appendix (including the Convention), where such a violation is alleged or appears to have been committed by the Parties, Cantons or Municipalities or any individual acting under the authority of such an official or organ.

1. Article 5 of the Convention: lawfulness of the applicants' detention

64. The applicants complain that they were unlawfully detained until 4 August 1997 for the mere purpose to exchange them against some other prisoners of war. Article 5, paragraph 1 of the Convention provides as follows:

> "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 obligations prescribed by law;
> (c) the lawful arrest or any 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 purposes 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 disease, 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. …."

65. Article 15 of the Convention sets out the requirements for a derogation from the obligation not to violate the rights contained in the Convention in times of war and public emergency. In the relevant part it reads as follows:

> "1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. ..."

66. As discussed above, it is beyond the competence of the Chamber *rationae temporis* to assess whether the applicants' arrest on 23 September 1995 by members of the Army of the Republic of Bosnia and Herzegovina was lawful. However, the Chamber is competent to assess whether the detention of the applicants in the time period after 14 December 1995 until their release on 4 August 1997 was in accordance with the Agreement.

67. In its written observations of 17 August 1999, the respondent Party explicitly states that the applicants were detained solely as prisoners of war in the sense of the Geneva Convention III and that the deprivation of liberty and the detention of the applicants were not based on any criminal charges. The respondent Party claims that in the immediate post-war period it cannot be held responsible for the detention of the applicants. To support its claim that it had no responsibility, the respondent Party mentions that the Law on Defence of the Federation of Bosnia and Herzegovina (OG FBiH no. 15/96), in which the armed forces were integrated and a state army was created, only entered into force on 27 August 1996. The respondent Party further claims that the question of the release and exchange of prisoners of war is exclusively regulated in Annex 1 A to the Dayton Agreement. It concludes that this regulation leaves no room for the Chamber to consider the case under the Articles of the Convention.

68. The Chamber notes that Article 5 of the Convention does not provide for deprivation of liberty as a consequence of prisoner of war status. At the same time, the Chamber observes that the detention of prisoners of war in accordance with the applicable international and domestic law cannot be said to be unlawful. Accordingly, the Chamber agrees with the respondent Party that the legality of the applicants' detention in the time from 14 December 1995 until 4 August 1997 must be assessed in the light of Article IX of Annex 1A to the Dayton Peace Agreement, which regulates questions regarding prisoners of war. However, the Chamber does not agree that as a consequence it cannot consider the case as a whole. The regulations provided for in Annex 1A of the Dayton Peace Agreement and the mandate of the Chamber set out in the Agreement are complementary elements, both containing the aim to recreate as quickly as possible normal conditions of life in Bosnia and Herzegovina.

69. The Chamber finds that the detention of the applicants as prisoners of war in itself is not a violation of Article 5 of the Convention. In this context, the Chamber notes that Article 15 of the Convention recognises the concept of derogation from the obligations under the Convention in a time of war or other public emergency. The existence of Article IX of Annex 1A to the Dayton Peace Agreement also recognises that in the first days after the end of the war people would still be held prisoners of war by all the formerly conflicting parties. Thus, on 14 December 1995 and in the immediate time thereafter, the detention of the applicants was lawful. The respondent Party was obliged to treat the applicants in accordance with their status as prisoners of war regulated by the Geneva Convention III, including the obligation to release them without delay after the cessation of active hostilities, an obligation that is further regulated in the present cases by Article IX of Annex 1A of the Dayton Peace Agreement.

70. The Chamber notes that the detention of the applicants did not end immediately after the the Dayton Peace Agreement came into force but lasted until August 1997. The applicants stayed in detaintion in January 1996 when all the fellow prisoners of war in the Zenica Military Prison were released.

71. The Chamber recalls that Article IX of Annex 1A to the Dayton Peace Agreement provides that the respondent Party was obliged to "release and transfer without delay all combatants and civilians held in relation to the conflict". The Article further sets a time-limit of not later than thirty (30) days after the

Transfer of Authority (as defined in Article I, paragraph 1a of Annex 1A, see paragraph 28 above) for the release and transfer of all prisoners. In addition, with the intention to "expedite this process, no later than twenty-one (21) days after this Annex enters into force, the Parties shall draw up comprehensive lists of prisoners and shall provide such lists to the ICRC, to the other Parties, and to the Joint Military Commission and the High Representative. These lists shall identify prisoners by nationality, name, rank (if any) and any internment or military serial number, to the extent applicable."

72. The Chamber notes that Annex 1A to the Dayton Peace Agreement came into force on 14 December 1995 and that the Transfer of Authority took place at the beginning of February 1996. The Chamber notes further that the applicants were not listed on any comprehensive list of prisoners of war. On the contrary, the applicants were deliberately hidden from representatives of international organisations on several occasions, allegedly because a certain general of the BiH Army wanted to exchange them for his brothers. As a result, as already noted in paragraph 71 above, the applicants stayed in detention when all their fellow prisoners of war were released on 27 January 1996 upon an intervention made by the ICRC.

73. The Chamber finds that, with the expiry of the time-limits set out in Article IX of Annex 1A to the Dayton Peace Agreement, Article 15 of the Convention is no longer applicable and that therefore the respondent Party had to comply with all obligations of the Convention set out in Article 5 of the Convention. The Chamber notes that no justification listed in Article 5, paragraph 1, which allows for a deprivation of liberty applies in the applicants' cases. The detention of the applicants was no longer legally justified. Hence, the Chamber concludes that the continuing detention of the applicants from the first days of March 1996 until 4 August 1997 constituted a violation of their rights under Article 5 of the Convention.

2. Discrimination of the applicants on grounds of their Serb origin

74. The applicants complain that they were discriminated against in the enjoyment of their right to liberty of person on grounds of their Serb origin. In the Ombudsperson's decision of 19 November 1997 to open an investigation in the applicants' cases, the Ombudsperson notes in this respect "that the nature of the exchange of prisoners of war must *de facto* be discriminatory, as the value of a prisoner of war is the very fact that he or she belongs to a specific category, that is the ‚perceived enemy'."

75. The Chamber recalls Article II(2)(b) of the Agreement, which states that the Chamber shall consider:

> "alleged or apparent discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status arising in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to this [Agreement] …."

76. The Chamber finds that the cases of the applicants primarily raise issues under Article 5 of the Convention. It considers that, in light of the findings it has made in respect of that Article, it is not necessary for it to examine the applicants' complaint of discrimination in the enjoyment of their right to liberty of person.

VII. REMEDIES

77. Under Article XI(1)(b) of the Agreement, the Chamber must address the question of what steps shall be taken by the respondent Party to remedy breaches of the Agreement which it has found, including orders to cease and desist, and monetary relief.

78. The applicant D.Š.'s compensation claim is as follows:
85.000 German Marks ("DEM") for mental pain suffered by the applicant;
75.000 DEM for fear suffered by the applicant;
20.000 DEM for mental pain suffered by his wife;
15.000 DEM for mental pain suffered by his son;
20.000 DEM for mental pain suffered by his father;
20.000 DEM for mental pain suffered by his brother;
15.000 DEM for mental pain suffered by his adoptied daughter.

79. The applicant N.Š.'s compensation claim is as follows:
85.000 DEM for mental pain suffered by the applicant;
75.000 DEM for fear suffered by the applicant;
20.000 DEM for mental pain suffered by his mother;
20.000 DEM for mental pain suffered by his sister.

80. The respondent Party submits that the applicants' compensation claims are ill-founded and that hence no compensation should be granted. The respondent Party expresses the opinion that the relatives of the applicants are not entitled to compensation. The respondent Party also claims that it was the risk of the applicants to be held as prisoners of war that falls within the applicants' responsibility and that the applicants should address the military unit of which they were members for compensation instead of the respondent Party.

81. Where it has found a breach of the Agreement, the steps which the Chamber may order the respondent Party to take include measures which will remove, alleviate or prevent damage to the applicant, as well as payment of compensation. Compensation may be awarded in particular in respect of pecuniary or non-pecuniary (moral) damage and may include costs and expenses incurred by the applicant in order to prevent the breach found or to obtain redress therefor. The Chamber may also address to the respondent Party orders to cease or desist, that is orders to discontinue, or refrain from taking, specific action.

82. The Chamber notes that it has established that the applicants have suffered a violation of their rights as protected by Article 5 paragraph 1 of the Convention. This violation is of a very serious nature, taking into consideration that their unlawful detention lasted for more than one and a half years. It is therefore appropriate to award the applicants a substantial amount of compensation for the non-pecuniary damages they suffered as a result of their detention.

83. In the *Hermas* case (case no. CH/97/45, *Hermas,* decision on admissibility and merits of 18 February 1998, paragraphs 112-121, Decisions and Reports 1998), the Chamber awarded the applicant DEM 18,000 for both pecuniary and non-pecuniary injury. In that case, the Chamber found violations of the applicant's rights as guaranteed by Articles 3, 4 and 5 of the Convention and discrimination in the enjoyment of those rights. The applicant Hermas had been held in illegal detention for almost 2 months, in which period he was mistreated. In the cases of R.G. and Predrag Matković (cases nos. CH/98/1027 and CH/99/1842, *R.G. and Matković,* decision on admissibility and merits of 9 June 2000, paragraphs 163-168, Decisions January-June 2000) the Chamber found a violation of Article 3, Article 5 and discrimination in respect to the enjoyment of those rights. Taking into account the severity of the treatment suffered by R.G., especially the fact that he suffered extremely painful injuries as a result of being shot and was tortured, the Chamber considered it appropriate to award him the sum of 25,000 Convertible Marks (*Konvertibilnih Maraka*, "KM"). The Chamber awarded Mr. Matković KM 10,000 for moral damage. The applicants in these cases had been held in illegal detention for almost six months.

84. In the present cases the Chamber has only found a violation of Article 5, as the other claims, including the claim under Article 3, were inadmissible. The Chamber notes, however, that the applicants were held in illegal detention for an extensive period, from March 1996 until 4 August 1997, thereby suffering very serious violations of their human right to liberty and security of person. Taking into account its jurisprudence, the Chamber considers it appropriate to award each applicant the sum of 25,000 KM

for non-pecuniary damage. This amount is to be paid within one month of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure.

85. The Chamber further awards simple interest at an annual rate of 10% as of the date of expiry of the one-month period set in paragraph 84 for the implementation of the present decision or any unpaid portion thereof until the date of settlement in full.

86. With respect to the applicants' request for compensation of non-pecuniary damage for the suffering of their relatives, the Chamber notes that a possible violation of the rights of the applicants' relatives was not addressed in the applications and thus was not the subject of the Chamber's consideration. Hence, in accordance with Article XI, paragraph 1 of the Agreement, the Chamber does not find it appropriate to order compensation in regard to the mental suffering of the applicants' relatives.

VIII. CONCLUSIONS

87. For the above reasons, the Chamber decides,

1. unanimously, to declare the applications admissible in relation to the complaints under Article 5 of the European Convention on Human Rights and discrimination in the enjoyment of the applicants' rights as protected by Article 5 of the Convention in conjunction with Article II(2)(b) of the Human Rights Agreement;

2. unanimously, to declare the remainder of the applications inadmissible;

3. unanimously, that the detention of the applicants from the beginning of March 1996 to 4 August 1997 constituted a violation of their right to liberty and security of person as guaranteed by Article 5 paragraph 1 of the Convention, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

4. unanimously, that it is not necessary to examine whether the applicants have been discriminated against in the enjoyment of their rights as guaranteed by Article 5 of the Convention;

5. by six votes to one, to order the Federation of Bosnia and Herzegovina to pay to each applicant, within one month of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, the sum of KM 25,000 (twenty five thousand Convertible Marks) by way of compensation for non-pecuniary damage;

6. by six votes to one, that simple interest at an annual rate of 10 % (ten per cent) will be payable on the sum awarded in conclusion 5 above from the expiry of the one-month period set for such payment until the date of final settlement of all sums due to the applicants under this decision; and

7. unanimously, to order the Federation of Bosnia and Herzegovina to report to it within one month of the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure on the steps taken by it to comply with the above orders.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the First Panel