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

Case no. CH/01/7351

Ana KRALJEVIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 5 March 2002 with the following members present:

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

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

Having considered 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. The applicant is a citizen of Bosnia and Herzegovina of Croat origin. Before the armed conflict in Bosnia and Herzegovina she was an ambulance driver at the Medical Centre in Ilidža. During the war she could not go from her place of residence, Kiseljak, to her place of work, Ilidža and Hrasnica•, where the Medical Centre was temporarily relocated. After the cessation of the war she did not succeed with her requests to resume her work, as she alleges, due to discrimination on the ground of her ethnic origin.

2. The case primarily raises the issue of discrimination in the enjoyment of the right to work and related rights protected by Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR") and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD").

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced on 30 March 2001 and registered on the same day.

4. During the April 2001 session the Chamber decided to reject the request for provisional measures and to transmit the case to the respondent Party for observations on the admissibility and merits.

5. The Federation submitted observations on 4 July 2001 and 22 January 2002. The applicant submitted observations in reply on 27 July 2001 and 28 January 2002.

6. The Chamber considered the admissibility and merits of the case on 6 June, 5 and 7 December 2001 and 5 March 2002. The Chamber adopted the present decision on the latter date.

III. FACTS

7. The Medical Centre employed the applicant as an ambulance driver on 17 October 1985. After the outbreak of the armed conflict in April 1992, the applicant stayed with her family in her house in Kiseljak since it was impossible to come to her work post in Ilidža due to the war activities.

8. On 13 June 1996 the Medical Centre issued a decision terminating the applicant's employment as of 2 May 1992. The reason indicated was that the applicant did not report to the employer for more than 20 days and did not explain the reason for her absence on time. The decision was posted on a bulletin board within the Medical Centre's premises.

9. In 1996 after the reintegration of Ilidža into the territory of the Federation, the Medical Centre employed two new drivers. Both new drivers had not worked at the Medical Centre before and are of Bosniak origin.

10. On 25 January 2000, i.e., after the Law on Labour (see paragraph 23 below) entered into force, the applicant filed a request to the Medical Centre seeking reinstatement into her employment position. On 8 February 2000 the Medical Centre requested her to present her personal dossier which could be found at the Ilidža Municipality. On 25 February 2000 the applicant received her personal dossier from the Ilidža Municipality. In that dossier the applicant discovered, for the first time, the decision terminating her employment, dated 13 June 1996.

11. On 3 March 2000 the applicant filed an objection against the decision of 13 June 1996 to the Medical Centre. The employer was obliged to respond to the applicant within a 15 days time-limit, but failed to do so.

• Ilidža and Hrasnica are both parts of Sarajevo. During the war Ilidža was controlled by Serb forces and Hrasnica remained under the control of the government of the Republic of Bosnia and Herzegovina. The town of Kiseljak was controlled by the HVO (Croat Council of Defence).

12. On 1 June 2000 the Medical Centre sent a notification to the applicant that, in accordance with the instructions on Article 143 paragraph 2, her request of 25 January 2000 is considered ill-founded and accordingly rejected.

13. On 11 July 2000 the applicant initiated a labour dispute by an action against the Medical Centre before the Municipal Court I in Sarajevo, seeking a provisional measure temporarily enabling her to resume work until the final decision by the Court. In the complaint she stated that the conduct of the Medical Centre was unacceptable because during the four-year period of 1996 to 2000 she frequently reported to work but always received the response that the circumstances of her case were not established yet. The applicant was not informed that a decision terminating her employment had been issued. In her complaint, the applicant requested the Court to establish that the procedural decision of 13 June 1996 terminating her employment was illegal and to order the Medical Centre to re–employ her. She further requested that the dispute be treated as a matter of urgency and to be compensated for all claims arising from the labour relations since 1992.

14. On 28 September 2000 the Municipal Court I of Sarajevo issued a decision relinquishing its jurisdiction in favour of the Cantonal Commission for the Implementation of Article 143 of the Law on Labour. The applicant did not appeal against this decision, and the case was transferred to the Cantonal Commission.

15. On 28 November 2000 the applicant filed a request to the Cantonal Commission for the Implementation of Article 143 of the Law on Labour.

16. On 22 May 2001 the Cantonal Commission issued a procedural decision establishing the following:

> "1) The appeal of Ana Kraljević, employee of the public institution "Medical Centre" Sarajevo, is well-founded;
> 2) The employer is ordered to act in accordance with Article 143 paragraphs 2-4 of the Law on Labour, i.e., to establish the labour status of Ana Kraljević as an employee on the waiting list, starting from the date of the submission of the request on 25 January 2000 until 5 May 2000 and to establish that her labour relations were terminated by force of law on 5 May 2000;
> 3) The employer is ordered to act in accordance with Article 143 paragraphs 4-7 of the Law on Labour and to determine the amount of severance pay and to conclude a contract on the severance pay with Ana Kraljević."

17. The applicant appealed against this decision to the Federal Commission. The proceedings are still pending.

IV. RELEVANT LEGAL PROVISIONS

A. The Law on Working Relations

18. The Law on Working Relations was published in the Official Gazette of the Republic of Bosnia and Herzegovina (hereinafter "OG RBiH") no. 21/92 of 23 November 1992. It was passed during the state of war as a Decree with force of law, and was later confirmed by the Assembly of the Republic (OG RBiH, no. 13/94 of 9 June 1994).

19. The Law provided 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 were 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."

B. The Law on Fundamental Rights in Working Relations

20. The Law on Fundamental Rights in Working Relations of the Socialist Federal Republic of Yugoslavia ("SFRY") (Official Gazette of the SFRY nos. 60/89 and 42/90) was taken over as a law of the Republic of Bosnia and Herzegovina (OG RBiH no. 2/92).

21. Article 23 paragraph 2 of the Law provides that:

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

22. Article 75 of the Law provides for the termination of a working relationship. Paragraph 2 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".

C. The Law on Labour

23. The Law on Labour (OG FBiH no. 43/99) entered into force on 5 November 1999. The Law was amended by the Law on Amendments to the Law on Labour (OG FBiH no. 32/00), which entered into force on 7 September 2000, with the particular effect that certain new provisions, including Articles 143a, 143b and 143c, were inserted.

24. Article 5 of the Law on Labour provides that:

"(1) A person seeking employment, as well as a person who is employed, shall not be discriminated against on the basis of 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 labour contract or other issues arising out of labour 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 unfavourable economic, social, educational or physical position.

(3) In the case of a 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 the discriminatory grounds;
3. If the court finds that the allegations of the plaintiff are well-founded, it shall order the application of the provisions of this Article, including employment, reinstatement to a previous position or restoration of all rights arising out of the labour contract."

25. Article 143 of the Law on Labour provides that:

"(1) An employee who has been on the waiting list as of the effective date of this law shall retain that status no longer than six months of this date [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, addressed in written form or directly the employer for the purpose of establishing the legal and working status, and has 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 an employee on the waiting list referred to in paragraphs 1 and 2 of this Article is not requested to resume 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 the entry into force of this Law, 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 the 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."

26. Article 145 of the Law on Labour 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 favourable for the employees."

27. In the Law on Labour, a new Article 143a was added that reads 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 Labour Law, introduce a claim to the Cantonal Commission for Implementation of Article 143 of the Law on Labour (hereinafter the "Cantonal Commission"), established by the Cantonal Minister competent for Labour 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 case the Cantonal Commission is not performing the tasks for which it is established, the Federal Commission shall take over the jurisdiction of the Cantonal Commission.

(4) If a procedure pertaining to the rights of the employee under paragraphs 1 and 2 of 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 the procedure."

28. The new Article 143b provides 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."

29. The new Article 143c provides 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."

30. The Law on Amendments to the Law on Labour furthermore introduced 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 Labour prior to the date of entry into force of this Law.

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 in application of Article 143 of the Law on Labour.

Article 54

Procedures of realisation 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, if it is more favourable to the employee, with the exception of Article 143 of the Law on Labour."

D. The Law on Civil Proceedings

31. Article 426 of the Law on Civil Proceedings (OG FBiH no. 42/98) states that in disputes concerning employment, the Court shall have particular regard to the need to resolve such disputes as a matter of urgency.

E. Statement of the Joint Civil Commission for Sarajevo

32. The Joint Civil Commission for Sarajevo met on 11 April 1996 in order to proceed with its work on the implementation of peace in Sarajevo under the auspices of the then Deputy High Representative Michael Steiner. Representatives of the Federal and Municipal Governments and the Serb residents of Sarajevo took part in the meeting and reached, *inter alia*, a decision on "professional workers", containing the following rules:

- Persons employed in professional jobs before the war have the right to return to their former workplaces without any reapplication procedure. They are already qualified. They may be required to submit a registration signalling that they intend to return to their jobs, but upon doing so, they must be re-employed.
- Persons hired during the war can be asked to re-apply. Any such process must be carried out without discrimination on the basis of ethnicity, and the principle of employment reflecting the ethnic composition of each area should be maintained.
- In cases where workplaces no longer exist, former employees should be placed on a waiting list until jobs are available. Persons placed on such a list will not lose seniority or pension status.

V. COMPLAINTS

33. The applicant alleges a violation of her right to a fair hearing under Article 6 of the Convention, her right to an effective remedy under Article 13 of the Convention, as well as the violation of her right to peaceful enjoyment of her possessions under Article 1 of Protocol No. 1 to the Convention due to the loss of salaries and contributions for the Pension and Social Fund. She complains about discrimination in the enjoyment of her right to work due to her ethnic origin and refers to Article 14 of the Convention which protects the enjoyment of rights as set forth in the Convention without discrimination. She requests reinstatement into her former working position.

34. The applicant further alleges that administrative and judicial proceedings are ineffective in that no final decision was rendered in the dispute.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. As to the facts

35. The respondent Party states that the employment of the applicant as an ambulance driver was terminated on 2 May 1992 on the basis of the decision of 13 June 1996. It alleges that the decision of 13 June 1996 was displayed on the notice board of the Medical Centre and claims that it became effective on 28 June 1996. The reason for the decision of 1996 is that, after the integration of Ilidža into the Federation, the Medical Centre offered its employees a period of time to enable those who had abandoned their jobs during the war to report back to work. The applicant did not address to the Medical Centre's competent department an objection against the decision terminating her employment. The Medical Centre issued an "Act on the Termination of the Employment" to all employees who did not submit appropriate documentation. The Federation contends that this Act refers to the applicant but not to employees who were prevented from fulfilling their obligations in the Medical Centre because they performed other duties such as military service, civil defence or compulsory work.

36. The Federation further alleges that the applicant applied for re-employment with the Medical Centre for the first time on 25 January 2000.

2. As to the admissibility

37. The respondent Party objects as to the admissibility of the application on grounds of incompetence *ratione temporis* with regard to all events that occurred before 14 December 1995.

38. The respondent Party further argues that the applicant did not exhaust effective remedies as she did not file an appeal against the decision of the Municipal Court of 28 September 2000 which suspended the proceedings and referred the case to the Cantonal Commission. Furthermore, appellate procedures are pending before the Federal Commission. The applicant, moreover, could have appealed also against the Cantonal Commission's decision before regular courts, a course she did not take.

3. As to the merits

39. As to the complaint of a violation of Article 6 of the Convention, the Federation claims that the applicant filed an action against her employment termination after more than four years from the date when the decision of 13 June 1996 became effective. The time that elapsed during the court proceedings cannot be considered as having exceeded the criterion of "reasonable time".

40. The Federation claims that the applicant gave her consent that the Municipal Court relinquished jurisdiction to the Cantonal Commission. Thereby she waived her right to have the decision on the termination of her employment annulled.

41. As to Article 1 of Protocol No. 1 to the Convention, the Federation contends that the applicant's employment was terminated under the conditions provided by law. Moreover, she did not file an objection against the termination of her employment.

42. The Federation further claims that the applicant's complaints of discrimination are not substantiated by evidence. It points out that on 1 June 1996 the general director of the Medical Centre issued an "Act on the Termination of the Employment" which refers to all former employees regardless of their national origin.

B. The applicant

43. The applicant contends that the national composition of the staff of the Medical Centre in Ilidža is drastically changed to the benefit of Bosniaks and to the detriment of Croats and Serbs. Her rights were determined exclusively by Bosniaks within the administration of the Medical Centre.

44. The applicant claims that in December 1995, as soon as it was again possible, she informed the Medical Centre in Hrasnica about her intention to resume work. On that occasion she was told that she should report to the Medical Centre on Vrazova Street in Sarajevo, where the Personnel Department and Administration was located. The applicant reported to the Medical Centre located on Vrazova Street, and, upon its request, submitted the data of her movement during the war and her request to continue to work at the Medical Centre. Allegedly, they told her that she would be informed about the outcome of that request in writing or by phone.

45. The applicant maintains that, since she did not receive any information from the Medical Centre until the year 2000, she repeatedly asked the management of the Centre when she could come to work. Each time, she was told that she should wait until normal working conditions are created at the Medical Centre.

46. The applicant states that she has never been invited to resume work and was not informed that drivers were needed. She also pointed out that, on two occasions, the employees of the Medical Centre told her in an unfriendly manner that she, as a Croat, had no business in this Medical Centre and that she should look for a job in Croat Kiseljak. She further states that she was an ambulance driver for many years and was helping all sick people regardless of their national origin.

47. The applicant complains that the Federation failed to organise both the court and the administrative proceedings in a way that would ensure the protection of her rights. She states that, by the Medical Centre's motion to remit, the case was transferred from the Court to the Commission that again issued a decision to her detriment. She has now for many years been unsuccessfully trying to be reinstated into her working position. She further claims that she was subject to harassment when she visited the offices of the Medical Centre in her attempts to resume work.

VII. OPINION OF THE CHAMBER

A. Admissibility

1. Competence *ratione temporis*

48. The respondent Party objects, as to the admissibility, that the issues raised in the application are outside the competence *ratione temporis* of the Chamber. The Chamber recalls that the applicant complains primarily about the Medical Centre preventing her from resuming work since the end of the war, the hiring of other ambulance drivers for a position which she carried out before the war, and the subsequent refusal to re-employ her. Although the Medical Centre considers the applicant's employment to have been effectively terminated on a date before the Human Rights Agreement entered into force, the decision on the employment termination was issued in 1996, i.e., at a time during which the Chamber has jurisdiction. Additionally, authorities of the Federation applied Article 143 of the Law on Labour by which the applicant's labour relations were terminated by force of law. The applicant initiated administrative and court proceedings against her termination. All complained acts accordingly fall within the Chamber's competence *ratione temporis*.

2. Requirement to exhaust effective domestic remedies

49. The Chamber 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 Chamber that the remedy was an effective

one.

50. Article 143 paragraph 2 of the Law on Labour provides that a person who does not work for his (former) employer anymore, but who was employed on 31 December 1991 and did not work for any other employer since that date, shall be considered to be an employee on the waiting list. According to the wording of the paragraph, this effect is restricted to persons who addressed their former employers to resume work within three months as from 5 November 1999 (i.e., until 5 February 2000). Pursuant to paragraph 4 of this Article, their employment relations shall be regarded as terminated by force of law on 5 May 2000 if the employer does not invite them to resume work until that day. This means that the working relations of all remaining employees on the waiting list cease on 5 May 2000 (see paragraphs 1 and 4 of Article 143). All persons laid off by force of law shall only be entitled to severance pay. The statement of claim for the severance pay can be filed with the Cantonal Commission for the Implementation of Article 143 of the Law on Labour (hereinafter the "Cantonal Commission").

51. The respondent Party alleges that the applicant submitted for the first time a request to the Medical Centre on 25 January 2000. The Chamber notes that thereby the applicant observed the legal time-limit of Article 143 paragraph 2 of the Law on Labour. It is further established that on 3 March 2000 the applicant filed an objection against her employment termination. In July 2000 she initiated court proceedings to have her labour status resolved. On 28 September 2000 the Municipal Court held a hearing and referred the case to the Cantonal Commission. In May 2001 the Cantonal Commission ordered the Medical Centre to pay damages to the applicant. The applicant, however, seeks re-employment and therefore appealed against this decision.

52. The applicant describes in detail how she addressed requests to the Medical Centre immediately after the cessation of the war. She alleges that she was told to present a written statement about her whereabouts and occupation during the war. After the submission of relevant documents she was told that she would be informed in due time about her request to resume work. She further alleges that she persistently continued to ask about her return to work. On 25 February 2000 the applicant received her personnel dossier from the municipal authorities. She claims that only then she discovered for the first time the decision on the termination of her employment, issued on 13 June 1996. The applicant contends that she feels deceived and misled because the Medical Centre falsely promised to inform her about the date when she could resume work.

53. The Chamber recalls that the decision on termination was announced on a bulletin board of the Medical Centre on 13 June 1996. After two weeks the decision was supposed to be effective. According to the applicable provisions on labour relations in the Federation of Bosnia and Herzegovina, a decision to terminate employment does not become effective until the employee is notified of his dismissal in writing which also must be delivered to him. The Medical Centre did not meet the requirements of due service by pinning up a decision on a board within its premises. No extraordinary circumstances are contended by the respondent Party which could possibly justify the form of communication chosen by the Medical Centre. Instead, the employer had available the address of the applicant and could have easily sent her a letter informing her about the termination of her employment. The Chamber thus considers that the applicant was never properly informed of her discharge. On the contrary, the applicant was made to cherish unfounded hopes that she could resume her work. Effectively she learned about her purported termination when she was given access to her personal dossier on 25 February 2000.

54. The respondent Party argues that the applicant could have appealed against the first-instance decision of the Municipal Court I of Sarajevo and could initiate an administrative dispute against the decision of the Commission before courts. It therefore claims that the applicant has effective remedies available. The Chamber notes that the Law on Labour could be interpreted to provide a remedy for a discriminated person seeking reinstatement. According to Article 5 paragraph 3 of the Law on Labour, a court can order reinstatement into a previous employment position if the complainant presents evidence of discrimination and the defendant fails to prove that the differential treatment was not made on discriminatory grounds.

55. The Chamber does not find that this interpretation of the Law on Labour has been applied by the Cantonal Court of Sarajevo. The Cantonal Court has repeatedly reversed judgments of the

Municipal Courts of Sarajevo which decided in first-instance decisions to order the defendant employers to re-establish labour relations with the plaintiff, and has referred such cases to the Cantonal Commission. The Chamber regards it as established that cases such as the applicant's are only considered in accordance with the wording of Article 143 of the Law on Labour (see cases nos. Gž-658/01, Gž-869/01, and Gž-797/01, judgments of the Cantonal Court in Sarajevo). Hence, the applicant cannot gain re-employment through the courts and the Commission.

56. The Chamber, therefore, cannot accept the Federation's argument. Regardless of whether the applicant's employment status was affected by the decision of the Medical Centre of 13 June 1996, the labour relationship in any event was terminated by force of law on 5 May 2000. The Law on Labour provides in Article 143, without exception, that the working relations of all employees, who are still on the waiting list on that day, are terminated. The applicant has accordingly no remedy available that she could be required to exhaust to gain a decision by the Commission or courts to resume work.

3. Admissibility as regards Article 6 of the Convention

57. The applicant claims that her right to a fair hearing as guaranteed under Article 6 of the Convention has been violated. Primarily she alleges that the Federation failed to organise both the court and the administrative proceedings in a way that would ensure the protection of her rights. She complains that for many years she has been unsuccessfully trying to be reinstated into her former position as an ambulance driver.

58. The Chamber notes that the applicant has initiated court proceedings only on 11 July 2000. On 28 September 2000, the Municipal Court suspended the proceedings and referred the case to the Cantonal Commission in accordance with Article 143 of the Law on Labour. Under Article 143c the applicant can challenge the final decision of the Federal Commission before a court. The Chamber therefore finds no indication that the applicant has been deprived of access to a court in the determination of her rights, nor that there has been any unfairness in the way the Municipal Court dealt with the applicant's case.

59. Accordingly, the application is inadmissible as manifestly ill-founded insofar as it concerns the alleged violation of Article 6 of the Convention.

4. Conclusion on admissibility

60. The Chamber concludes that the application is admissible insofar as the applicant complains about discrimination in the enjoyment of her right to work. The application is further admissible insofar as she alleges violations of her right to peaceful enjoyment of her possessions and her right to an effective remedy. The Chamber dismisses the remainder of the complaints as inadmissible.

B. Merits

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

1. Discrimination in the enjoyment of the right to work as well as to just and favourable remuneration and protection against unemployment, as guaranteed by the ICESCR and the CERD

62. 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 Chamber 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, amongst others the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination (see *Zahirović,* case no. CH/97/67, decision on admissibility and merits, delivered on 8 July 1999, paragraph 59 with further references, Decisions January – July 1999).

63. The Chamber further notes that the basis of discrimination in Bosnia and Herzegovina often rests upon the perceived ethnic or national differences expressed in terms such as Bosniak, Croat and Serb. Therefore, the Chamber uses this terminology in discrimination cases without endorsing it. By Bosniak, the Chamber refers to persons who can be considered to have a Bosnian Muslim cultural heritage (see *Brkić*, case no. CH/99/2696, decision on the admissibility and merits, delivered on 12 October 2001, paragraph 64).

64. The Chamber will consider the allegation of discrimination under Article II(2)(b) of the Agreement in relation to Articles 6(1) and 7(a)(i)(ii) of the ICESCR and Article 5(e)(i) of the CERD which, in relevant part, read as follows:

> Article 6(1) of the ICESCR:
>
> "The States Parties to the present Covenant recognise 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."
>
> Article 7 of the ICESCR:
>
> "The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable 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; …"
>
> Article 5 of the CERD:
>
> "… States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
> …
> (e) Economic, social and cultural rights, in particular:
> (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration.
> …"

(a) Impugned acts and omissions

65. Acts and omissions possibly implicating the responsibility of the Federation under the Agreement include the failure to re-employ the applicant after the end of the armed conflict, the hiring of other ambulance drivers by the Medical Centre for a position which the applicant held before the war, and further actions of termination by notice of dismissal and force of law.

66. These acts affect the applicant's enjoyment of the rights enshrined in Articles 6(1) and 7(a)(i) and (ii) of the ICESCR and Article 5(e)(i) of the CERD. The Chamber is accordingly called upon to examine whether the Federation has failed to secure protection of these rights without discrimination.

(b) Differential treatment and possible justification thereof

67. The Chamber considers it necessary first to determine whether the applicant was treated differently from others in the same or relevantly 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 of proportionality between the means employed and the aim sought to be realised.

68. There is a particular onus on the respondent Party to justify otherwise prohibited differential treatment which is based on any of the grounds explicitly enumerated in Article II(2)(b) of the Agreement (see the *Brkić* decision, *loc. cit.*, paragraphs 71 *et seq.* with further references).

69. The applicant argues that she was not re-employed solely because of her Croat origin. The respondent Party does not dispute that the applicant once was employed by the Medical Centre but asserts that her employment was lawfully terminated. The Federation claims that the employment terminated on 2 May 1992 because the applicant was absent from work for more than 20 days and did not explain her absence. Article 23 of the Law on Fundamental Rights in Working Relations required that "a written decision on the realisation of a worker's individual rights, obligations and responsibilities shall be delivered to the worker obligatorily". The Chamber has already noted that such a written decision was never delivered to the applicant, neither on 2 May 1992 nor on 13 June 1996. Accordingly, the employment relationship did not cease in May 1992 or June 1996.

70. Furthermore, it is questionable whether the termination of the applicant's employment by the decision of 13 June 1996 became effective when she finally learned about its existence, allegedly only in February 2000. As the applicant lived in Kiseljak she was prevented from going to work during the war. This constitutes a "good cause" pursuant to Article 15 of the Law on Working Relations and Article 75 of the Law on Fundamental Rights in Working Relations, both provisions relied on by the respondent Party in its observations. The applicant did not communicate the reason for her absence during the war. As the employer knew that she lived in an area controlled by other forces, there was no need to explain the situation. Furthermore, the war circumstances made communication difficult. Accordingly, the decision of 13 June 1996 is substantively defective and therefore violates Federation law.

71. The applicant initiated administrative and court proceedings against her labour termination. The Chamber has already found that it is impossible for the applicant to be successful in the proceedings because the courts and the Commission only consider cases of people seeking re-instatement into their pre-war occupations under Article 143 of the Law on Labour. Therefore, even if discriminatory decisions on labour termination were rendered, the Federation courts and authorities do not remedy such kind of terminations by providing opportunities for the re-employment of the laid off people. Persons who lost their jobs or cannot resume their work due to discriminatory treatment are only entitled to compensation payments. This failure of the authorities of the Federation to offer appropriate remedies also bars the applicant from getting her fundamental rights recognised, although discrimination was the reason for the refusal of the employer to re-employ her.

72. The Medical Centre chose to employ new drivers who are of Bosniak origin instead of the applicant. It appears, therefore, that the Centre's decision to dismiss her was not inspired by circumstances that influenced the amount and the nature of the Centre's work. The applicant described the changes in the institution, with names and the origin of employees before and after the armed conflict. Since the armed conflict the composition of the staff of the Medical Centre has changed in favour of Bosniaks. Taking into account the circumstances described, such as the failure to inform the applicant about her termination, the Chamber concludes that the real reason to discharge and, subsequently, not to re-employ the applicant was the fact that she is of Croat descent.

73. In the light of all these considerations the Chamber finds it established that the applicant has been subjected to differential treatment in comparison with colleagues of Bosniak origin. The Chamber has explained that there is no evidence showing that the applicant's treatment has been objectively justified in pursuance of any legal provisions during and after the armed conflict. The respondent Party has failed to show that its authorities provided opportunities for a further

investigation of the matter in order to remedy possible discriminatory treatment. The Chamber, therefore, finds that the Federation authorities have actively discriminated against the applicant through the administrative bodies of the Medical Centre due to her Croat origin.

74. The Chamber 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 instrument in question. The applicant has been discriminated against also in the enjoyment of her rights as guaranteed by Article 5(e)(i) of the CERD, in particular her right to protection against unemployment.

2. Complaint under Article 13 of the Convention and Article 1 of Protocol No. 1 to the Convention

75. The Chamber finds that in light of its finding of a violation of Article II(2)(b) of the Agreement in conjunction with Articles 6(1) and 7(a)(i)(ii) of the ICESCR and Article 5(e)(i) CERD, there is no need to examine the applicant's complaint of a violation of her right to an effective remedy under Article 13 of the Convention and to peaceful enjoyment of possessions as guaranteed by Article 1 of Protocol No. 1 to the Convention.

3. Conclusion on the Merits

76. The Chamber concludes that the applicant's rights as guaranteed under Articles 6(1) and 7(a)(i) and (ii) of the International Covenant on Economic, Social and Cultural Rights and Article 5(e)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination in conjunction with Article II(2)(b) of the Agreement have been violated.

VIII. REMEDIES

77. Under Article XI(1)(b) of the Agreement the Chamber 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 it has found, including orders to cease and desist, and monetary relief.

78. In her application the applicant seeks reinstatement into her position. The applicant further requests that the Federation be ordered to compensate her for lost income and related contributions. She requests compensation in the amount of DEM 46,998 for the period from 15 December 1995 until 31 March 2001.

79. The Federation objects to the claim and submits that the claim is unjustified and ill-founded.

80. The Chamber has found the Federation to be in breach of its obligations under the Agreement by having discriminated against the applicant on the basis of ethnic origin in the enjoyment of her rights under Article 6(1) and 7(a)(i) and (ii) ICESCR and Article 5(e)(i) CERD. Therefore, the Chamber finds it appropriate to order remedies, including the payment of pecuniary and non-pecuniary compensation.

81. The Chamber will order the Federation to undertake immediate steps to ensure that the applicant is no longer discriminated against in her right to work and to just and favourable conditions of work, and that she be offered the possibility of resuming her work on terms appropriate to her former position and equal to those enjoyed by other employees.

82. The Chamber finds that on account of the breaches found that the applicant has suffered loss of opportunity in connection with employment and mental suffering stemming from the uncertainty surrounding her employment status. The Chamber is of the opinion that the Federation authorities should have undertaken all possible steps to resolve the applicant's situation. The applicant explains her efforts to resume work at the Medical Centre. She claims that she had

approached the institution shortly after the war, submitted documents and repeatedly inquired about the time when she could expect to return to her position. The Chamber has neither the information necessary to establish when the applicant should have been re-employed by the Medical Centre, nor the figures to estimate the amounts of salary and contributions to which the applicant would have been entitled had she been re-employed. It is also not the Chamber's task to calculate these amounts. Addressing the applicant's request for compensation, the Chamber takes into account the applicant's unsuccessful attempts to resume work and the Medical Centre's inappropriate responses to her endeavour from the date the Chamber has jurisdiction, 14 December 1995, until the delivery of this decision on 12 April 2002. For these reasons the Chamber awards the applicant, on an equitable basis, a total of 15,000 KM by way of compensation for pecuniary and non-pecuniary damages.

83. The applicant shall also receive at the end of each month 20 KM for each day until she is offered to resume her work on terms compatible with her former position and equally enjoyed by others. Additionally, the Chamber will award 10 per cent interest per annum on the sum referred to in the preceding paragraph. The interest shall be paid as of the date of the expiry of a one-month time period set for the implementation of the present decision until the date of settlement in full.

84. As regards the applicant's compensation claims beyond the awarded sums, the Chamber considers the means ordered adequate and capable to ensure the respect for the applicant's rights and to remedy the established violations. Accordingly, the Chamber rejects the remainder of the claims and refrains from awarding any further pecuniary or non-pecuniary compensation.

IX. CONCLUSION

85. For these reasons, the Chamber decides,

1. unanimously, to declare admissible the application insofar as the applicant complains about discrimination in the enjoyment of her right to work and alleges violations of her right to an effective remedy;

2. by 6 votes to 1, to declare admissible the applicant's application insofar as she complains of a violation of her right to peaceful enjoyment of her possessions;

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

4. unanimously, that the applicant has been discriminated against in the enjoyment of her right to work as guaranteed by Articles 6(1) and 7(a)(i) and (ii) of the International Covenant on Economic, Social and Cultural Rights, as well as in the enjoyment of her rights to work, to free choice of employment and to protection against unemployment under Article 5(e)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination 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, that in view of the finding of discrimination in the enjoyment of the rights protected by Article 6(1) and 7(a)(i) and (ii) of the International Covenant on Economic, Social and Cultural Rights and Article 5(e)(i) International Convention on the Elimination of All Forms of Racial Discrimination, it is not necessary to examine the applicant's complaint also under Article 13 of the Convention and Article 1 of Protocol No. 1 to the Convention;

6. unanimously, to order the Federation to take all necessary steps to ensure that the applicant is immediately offered the possibility to resume her work as a driver on terms compatible with her former position and equally enjoyed by others without suffering any further discrimination;

7. unanimously, to order the Federation of Bosnia and Herzegovina to pay to the applicant not later than one month after the date when this decision becomes final and binding in accordance with

Rule 66 of the Chamber's Rules of Procedure the amount of 15,000 Convertible Marks (fifteen thousand *Konvertibilnih Maraka*) by way of compensation for pecuniary and non-pecuniary damages;

8. unanimously, to order the Federation of Bosnia and Herzegovina to pay the applicant simple interest at a rate of 10 (ten) per cent per annum over the sum stated in conclusion no. 7 or any unpaid portion thereof not later than one month after the date when this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure until the date of settlement in full;

9. unanimously, to order the Federation of Bosnia and Herzegovina to pay to the applicant at the end of each month KM 20 for each day, not including Saturdays and Sundays, until the applicant is offered to resume her work on terms compatible with her former position and equally enjoyed by others; the sums shall be paid from the date when this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure; and

10. unanimously, to order the Federation of Bosnia and Herzegovina to report to it within one month from the date when this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedures 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