DECISION ON ADMISSIBILITY AND MERITS

Case no. CH/99/1713

Spomenka Vanovac

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, sitting in plenary session on 5 November 2004 with the following members present:

Mr. Jakob MÖLLER, President
Mr. Miodrag PAJIĆ, Vice-President
Mr. Želimir JUKA
Mr. Mehmed DEKOVIĆ
Mr. Andrew GROTRIAN

Mr. J. David YEAGER, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Meagan HRLE, Deputy Registrar

Having considered the aforementioned application introduced to the Human Rights Chamber for Bosnia and Herzegovina 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;

Noting that the Human Rights Chamber for Bosnia and Herzegovina ("the Chamber") ceased to exist on 31 December 2003 and that the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina ("the Commission") has been mandated under the Agreement Pursuant to Article XIV of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina entered into on 22 and 25 September 2003 ("the 2003 Agreement") to decide on cases received by the Chamber through 31 December 2003;

Adopts the following decision pursuant to Articles VIII(2) and XI of the Agreement, Articles 5 and 9 of the 2003 Agreement and Rules 50, 54, 56, and 57 of the Commission's Rules of Procedure:

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina of Serb origin. She was employed by the public company PTT (“PTT”) at the Post Office at Dolac Malta in Sarajevo before the outbreak of the armed conflict. After the end of the armed conflict she reported to the company for work, but she received a decision terminating her employment as of 23 May 1992 because she had been absent without leave for more than five consecutive days. She filed an objection to the Company's Steering Board against the procedural decision, but the Steering Board confirmed the original decision terminating her employment on 19 October 1996. The applicant initiated court proceedings. The second instance court (Cantonal Court in Sarajevo) referred the case back to the first instance court. In the repeated court proceedings before the Municipal Court in Sarajevo the proceedings were suspended and her case was transmitted to the Cantonal Commission for the Implementation of Article 143 of the Law on Labor ("the Cantonal Commission"). The case was later referred back to the first instance court, following a conclusion of the Cantonal Commission.

2. The case raises issues with regard to discrimination in the enjoyment of the right to work and related rights as guaranteed by Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”). The application also raises issues under Article 6 of the European Convention on Human Rights (“the Convention”).

II. PROCEEDINGS BEFORE THE CHAMBER AND THE COMMISSION

3. The application was introduced on 11 March 1999 and registered on 12 March 1999. The applicant is represented by Mrs. Senija Poropat, a lawyer practicing in Sarajevo.

4. On 27 April 2001 the applicant's authorized representative provided information concerning further developments related to the application and on 22 July 2002 she provided further information.

5. On 10 September 2002 the Chamber informed the applicant's authorized representative about its decision to organize the proceedings. On the same day the application was transmitted to the respondent Party for its observations.

6. On 11 November 2002 the Chamber received the written observations of the respondent Party.

7. On 20 November 2002 the Chamber forwarded the respondent Party's observations on the admissibility and merits to the applicant's authorized representative for comments.

8. On 24 April 2003 the Chamber received supplemental observations from the respondent Party. These supplemental observations were transmitted to the applicant's authorized representative, who responded by sending her additional observations to the Chamber on 14 May 2003.

9. On 27 May 2003, the Chamber transmitted the response of the applicant's authorized representative to the respondent Party.

10. The respondent Party submitted additional information to the Commission on 5 January 2004.

11. The Commission forwarded the additional information to the applicant's authorized representative on 9 January 2004.

12. On 19 January 2004 the Commission received additional written observations from the applicant's authorized representative, which were transmitted to the respondent Party for its information and possible comments on 21 January 2004. On 22 July 2004 and 15 September 2004, the respondent Party submitted additional information to the Commission.

III. FACTUAL BACKGROUND

13. The facts as summarized bellow are based on the application form and the attached documents.

14. The applicant is of Serb origin.

15. Before the outburst of the armed conflict, the applicant was employed with PTT and worked at the Post Office at Dolac Malta in Sarajevo. During the armed conflict she could not report for work, because her home and her place of work were located in the areas under control of opposite sides in this conflict. After the end of the armed conflict she reported for work, on which occasion (4 September 1996) she received a decision terminating her employment as of 23 May 1992 because she had been absent without leave for more than five consecutive days. She filed an objection to the Company's Steering Board against the procedural decision, but the Steering Board confirmed the original decision terminating her employment on 19 October 1996.

16. On 30 October 1996 the applicant initiated proceedings before the Municipal Court II in Sarajevo requesting the annulment of the procedural decision terminating her employment. On 9 December 1997, the Court issued the judgment refusing the applicant's statement of claim. On 4 May 1998, the applicant appealed against this judgment the Cantonal Court in Sarajevo. At the time she applied to the Chamber, the proceedings upon her appeal were still pending.

17. The applicant applied to the Human Rights Ombudsperson for Bosnia and Herzegovina ("Ombudsman"). On 29 April 1998 the Ombudsman decided not to open an investigation because the court proceedings were still pending.

18. On 25 February 1999 the Cantonal Court in Sarajevo issued a procedural decision quashing the judgment of the first instance court and returning the case for renewed proceedings because of incomplete factual background. During the course of renewed proceedings before the Municipal Court II in Sarajevo, the applicant amended her statement of claim, giving up her request to be reinstated into her work because in the meantime (as of 1 December 1998) she found employment with another employer. However, the applicant maintained her claim for the court to annul the procedural decision terminating her employment and to order the Company to pay her contributions for the pension and disability fund, to have her years of service recognized for the period 1 January 1992 through 1 December 1998, and to be compensated for damages and for legal costs and expenses.

19. On 18 June 2002 the Municipal Court II in Sarajevo suspended the court proceedings and referred the case to the Cantonal Commission for Implementation of Article 143 of the Labor Law.

20. On 15 July 2002 the applicant appealed to the Cantonal Court in Sarajevo against the procedural decision of the Municipal Court. On 12 March 2003 the Cantonal Court dismissed the applicant's appeal and upheld the procedural decision of the Municipal Court II, suspending the court proceedings and referring the case to the Cantonal Commission for Implementation of Article 143 of the Labor Law.

21. The Cantonal Commission, by its conclusion no. 13-04-34-Ž-14018/04 of 19 May 2004, dismissed the applicant's appeal, stating that it was not competent, and it returned the case file to the Municipal Court II in Sarajevo to deal with it on the merits and to issue its decision in the labour dispute. The proceedings are still pending.

IV. RELEVANT LEGAL PROVISIONS

A. The Law on Fundamental Rights in Labor Relations

22. The Law on Fundamental Rights in Labor Relations of the Socialist Federal Republic of Yugoslavia ("SFRY") (Official Gazette of SFRY, nos. 60/89 and 42/90) was taken over as a law of the Republic of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RBiH" - no. 2/92). Article 23 paragraph 2 of the Law provides that:

> "A written decision on the realization of a worker's individual rights, obligations and responsibilities shall be delivered to the worker obligatorily."

Article 75 of the Law provides for the termination of a working relationship. Paragraph 2(3) of that Article reads as follows:

> "The working relationship ends without the consent of the employee, … if he or she stayed away from work for five consecutive days without good cause."

B. The Law on Labor Relations

23. The Decree with Force of Law on Labor Relations during the State of War or Immediate Threat of War (OG RBiH no. 21/92 of 23 November 1992) entered into force on the day of its publication. It was later confirmed by the Assembly of the Republic (OG RBiH no. 13/94 of 9 June 1994) and applied as the Law on Labor Relations. It remained in force until 5 November 1999. The Law contained the following relevant provisions:

> Article 10
>
> "An employee can be sent on unpaid leave due to his or her inability to come to work in the following cases:
>
> > If he or she lives or if his or her working place is on occupied territory or on territory where fighting is taking place.
>
> …
>
> "Unpaid leave can last until the termination of the circumstances mentioned above, if the employee demonstrates, within 15 days after the termination of these circumstances, that he or she was not able to come to work earlier. During the unpaid leave all rights and obligations of the employee under the employment are suspended."
>
> Article 15
>
> "The employment is terminated, if, while under a compulsory work order, the employee stayed away from work for more than 20 consecutive working days without good cause, or if he or she took the side of the aggressor against the Republic of Bosnia and Herzegovina."

C. The Law on Labor

24. The Law on Labor (OG FBiH 43/99) entered into force on 5 November 1999. The Law was amended by the Law on Amendments to the Law on Labor (OG FBiH 32/00) with the particular effect that certain new provisions, including Articles 143a, 143b, and 143c, were added and entered into force on 7 September 2000.

25. Article 5 of the Law on Labor provides that:

> "(1) A person seeking employment, as well as a person who becomes employed, shall not be discriminated against based on race, colour, sex, language, religion, political or other opinion, ethnic or social origin, financial situation, birth or any other circumstance, membership or non-membership in a political party, membership or non-membership in a trade union, and physical or mental impairment in respect of recruitment, training, promotion, terms and conditions of employment, cancellation of the labor contract or other issues arising out of labor relations.
>
> "(2) Paragraph 1 of this Article shall not exclude the following differences:
>
> > 1. which are made in good faith based upon requirements of particular a job;

2. which are made in good faith based on incapability of a person to perform tasks required for a particular job or to undertake training required, provided that the employer or person securing professional training has made reasonable efforts to adjust the job or the training which such person is on, or to provide suitable alternative employment or training, if possible;

3. activities that have as an objective the improvement of the position of persons who are in unfavorable economic, social, educational or physical position.

"(3) In the case of breach of paragraphs 1 and 2 of this Article:

1. Persons whose rights are violated may submit a complaint before the competent court in relation to the infringement of their rights;

2. If the complainant presents obvious evidence of discrimination prohibited by this Article, the defendant is obliged to present evidence that such differential treatment was not made on discriminatory grounds;

3. If the court finds the complaint to be well-founded, it shall make such order as it deems necessary to ensure compliance with this article, including an order for employment, reinstatement, or the provision or restoration of any right arising from the contract of employment."

26. Article 143 of the Law on Labor provides that:

"(1) An employee who is on the waiting list on the effective date of this law shall retain that status no longer than six months from the effective date of this law (5 May 2000), unless the employer invites the employee to work before the expiry of this deadline.

"(2) An employee who was employed on 31 December 1991 and who, within three months from the effective date of this law (5 February 2000), addressed in written form or directly the employer for the purpose of establishing the legal and working status – and had not accepted employment from another employer during this period, shall also be considered an employee on the waiting list.

"(3) While on the waiting list, the employee shall be entitled to compensation in the amount specified by the employer.

"(4) If a waiting list employee referred to in paragraphs 1 and 2 of this Article is not requested to return to work within the deadline referred to in paragraph 1 of this Article, his or her employment shall be terminated with a right to severance pay which shall be established according to the average monthly salary paid at the level of the Federation on the date of entry of this Law into force, as published by the Federal Statistics Institute.

"(5) The severance pay referred to in paragraph 4 of this Article shall be paid to the employee for the total length of service (experience) and shall be established on the basis of average salary referred to in paragraph 4 of this Article multiplied with the following coefficients:

Experience	Coefficient
- up to 5 years	1.33
- 5 to 10 years	2.00
- 10 to 20 years	2.66
- more than 20 years	3.00."

…

(8) If the employee's employment is terminated in terms of paragraph 4 of this Article, the employer may not employ another employee with the same qualifications or educational background within one year except the person referred to in Paragraphs 1 and 2 of this Article if that person is unemployed."

27. Article 145 of the Law on Labor provides that:

> "Proceedings to exercise and protect the rights of employees, which were instituted before this law has come into effect, shall be completed according to the regulations applicable on the territory of the Federation before the effective date of this law, if this is more favorable for the employees."

D. The Law on Amendments to the Law on Labor

28. In the Law on Amendments to the Law on Labor, a new Article 143a was added to the Law on Labor as follows:

> "(1) An employee believing that his employer violated a right of his arising from paragraph 1 and 2 of Article 143, may within 90 days from the entry into force of the Law on Amendments to Labor Law, introduce a claim to the Cantonal Commission for Implementation of Article 143 of the Law on Labor (hereinafter the "Cantonal Commission"), established by the Cantonal Minister competent for Labor Affairs (hereinafter the "Cantonal Minister").
>
> "(2) The Federal Commission for Implementation of Article 143 (hereinafter the "Federal Commission"), which is established by the Federal Minister, shall decide on the complaints against the procedural decisions of the Cantonal Commission.
>
> "(3) In the case when the Cantonal Commission is not performing tasks for which it is established, the Federal Commission shall overtake the jurisdiction of the Cantonal Commission.
>
> "(4) If a procedure pertaining to the rights of the employee under paragraph 1 and 2 of the Article 143 has been instituted before a Court, this Court shall refer the case to the Cantonal Commission, and issue a decision on suspension of procedure."

29. In the Law on Amendments to the Law on Labor, a new Article 143b was added to the Law on Labor as follows:

> "(1) Members of the Federal/Cantonal Commission shall be appointed by the Federal/ Cantonal Minister on the basis of their professional experience and demonstrated ability for performance of their function.
>
> (2) Members of the Commission have to be independent and objective and may not be elected officials or have any political mandate.
>
> (3) The Federal Ministry or competent organ of the Canton shall bear the expenses of the Federal/Cantonal Commission."

30. In the Law on Amendments to the Law on Labor, a new Article 143c was added to the Law on Labor as follows:

> "The Federal/Cantonal Commission may:
>
> 1. hear the employee, employer, and their representatives;
>
> 2. summon witnesses and experts;
>
> 3. request appropriate authority organs and employers to submit all relevant information.
>
> "Decisions of the Federal/Cantonal Commission shall be:
>
> 1. final and subject to the court's review in accordance with the law;
>
> 2. legally based;

3. transmitted to the applicant within 7 days."

31. The Law on Amendments to the Labor Law further added the following Articles 52, 53, and 54:

Article 52

"This Law shall not affect contracts and payments done between an employer and his employee in the application of Article 143 of the Law on Labor prior to the date of entry into force of this Law (i.e. 7 September 2000).

Article 53

"This Law shall not affect final decisions issued by the Court in the period prior to the entry into force of this Law (7 September 2000) in the application of Article 143 of the Law on Labor.

Article 54

"Procedures of realization and protection of employees' rights initiated prior to the entry into force of this Law shall be completed according to the regulations applicable on the territory of the Federation prior to the entry into force of this Law (7 September 2000), if it is more favorable to the employee, with the exception of Article 143 of the Law on Labor."

32. The Supreme Court of the Federation of Bosnia and Herzegovina, in its decision no. U-388/01, delivered on 12 December 2001, held that the decisions of the Cantonal Commission and Federal Commission do not have the legal nature of administrative acts. In its opinion, the Supreme Court stated that the Commissions are not organs that conduct proceedings under the laws regarding administrative proceedings, but they are *sui generis* bodies unique to the field of labour relations. Therefore, their final decisions are not subject to judicial review under regular administrative dispute procedures, which are limited to review of administrative acts. Extra-judicial remedies cannot be filed against the Commissions' decisions because they can only be filed against effective judicial decisions. Commission decisions should, however, be subject to review by competent regular courts subject to the laws on civil procedure.

E. The Law on Civil Procedure

33. Article 426 of the Law on Civil Procedure (OG FBiH no. 42/98) stipulates that, in proceedings concerning labour relations, the court shall generally have regard to the urgency of such matters, especially in scheduling hearings and setting time limits.

V. COMPLAINTS

34. The applicant alleges a violation of her right to a fair hearing under Article 6 of the Convention as well as of the breach of the prohibited discrimination.

35. Also, in the opinion of the Commission, the application raises issues under Article 6 of the Convention, the issue of discrimination in the enjoyment of the right to work and related rights as guaranteed under Articles 6 and 7 of the ICESCR and Article 26 of the International Covenant on Civil and Political Rights ("ICCPR").

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. As to the facts

36. In its observations, the respondent Party contests the applicant's allegations that she was prevented during the period concerned from reporting to work (after 30 April 1992), and that she

actually reported to work within 15 days after the integration of Grbavica into the Federation of Bosnia and Herzegovina. As for the remaining part, the respondent Party did not contest the facts as stated by the applicant.

2. As to the admissibility

37. The respondent Party first asserts a lack of competence in the Commission *ratione temporis* in relation to the issues raised in the application for the events that occurred before the Agreement entered into force.

38. The Federation further argues in its observations dated 11 November 2002 that the applicant did not exhaust domestic remedies because, at the time these observations were submitted, the applicant's case was not before the Cantonal Commission for the Implementation of Article 143 of the Law on Labor.

39. As to the applicant's allegations of violations of her rights guaranteed by Article 6 of the Convention, the respondent Party is of the opinion that this article has not been violated, and proposes that this part of the application be declared inadmissible as manifestly ill-founded.

3. As to the merits

40. In respect of Article 6 of the Convention, the respondent Party points out that the courts of the respondent Party, having acted in accordance with valid legal regulations, have decided within a reasonable time upon the applicant’s requests and issued appropriate decisions in compliance with the "urgency" of this labour dispute.

41. As for discrimination in relation to articles 6 and 7 of the ICESCR, the respondent Party considers that the applicant has not been discriminated against and that its actions and the aforementioned decisions were issued in accordance with the relevant legislation, and that the applicant was not treated differentially because of her ethnic origin.

B. The applicant

42. The applicant asserts that the court proceedings initiated on 30 October 1996 have been delayed with no end in sight and that all the decisions issued up until now have been unlawful and discriminatory. In addition, the applicant considers that her case should not have been dealt with under Article 143 of the Law on Labor.

VII. OPINION OF THE COMMISSION

43. The Commission recalls that the application was introduced to the Human Rights Chamber under the Agreement. As the Chamber had not decided the application by 31 December 2003, in accordance with Article 5 of the 2003 Agreement, the Commission is now competent to decide on the application. In doing so, the Commission shall apply the admissibility requirements set forth in Article VIII(2) of the Agreement. Moreover, the Commission notes that the Rules of Procedure governing its proceedings do not differ, insofar as relevant for the applicant’s case, from those of the Chamber, except for the composition of the Commission.

44. In accordance with Article VIII(2) of the Agreement, “the [Commission] shall decide which applications to accept […]. In so doing, the [Commission] shall take into account the following criteria: (a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted […]” and “(c) The [Commission] shall also dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded, or an abuse of the right of petition.”

A. Admissibility

1. Competence *ratione temporis*

45. The Commission will next address the question of to what extent it is competent *ratione temporis* to consider this case, bearing in mind that the respondent Party objects, as to the

admissibility, that the issues raised in the application are outside the competence *ratione temporis* of the Commission.

46. The Commission notes that some of the alleged violations occurred before the entry into force of the Agreement on 14 December 1995. In accordance with generally accepted principles of international law, the Agreement cannot be applied retroactively. It is thus outside the competence of the Commission *ratione temporis* to decide whether events occurring before the entry into force of the Agreement gave rise to violations of human rights (*see, e.g.*, *Matanović v. The Republika Srpska,* case no. CH/96/1, decision on the admissibility of 13 September 1996, Decisions 1996-1997).

47. Evidence relating to such events may, however, be relevant as a background to events occurring after the Agreement entered into force (*see, e.g.*, *Eraković v. The Federation of Bosnia and Herzegovina*, case no. CH/97/42, decision of 15 January 1999, paragraph 37). Moreover, in so far as an applicant alleges a continuing violation of her rights after 14 December 1995, the case will fall within the Commission's competence *ratione temporis* (*see Bastijanović* v. *Bosnia and Herzegovina and The Federation of Bosnia and Herzegovina*, case no. CH/96/8, decision of 4 February 1997, Decisions 1996-97).

48. Although the respondent Party apparently considers the applicant's employment to have been effectively terminated on 23 May 1992, it concedes that this occurred by retroactive application of the decision of the PTT Steering Board taken on 17 October 1996, at which time the Chamber had jurisdiction. The applicant initiated court proceedings against the termination of his employment, and these proceedings have not been concluded yet. Accordingly, all acts complained of fell within the Chamber's competence *ratione temporis*.

49. The Commission is also competent to examine the fact that the applicants' salaries and related contributions have not been paid after 14 December 1995.

50. The Commission is also competent *ratione temporis* to examine any omissions on the part of authorities for which the Federation is responsible under the Agreement, in so far as such omissions occurred or continued after 14 December 1995.

2. Requirement to exhaust effective domestic remedies

51. The Commission must next consider whether, for the purpose of Article VIII(2)(a) of the Agreement, any "effective remedy" was available to the applicant in respect of her complaints and, if so, whether she has demonstrated that it has been exhausted. It is incumbent on a respondent Party arguing non-exhaustion to show that there was a remedy available to the applicant other than her application based on the Agreement and to satisfy the Commission that the remedy was an effective one.

52. The respondent Party asserts that the applicant has available domestic remedies and that they have not been exhausted since the proceedings to settle the working-legal status of the applicant are pending before the competent court. The respondent Party alleges that the applicant will have a possibility of further court review if she is not satisfied with the way this dispute is settled. In addition, the respondent Party considers that the mere doubt as to a successful outcome does not exonerate the applicant from the requirement to exhaust domestic remedies.

53. In the present case, the applicant asserts that the proceedings at issue are in contravention of article 6 of the Convention, since they have been pending ever since 1996 and she has no prospect of a final and binding conclusion. In that regard, the applicant requested the protection of her rights as guaranteed, *inter alia*, by the Convention because of her inability to obtain a final and binding court decision concerning her civil rights within reasonable time.

54. The Commission points out that under Article I of the Agreement, the Parties are obliged to "secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms". The Commission, in pursuance of the case law of the European Court of Human Rights regarding the principle of exhaustion of domestic remedies, also points out that in applying the rule contained in Article VIII(2)(a) of the Agreement, the Commission must act with a certain degree of flexibility and without excessive formalism (*see* European Court of Human

Rights judgment, *Cardot v. France,* of 19 March 1991, Series A, no. 200, paragraph 34). Furthermore, the Commission points out that the rule on exhaustion of domestic remedies, available under the law of the State, is not an absolute one and it may not be applied automatically. When examining whether the aforementioned principle has been complied with, it is essential to take into account the specific circumstances of each individual case (see European Court judgment *Van Oosterwijck v. Belgium,* of 6 November 1980, Series A, no. 40, paragraph 35). This means, *inter alia*, that there should be realistically taken into account not only the existence of formal remedies in a legal system, but also the overall legal and political context as well as the personal circumstances of appellant.

55. As already pointed out, under Article I of the Agreement, the Parties are obliged to “secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms”, including the rights and freedoms provided for by the Convention and the other international agreements listed in the Appendix to the Agreement. The Commission notes that Article 6 of the Convention not only places a positive obligation upon States to organize their legal systems in such manner as to enable persons to have fair proceedings in determining their civil rights and obligations but also to guarantee the "reasonable time“ of those proceedings. Any flaws in the organization of the judicial system of an entity or a state, must not affect respect for individual rights and freedoms provided for by, *inter alia*, the Convention and its Article 6, neither should they be attributed to any individual (*see* Constitutional Court of Bosnia and Herzegovina decision, no. U 15/03, of 28 November 2003, Official Gazette of Bosnia and Herzegovina, no. 8/04, paragraph 26).

56. Considering the abovementioned circumstances, the Commission notes that in Bosnia and Herzegovina, and in the present case in the Federation, there exists no remedy that would enable the applicant to complain of the excessive length of proceedings (compare *mutatis mutandis*, *Tomé Mota v. Portugal*, application no. 32082/96, ECHR 1999-IX), and it considers that the applicant was correct when she felt that no other remedy would have been effective in respect of her complaint. The respondent Party's allegations pertaining to the existence of a remedy are exclusively related to the applicant's claims which are being dealt with on the merits before regular courts, whereas it did not present any arguments to contravene the applicant's allegations that there is no remedy available against the unreasonable length of proceedings.

57. Finally, the Commission is of the opinion that the unreasonable length of proceedings may constitute a *de facto* deprivation of access to court and of a possibility to obtain a decision on the merits within a reasonable time concerning the present dispute in respect of civil rights before the competent institutions. Bosnia and Herzegovina must enable every individual to "effectively" avail herself of judicial proceedings (*mutatis mutandis* decision of the European Court of Human Rights, *Airey v. Great Britain*, of 9 October 1979, Series A, no. 32, paragraphs 20 ff), which also follows from the principle of the rule of law as stipulated in Article I(2) of the Constitution of Bosnia and Herzegovina. Otherwise, “unreasonable time” and a solely formal access to court would only constitute a formal, not *de facto* guarantee of protection of human rights and freedoms.

58. In the present case, the applicant tried to have her case resolved before domestic judicial bodies. However, her court proceedings remained unsolved until 2002, when it was suspended and the case referred to the Cantonal Commission, which in 2004 declared itself not competent to deal with her case again and returned the case file to the Municipal Court in Sarajevo. Under these circumstances the applicant cannot be required to exhaust any additional effective remedies because they do not exist.

59. The Commission concludes that the applicant has no effective remedy available to resolve the length of proceedings problem, making it impossible for her to obtain final and binding resolution of her claim before competent domestic institutions. The application against the Federation of Bosnia and Herzegovina is, therefore, admissible in its entirety.

3. Conclusion of the admissibility

60. The Commission concludes that the application is admissible in so far as it concerns the applicant's complaint of discrimination in the enjoyment of the rights stemming from her

employment and the violation of her right to a fair trial in respect of the actions or failures to act which occurred or have continued after the Agreement entered into force on 14 December 1995. The Commission rejects this application as inadmissible in the part relating to the actions or failures to act which occurred before 14 December 1995.

B. As to the merits

61. Under Article XI of the Agreement the Commission must next address the question whether the facts found disclose a breach by the respondent Party of its obligations under the Agreement. Under Article I of the Agreement, the Parties are obliged to "secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms", including the rights and freedoms provided for by the Convention and the other international agreements listed in the Appendix to the Agreement.

1. Article 6 of the Convention

62. Article 6, paragraph 1 of the Convention provides, as far as relevant, as follows:

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

(a) Length of proceedings

63. The Commission notes that the applicant initiated court proceedings on 30 October 1996 and, after successfully appealing the initial refusal of his complaint, the case was referrred back to the first instance court for renewed proceedings. In renewed proceedings, the Municipal Court II in Sarajevo, by its procedural decision no. Pr-74/99 of 18 June 2002, suspended the proceedings and referred the case to the Cantonal Commission to deal with pursuant to Article 143 of the Law on Labour. This case was returned, following a conclusion by the Commission dated 19 May 2004 to the Municipal Court and no further action was taken in the proceedings.

64. When assessing the length of proceedings in terms of Article 6(1) of the Convention, the Commission must, *inter alia*, take into account the conduct of the applicant and the authorities as well as the complexity of the dispute, but also what is at stake for the applicant (see, eg., European Court of Human Rights decision in case *Vernillo v. France,* judgment of 20 February 1981, Series A, no. 198, paragraph 30; *Zimmermann & Steiner v. Switzerland*, judgment of 13 July 1983, Series A, no. 60, paragraph 24; the Chamber's decision, *Arif Brkić,* CH/99/2696, paragraph 85).

(1) Complexity of the case

65. The Commission points out that the complexity of the case needs to be examined in the lights of the factual and legal aspect of this dispute, i.e. the evidence which the competent court needs to present and assess in the light of the legal nature of the dispute and the proceedings pertaining to this case.

66. The issue in the applicant's case is whether her employment was terminated in accordance with law and, in that regard, whether she is entitled to have her contributions for the pension and disability insurance paid, to have her years of service recognized for the period 1 January 1992 through 1 December 1998 and also whether she is entitled to be conpensated for the damage sustained in the amount of 12,800.00 KM. The issues presented are not of particularly complex nature. This conclusion is not affected by the fact that the applicant altered her statement of claim during the course of proceedings, as the factual and legal essence of the case remaind the same.

67. The failure to conclude the proceedings within the reasonable time is worsened by the fact that an employee who considers his or her employment to have been terminated by mistake has a considerable personal interest in the proceedings to be speedily concluded and in obtaining a court decision, cosidering that he or she depends upon it for their livelihood. The domestic law requires that cases pertaining to labour relations must be dealt with having regard to the urgency of such matters. In that regard, the competent organs must invest additional efforts in order to conclude the proceedings within a reasonable time.

(2) The conduct of the parties to the proceedings

68. The Commission notes that the first instance proceedings, from the point of initiation on 30 October 1996, lasted for over a year and the appeal proceedings also lasted for over a year. In addition, the second instance proceedings resulted in the referral of the case to the first instance court, exposing the applicant to a new set of proceedings. Finally, the repeated proceedings lasted for over three years and did not result in a decision on the merits, but in a procedural decision suspending the proceedings and referring the case to the Cantonal Commission to deal with it under Article 143 of the Law on Labour. The Proceedings upon the appeal against this procedural decision lasted for about eight months, whereas the case was pending before the Commission as of March 2003 until the end of May 2004, when it was returned again to the Municipal Court in Sarajevo. Since the Cantonal Commission issued its conclusion, no action has been taken before the competent Municipal Court in Sarajevo. This means that the proceedings in this relatively simple legal matter have been pending for eight years already, although the Law explicitly requires an "urgent" procedure, because the right to work is one of the fundamental rights in the modern democratic society, which is based on the market economy.

69. According to the parties to the proceedings, there are no indications that the length of proceedings may be attributed to the applicant. Also, the respondent Party did not offer any explanation that could lead to the conclusion that any delays in the case could not be attributed to the judicial authorities or the respondent Party itself.

70. The Commission finds that the applicant cannot be held responsible for the delays in the proceedings, that the case is not a complex one and that the conduct of the courts indicates the lack of requisite dedication to the case. The Commission, further, finds that the period of eight years, which is the length of these proceedings, cannot be regarded as "reasonable". This constitutes a violation of her right to a fair hearing within reasonable time under Article 6, paragraph 1 of the Convention.

71. The Commission must stress that it is fundamental for a legal system to conduct proceedings within a reasonable time, as any unnecessary delays often lead to the *de facto* deprivation of individuals of their rights, and loss of confidence in the legal system.

72. The violation is aggravated by the suspension of the proceedings in the case before the Municipal Court II in Sarajevo and referral of the case to the Cantonal Commission, which took over a year to issue a procedural decision declaring itself not competent to deal with the case and returning it to the Municipal Court. Under these circumstances, the Commission finds that the procedural decision of the Municipal Court II in Sarajevo caused further delays in the applicant's case.

73. The Commission therefore concludes, based on the length of proceedings, that the Federation of Bosnia and Herzegovina has violated the applicant’s right to a fair trial within reasonable time under Article 6 paragraph 1 of the Convention.

(b) Conclusion

74. For the above reasons, the Commission concludes that there has been a violation of the applicant’s rights under Article 6, paragraph 1 of the Convention, for which the Federation of Bosnia and Herzegovina is responsible.

2. Discrimination in the enjoyment of the right to work and free choice of employment as guaranteed by Articles 6 and 7of the ICESCR

75. Under Article II of the Agreement, the Chamber has jurisdiction 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 sixteen international agreements listed in the Appendix to the Agreement on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status, which follows from enjoyment of any rights or freedoms guaranteed in the international agreements listed in the Appendix to this Annex.

76. The Chamber has repeatedly held that the prohibition of discrimination is a central objective of the Dayton Peace Agreement to which the Chamber must attach particular importance. Article II(2)(b) of the Agreement affords the Commission jurisdiction to consider alleged or apparent discrimination on a wide range of grounds in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to the Agreement, including the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Convention on the Elimination of All Forms of Racial Discrimination (see case no. CH/01/7351, *Kraljević*, decision on admissibility and merits, delivered on 12 April 2002, paragraph 62).

77. Article 6(1) of the ICESCR, as far as relevant, reads as follows:

> "The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."

78. Article 7 of the ICESCR, as far as relevant, reads as follows:

> "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular:
>
> "(a) Remuneration which provides all workers, as a minimum, with:
>
> "(i) fair wages and equal remuneration for work of equal value without distinction of any kind, …
>
> "(ii) a decent living for themselves and their families in accordance with the provisions of the present Covenant, …."

(a) Impugned acts and omissions

79. Acts and omissions possibly implicating the responsibility of the Federation under the Agreement include the failure to annul the procedural decision terminating the applicant's employment, failing to order the Company to pay for the applicant her due contributions for the pension and disability insurance, and failing to recognize her years of service for the period 1 January 1992 through 1 December 1998, or to pay her compensation for sustained damage.

80. These acts affect the applicant's enjoyment of the rights guaranteed by Articles 6(1) and 7(a)(i) and (ii) of the ICESCR. The Commission will therefore examine whether the Federation has secured protection of these rights without discrimination.

(b) Differential treatment and possible justification thereof

81. The Commission must first determine whether the applicant was treated differently from others in the same or similar situations. Any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship or proportionality between the means employed and the aim sought to be realized. The burden is on the respondent Party to justify otherwise prohibited differential treatment based on grounds explicitly enumerated in Article II(2)(b) of the Agreement (*see* case no. CH/99/2696, *Brkić*, decision on admissibility and merits of 8 October 2001, paragraph 71, Decisions July-December 2001).

82. The applicant asserts that her employment was terminated and that she was not re-employed solely because of her Serb origin. The respondent Party does not dispute that the applicant was employed by PTT but argues that her employment was lawfully terminated. The Federation claims that the employment was terminated by the procedural decision of 23 May 1992 because the applicant was absent from work for five consecutive days beginning 30 April 1992.

83. The Commission notes that the employer's decision to terminate the applicant's employment was based on his unjustified absence from work for five consecutive days under the Law on Fundamental Rights in Labor Relations.

84. The applicant lived in Grbavica and was prevented from going to work during the war. The applicant did not communicate the reason for her absence during the armed conflict. Her employer certainly knew, however, that she lived in an area where war conditions prevented her reporting to work, and there was no need to explain the situation. Moreover, the circumstances surrounding the armed conflict made any communications difficult.

85. The Commission notes that, under the circumstances, persons of Serb origin living in Grbavica and employed in the Federation were generally unable to report to work during the armed conflict and were the persons most likely to suffer termination of their employment by operation of the statutes place at the time the applicant stopped reporting to work.[1] In light of all these considerations, the Commission finds that the applicant has been subjected to differential treatment in comparison with persons of different ethnic origin. There is no evidence that the applicant's treatment was objectively justified by law either during or after the armed conflict. In this regard, the Commission notes that the Municipal Court II in Sarajevo found no legal basis for the issuance of the procedural decision terminating the applicant's employment. The Commission concludes therefore that the Federation authorities, through PTT, actively discriminated against the applicant due to her Serb origin. This violation was perpetuated by the violation of the right to a fair proceedings within reasonable time, particularly by the unnecessary referral of the case to the Cantonal Commission, which was not competent to deal with the case because of which the proceedings were suspended for almost two years.

86. The Commission concludes that the applicant has been discriminated against in the enjoyment of her right to work, and to just and favourable conditions of work, as defined in Articles 6 and 7 of the ICESCR, the Federation thereby being in violation of its obligations under Article I of the Agreement to secure to all persons within its jurisdiction, without discrimination on any ground, the rights guaranteed by the ICESCR.

(c) Conclusion as to discrimination

87. The Commission concludes that the applicant has been discriminated against on the ground of her national or ethnic origin in the enjoyment of her right to work, and to just and favourable conditions of work, as defined in Articles 6 and 7 of the ICESCR, the Federation thereby being in violation of its obligations under Article I of the Agreement to secure to all persons within its jurisdiction, without discrimination on any ground, the rights guaranteed under the instrument in question.

3. Conclusion on the merits

88. The Commission concludes that the applicant's rights guaranteed under Article 6 of the Convention have been violated and that she has been discriminated against in enjoyment of her rights under Article 6(1) and Article 7(a) of the ICESCR.

VIII REMEDIES

89. Under Article XI(1)(b) of the Agreement the Commission must next address the question of which steps shall be taken by the Federation of Bosnia and Herzegovina to remedy breaches of the Agreement which the Commission has found, including orders to cease and desist, and monetary relief.

90. In her application the applicant does not seek reinstatement to her previous working post. However, the applicant requests from the Commission to order the respondent Party to pay her compensation in the amount of 12,800.00 KM including a simple interest rate of 10% annually starting from 2 December 1998 until full payment, to pay the applicant's contributions for pension and disability insurance, to recognize her years of service in the period 1 January 1992 through 1 December 1998 and to pay the legal costs and expenses in the amount of 3,154.00 KM.

[1] Subsequent legislation expressly prohibited the termination of the employment of persons who were unable to report to work because of hostilities (*see* paragraph 23, *supra*).

91. The respondent Party objects to the claim and submits that the claim is unjustified and ill-founded, particularly as far as it relates to the period before 14 December 1995, as the date of entry into force of the Agreement.

92. The Commission has found the respondent Party to be in breach of its obligations under the Agreement by violating the applicant's right to the conduct of court proceedings within a reasonable time and by discriminating against her because of her ethnic origin in the enjoyment of her rights under Articles 6(1) and 7(a)(i) and (ii) of the ICESCR. The Commission, therefore, finds it appropriate to order remedies, including the payment of monetary compensation as set out in paragraphs 94 and 98 below.

93. The Commission finds it appropriate to award to the applicant a certain amount in recognition of her sense of injustice she had suffered as a result of it being impossible for her to have her case dealt with before the competent courts. Accordingly, the Commission shall order the respondent Party to pay to the applicant the amount of 1,000.00 KM in recognition of her suffering as a result of not being able to have her case resolved within reasonable time, to be paid within one month of the date of receipt of this decision.

94. The Commission finds it appropriate to award the applicant compensation for her lost income. The applicant requested the Commission to order the respondent Party to pay her compensation in the amount of 12,800.00 KM as well as the contributions to the pension and disability insurance fund for the entire period when she was prevented from working until the date she found new employment. The respondent Party objects to these claims and argues that they are unjustified and ill-founded, particularly as far as they relate to the period before 14 December 1995, as the date of entry into force of the Agreement.

95. The Commission has already noted that it has no competence to order compensation for the damage sustained before the Agreement came into force. The Commission shall, therefore, order the respondent Party only to pay compensation for the period after the Agreement came into force, i.e. from 14 December 1995 onwards.

96. The Commission shall also order the respondent Party to calculate and pay for the applicant all due contributions to the appropriate funds, including unpaid contributions to the pension and disability insurance for the period 1 January 1996 through 1 December 1998, no later than one month after the date of receipt of this decision.

97. The Commission shall, further, order the respondent Party to pay the applicant, by way of compensation for her lost income for the period 1 January 1996 through 1 December 1998, the amount of 9,600.00 KM (nine thousand six hundred convertible marks), no later than one month after the date of receipt of this decision.

98. According to the Official Gazette of the Federation of Bosnia and Herzegovina (no. 5/97, 4/98, 5/99, 50/99 and 51/00), an average salary in "non-economic employment relationships" (including PTT employees) amounted to 239 KM in 1996, 348 KM in 1997, and 406 KM in 1998. The Commission is of the opinion that the applicant's claims to be paid the amount of 12,800.00 KM as compensation for the months when she was not working, as well as relevant contributions for the same period, are too high. However, the Commission finds that the amount of 300 KM per mount is sufficient as compensation for her lost income in the relevant period (*see* case no. CH/97/90, *Rajić,* delivered on 7 April 2000, Decisions and Reports January-August 2000; case no. CH/98/1018, *Pogarčić*, delivered on 6 April 2001, Decisions and reports January-June 2001; case no. CH/99/269 *Brkić*, delivered on 12 October 2001, Decisions and reports July-December 2001; and case no. CH/00/3476 M.M., delivered on 7 March 2003, Decisions and reports January-June 2003). Starting from January 1996 until the end of December 1998, the sum of the applicant's lost income amounts to 9,600.00 KM (nine thousand six hundred convertible marks). This compensation is to be paid, no later than one month after the date of receipt of this decision. In respect of her claim to be compensated for the legal costs and expenses incurred in the proceedings by the applicant, the Commission finds that claim to be based on the value of the dispute and in accordance with applicable Federation advocates' fees. The Respondent Party did not object to the amount of the requested compensation for legal costs and expenses. Accordingly,

the Commission finds that the costs and expenses incurred in the proceedings before domestic courts and the Commission should be compensated in the amount of 3,154.00 KM, to be paid no later than one month after the date of receipt of this decision.

99. In addition, the Commission shall award an annual interest at the rate of 10 % to the amounts awarded to the applicant in the previous paragraph. This interest shall be payable as of the date of the expiry of the one-month period set for the implementation of this decision until the date of settlement in full.

IX CONCLUSION

100. For the above mentioned reasons, the Commission decides,

1. unanimously, to declare the application admissible insofar as it relates to alleged violations of human rights after 14 December 1995;

2. unanimously, to dismiss the remainder of the application as inadmissible;

3. unanimously, that the applicant's right to a fair hearing within a reasonable time under Article 6, paragraph 1 of the European Convention on Human Rights has been violated, the Federation of Bosnia and Herzegovina thereby being in violation of Article I of the Agreement;

4. unanimously, that the applicant has been discriminated against in the enjoyment of her right to work as guaranteed by Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights, in conjunction with Article II(2)(b) of the Human Rights Agreement, the Federation of Bosnia and Herzegovina thereby being in violation of Article I of the Agreement;

5. unanimously, to order the Federation of Bosnia and Herzegovina to calculate and pay for the applicant all due contributions to the appropriate funds, including the unpaid contributions for pension and disability insurance for the period from 1 January 1996 through 1 December 1998, no later than one month after the date of receipt of this decision;

6. unanimously, to order the Federation of Bosnia and Herzegovina to pay the applicant, no later than one month after the date of receipt of this decision, the amount of 13,754.00 KM (thirteen thousand seven hundred and fifty four convertible marks) by way of compensation for the lost salaries, non-pecuniary damage and legal costs and expenses;

7. unanimously, to order the Federation of Bosnia and Herzegovina to calculate and pay to the applicant interest at 10% (ten percent) per annum on the amount established in conclusion no. 6 or any unpaid amount thereof from the due date until the date of settlement in full; and

8. unanimously, to order the Federation of Bosnia and Herzegovina to report to the Commission, or its successor institution, within two months of its receipt of this decision, on the steps taken by it to comply with the above orders.

(signed)
J. David YEAGER
Registrar of the Commission

(signed)
Jakob MÖLLER
President of the Commission