DECISION ON ADMISSIBILITY AND MERITS
(delivered on 12 October 2001)

Case no. CH/97/76

Irfan SOFTIĆ

against

BOSNIA AND HERZEGOVINA
and
THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 8 October 2001 with the following members present:

Ms. Michèle PICARD, President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Želimir JUKA
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Miodrag PAJIĆ
Mr. Vitomir POPOVIĆ
Mr. Viktor MASENKO-MAVI
Mr. Andrew GROTRIAN
Mr. Mato TADIĆ

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 Article 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 was working as a legal adviser for the Ministry of Trade and Tourism of the Republic of Bosnia and Herzegovina. This Ministry was transformed several times. On 21 January 1996 it became the Ministry for Foreign Trade and International Communications of the then Republic, and on 20 August 1996 of Bosnia and Herzegovina. The case concerns a decision of the Minister of this Ministry by which the applicant's working relationship with the Ministry was to be regarded in retrospect as non-existent as of 1 February 1996, the date when he was transferred to the newly transformed Ministry.

2. The applicant initiated lawsuits to gain payment of his salary for the unrecognised period of working time from the Ministry for Foreign Trade and Economic Relations of Bosnia and Herzegovina, the successor of the previous Ministry for Foreign Trade and International Communications. The lawsuits were lodged before courts of the Federation of Bosnia and Herzegovina.

3. The case primarily raises issues under Article 6 of the European Convention on Human Rights and under Article 1 of Protocol No. 1 to the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

4. The application was introduced on 20 October and registered on 21 October 1997.

5. On 13 July 1998 the Chamber decided, pursuant to Rule 49(3)(b) of the Rules of Procedure, to transmit the application to both Bosnia and Herzegovina and the Federation for observations on the admissibility and merits thereof.

6. On 29 September 1998 the Federation of Bosnia and Herzegovina requested an extension of the time-limit for its observations, which was refused on 22 October 1998. Bosnia and Herzegovina submitted observations on 5 October 1998. Further observations were received from Bosnia and Herzegovina on 9 December 1998 and from the Federation on 3 June 1999, 28 December 1999, 20 April 2001, 30 May 2001, 14 August 2001 and 11 September 2001.

7. The applicant submitted a compensation claim on 5 October 1998 and additional observations on 16 November 1998, 2 February 1999, 6 April 2001, 17 April 2001, 22 May 2001, 23 July 2001 and 21 August 2001.

8. The Chamber deliberated on the case on 10 June 1999 and decided to suspend consideration of it and to wait for the outcome of the proceedings before the domestic courts. The Chamber continued its deliberations on the case on 7 June, 7 September and 8 October 2001 and adopted the present decision on the latter date.

III. ESTABLISHMENT OF THE FACTS

9. Until 1991, the applicant was employed as a lawyer by the state-owned enterprise "Energoinvest". In 1992 and 1993 a number of experts of this enterprise were recruited by institutions of the then Republic of Bosnia and Herzegovina due to a lack of staff caused by the war hostilities. However, they kept their status as employees of the enterprise but were placed on a "waiting list". The applicant was on the waiting list of "Energoinvest" from April 1991 until he retired from public service on 31 December 1997.

10. On 23 October 1993 the Government of the then Republic of Bosnia and Herzegovina appointed the applicant adviser to the Ministry of Trade and Tourism.

11. The applicant fulfilled his working obligations in this Ministry, which was transformed several times into new Ministries. On 21 January 1996 it became the Ministry for Foreign Trade and International Communications of the Republic of Bosnia and Herzegovina. On 1 February 1996 the applicant was formally transferred to this Ministry where he was again employed as a legal adviser.

12. On 18 April 1996 the Minister informed the employees that the work in the Ministry would be re-organised as the state of war had ceased. The Ministry began a recruitment process and its then officials were free to apply for re-employment. The applicant submitted an application to be assigned to a position.

13. The applicant performed his tasks and duties until mid-June 1996, when the Ministry moved from the UPI building in Sarajevo to the Presidency building. The applicant was told that he would be moved to the new location once he had received a new assignment in the ongoing public recruitment process. The applicant frequently asked about his relocation and assignment but only learnt at the end of November 1996 about the outcome of the selection procedure and that he would not be assigned to a post.

14. On 1 December 1996 the Ministry, with the consent of the applicant, issued a decision according to which, if he had not been re-assigned by 2 June 1997, his working relation with the Ministry would end on 2 December 1997. The applicant was thereby informed that, for this period, he was not assigned to a specific post. However, the applicant only received his salary for December 1996, January 1997 and February 1997 and was later informed that he had been struck off the pay roll.

15. On 16 June 1997 the Minister of Foreign Trade and International Communications of Bosnia and Herzegovina issued a decision with the following wording in the operative part: "The procedural decisions no. ... of 1 February 1996 and no. ... of 1 December 1996, issued with regard to Irfan Softić, are cancelled and cease to be in force, as it is impossible to register him in the Pension and Disability Insurance Fund of Sarajevo. The labour relation has not been established from 21 January 1996 onwards." The reasoning of the decision states that on 21 January 1996 the applicant was taken over from the former Ministry of Trade and Tourism, but that he had not been assigned to a specific post since 1 December 1996. The decision notes that from 16 December 1993 until the date of this decision, the applicant had failed to forward the necessary documents in relation to his working status and could therefore not be registered in the Pension and Disability Insurance Fund. It further states that the applicant is an employee of Energoinvest.

16. Nine other employees of the Ministry of Foreign Trade and International Communications received similar decisions on non-assignment on 1 December 1996 but did not receive a decision on the annulment of the decision on non-assignment and were paid all the wages due to them.

17. On 30 June 1997 the applicant addressed a written request to the Ministry of Justice and General Administration of Bosnia and Herzegovina to examine the validity of acts against him. The Ministry did not perform any inspection nor inform the applicant of any results.

18. On 2 July 1997 the applicant lodged a complaint to the Minister of the Ministry of Foreign Trade and International Communications. On 8 October 1997 the applicant requested an urgent decision. However, he did not receive any response from this Ministry.

19. On 15 October 1997 the applicant initiated an administrative dispute before the Supreme Court of the Federation of Bosnia and Herzegovina against the decision of 16 June 1997.

20. On 7 November 1997 the applicant initiated labour dispute proceedings before the Municipal Court I in Sarajevo against the Ministry for Foreign Trade and Economic Relations of Bosnia and Herzegovina. He claimed payment of his salary for the period from March until December 1997. The Ministry objected that it was not the proper defendant with respect to the applicant's claim because it did not regard itself as a successor of the dissolved Ministries which had previously employed the applicant.

21. On 18 November 1998 the Supreme Court of the Federation informed the applicant that it was not competent to consider complaints against acts of the organs of Bosnia and Herzegovina and that it had referred the dispute to the Municipal Court I of Sarajevo, which it considered to have territorial jurisdiction over the dispute because it was a labour-related case.

22. On 17 March 1999 the complaint referred to the Municipal Court I by the Supreme Court was dismissed because of the other labour dispute pending before the same Municipal Court and raising similar and related issues.

23. On 28 April 1999 the Municipal Court I of Sarajevo dismissed the applicant's lawsuit in the labour dispute. The court accepted the Ministry for Foreign Trade and Economic Relations as the proper defendant but stated in its findings that the previous Ministry for Foreign Trade and International Communications was entitled to issue the decision to cancel the decision of 1 December 1996, by which the applicant was entitled to receive salaries until 2 December 1997. Furthermore, the Court stated that the applicant's labour relation was such that he was an employee of Energoinvest and that he should have received his wages there. The applicant appealed against this decision in due time to the Cantonal Court.

24. On 21 December 1999 the applicant requested the Government of the Federation of Bosnia and Herzegovina to declare null and void the procedural decision of the Minister of Foreign Trade and International Communications of Bosnia and Herzegovina of 16 June 1997. The applicant did not receive any response to his request.

25. On 20 March 2000 the Cantonal Court issued a decision accepting the applicant's appeal against the judgment of the Municipal Court I, annulled the first-instance judgment and referred the case back to the lower court for re-hearing. The reason given for the decision of the Cantonal Court was that the Municipal Court had wrongly and incompletely ascertained the facts and had not established a legal basis for the decision of the Ministry of 16 June 1997 by which the obligation for the payment of wages was annulled.

26. The Municipal Court, after the case was referred back to it, held a preliminary hearing on 8 November 2000. At the following public hearing, scheduled for 9 January 2001, the defendant's representative did not appear. A further hearing in the labour dispute was held on 20 March 2001. During this hearing the applicant proposed a settlement upon which he would withdraw his lawsuit and Bosnia and Herzegovina would conclude an employment contract with him lasting one year. The defendant, Bosnia and Herzegovina, declared that the proposed settlement would be discussed at the next hearing which was scheduled for 18 May 2001.

27. The defendant's representative did not appear at the scheduled hearing on 18 May 2001. The court postponed the hearing until 19 July 2001. At the last hearing on 19 July 2001 the applicant proposed to hear a witness in support of his claim during the next hearing. The court allowed the petition and postponed the hearing until 28 November 2001.

IV. RELEVANT DOMESTIC LAW

A. Constitution of Bosnia and Herzegovina

28. Annex II to the Constitution of Bosnia and Herzegovina is entitled "Transitional Arrangements". Article 2 of Annex II is entitled "Continuation of Laws" and reads as follows:

> "All laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina."

29. Article 4 of Annex II reads as follows:

> "Until superseded by applicable agreement or law, governmental offices, institutions, and other bodies of Bosnia and Herzegovina will operate in accordance with applicable law."

B. Laws in force in Bosnia and Herzegovina

1. The Law on State Administration

30. The Law on State Administration (Official Gazette of the Republic of Bosnia and Herzegovina [hereinafter "OG RBiH"] no. 26/93) was taken over as law of Bosnia and Herzegovina pursuant to Article 2 of Annex II of the Constitution of Bosnia and Herzegovina. It establishes a detailed regime for regulating, among other things, the working relations of employees in the Bosnia and Herzegovina Administration. Articles 323 through 327 deal with the rights of employees in case of a reduction in workload.

31. According to Article 323 of the Law on State Administration, employees whose positions become unnecessary due to a reduction in workload shall be appointed to other duties and activities commensurate with his/her education, within the same or another organ of the same social-political community. In case an employee cannot be appointed to duties and activities in such manner he/she shall remain unassigned for up to 6 months.

32. Article 325 provides that an unassigned worker, if not assigned within 6 months from the day he/she became unassigned, shall terminate working relations with the administrative organ. The 6-month notice period shall run from the date of receipt of a procedural decision establishing that a worker is unassigned.

33. Article 326 provides that an unassigned worker is entitled to an increase of salary, as well as other remuneration in the same manner as other administrative workers working at that administrative organ.

34. Articles 328 deals with workers' rights in case of the dissolution of administrative organs. It provides that an administrative organ taking over the activities of the dissolved administrative organ shall take over workers employed with that organ on the day that the administrative organ is dissolved. The take-over shall take place automatically including the assumption of related activities. Workers of a dissolved administrative organ that are not assigned to a post, shall enjoy the rights encompassed in the provisions of this law on the rights of workers in case of a reduction in workload within administrative organs.

35. Articles 332 through 335 deal with the rights and duties of workers. Article 333 provides, in relevant part, that an employee who considers that his/her rights have been violated by a procedural decision taken by the official managing an administrative organ may submit an objection to that official. An objection shall be submitted within 15 days from the day of receipt of the procedural decision. Article 335 provides that such workers shall be entitled to seek protection from the regular courts against procedural decisions negatively impacting on their working relations issued by the official managing an administrative organ.

2. Law on Labour Relations

36. The Law on Labour Relations (Official Gazette of the Socialist Republic of Bosnia and Herzegovina [hereinafter "OG SRBiH"], nos. 20/90, 23/91 and OG RBiH, nos. 21/92) provides the following provisions regarding workbooks:

> Article 36
> "The workbook is an official document.
> The municipal administrative organ competent for labour issues shall issue workbooks.
> The workbook shall contain information prescribed by the provision on workbooks."
>
> Article 37
> "When entering into labour relations, the employee shall submit his or her workbook to the organisation, i.e. to his or her employer."

"When terminating the employment, the organisation, i.e. the employer, shall be obliged to return to the employee the properly concluded workbook at the latest within five days from the date on which his or her employment was terminated."

37. Article 6 of the Law on Labour Relations of the Republic of Bosnia and Herzegovina (OG RBiH nos. 21/92, 13/94) provides as follows:

"An employee may be temporarily assigned to another company or to another legal entity in the same or another place to a position for which he or she fulfils all the qualifications required for certain professions."

"A managing director, in agreement with the managing director of the company or another legal entity to which the worker is assigned, shall issue a decision on assignment of an employee from another company or legal entity."

"If an agreement referred to in paragraph 2 of this Article has not been reached, and the assignment of an employee has significance for the socio-political community, a decision on assignment shall be issued by the administrative organ of the socio-political community on whose property the main office of the company or other legal entity, from which the employee is assigned, is located."

"An employee assigned to another company or other legal entity shall acquire his or her rights and take over obligations at work on the basis of the work of the company or legal entity to which he is assigned."

"The Assignment of employees according to paragraph 1 of this Article may last at the latest until the cessation of the state of war."

3. Instruction on Workbooks

38. The Instruction on Workbooks (OG SRBiH no. 41/90), as amended by the Instruction on Amendments to the Instruction on Workbooks (OG RBiH no. 14/93), provides, among other things, a detailed procedure for the issuance of workbooks and annulment and issuance of new workbooks. Article 18 provides that the company or other legal entity is obligated to return the workbook to the employee, correctly filled in, within 5 days after cessation of his/her working relation. The date of cessation of work shall be entered as the date determined in the decision.

4. Law on the Court of Bosnia and Herzegovina

39. The Law on the Court of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina no. 29/00) was published on 30 November 2000 and entered into force as of 8 December 2000. The Law provides for a court competent at the level of Bosnia and Herzegovina. Article 14 provides, generally, that the Court shall have administrative jurisdiction over actions taken against final administrative acts or silence of the administration of the institutions of Bosnia and Herzegovina.

40. The Court of Bosnia and Herzegovina has not been established to this day.

C. Law on Civil Procedure of the Federation of Bosnia and Herzegovina

41. Article 348 paragraph 1 of the Law on Civil Procedure (Official Gazette of the Federation of Bosnia and Herzegovina no. 42/98) reads as follows:

"The second-instance court, at the session of the panel or on the basis of a hearing, may reject the appeal as out of time, incomplete or not allowed, may reject the appeal as ill-founded and confirm the first instance judgment, annul this judgment and return the case to the first instance court for retrial, annul this judgment and reject the appeal or alter the first instance judgment."

42. Article 352 reads as follows:

> "By its procedural decision the second-instance court shall annul the first instance judgment and return the case to that court for retrial if it considers that the latter should hold a new main hearing before the first instance court in order to establish the correct facts, unless it decides to hold a hearing itself."
>
> "The second-instance court shall also act in this way if the party did not challenge the judgment due to a wrongly and incompletely established factual background, if during the proceedings reasonable suspicion arises that the facts upon which the first instance judgment is based have been established incorrectly."
>
> "If the second-instance court, sitting at the session of the panel or at the hearing, finds that new facts should be established or new evidence taken for the purpose of a correct establishment of the factual background, it shall annul the first instance judgment and return the case to the first instance court for rehearing."

43. Article 357 reads as follows:

> "In the reasoning of the judgment or the procedural decision, the second instance court should decide which complaints are important for reaching a decision and should indicate its reasons taken into account ex officio."
>
> "If the first instance judgment is annulled due to substantial violations of provisions of civil procedure, it should be stated in the reasoning which provisions have been violated and what these violations consists of."
>
> "If the first instance judgment is annulled and the case returned to the first instance court for retrial for the purpose of a correct establishment of the factual background, it shall indicate the failings in the establishment of the factual background, i.e. the reasons why the new facts and evidence are important and why they are relevant for making a correct decision."

44. Article 359, paragraph 1 provides as follows:

> "The first instance court shall be obliged to take all civil proceedings and to consider all disputable issues which the second-instance court pointed out in its procedural decision. The parties are entitled to present new facts and proffer new evidence at the new main hearing."

45. Article 434 of the earlier Law on Civil Proceedings (Official Gazette of the Socialist Federal Republic of Yugoslavia no. 4/77) states that in disputes concerning employment, the court shall have particular regard to the need to resolve such disputes as a matter of urgency. The new Law on Civil Procedure contains the same provision in Article 426.

V. COMPLAINTS

46. The applicant was informed by the Chamber that his initial complaints did not appear to relate to allegations of violations of human rights. In his submission received on 7 October 1998, he specified his complaint and alleged violations of Article 6 of the Convention, Article 1 of Protocol No. 1 to the Convention and Article 14 (Procedural Guarantees in Civil and Criminal Trials) and Article 26 (Equality) of the International Convenant on Civil and Political Rights (hereinafter "ICCPR"). Moreover, he specified that he had been deprived of 9 months' worth of salary (from 1 March until 2 December 1997) amounting to KM 7,000 and he claimed simple interest at an unspecified rate.

VI. SUBMISSIONS OF THE PARTIES

A. Bosnia and Herzegovina

47. Bosnia and Herzegovina considers the application inadmissible on the ground that domestic remedies have not been exhausted. The Agents state that the municipal and cantonal courts of the Federation are competent to decide upon the case because it is a labour dispute.

48. As to the merits, Bosnia and Herzegovina argues that the Ministry of Foreign Trade and International Communications of Bosnia and Herzegovina took over all employees of the former Ministry of Trade and Tourism including the applicant. Bosnia and Herzegovina also asserts that the applicant never properly established working relations with any of the predecessors of the Ministry of Foreign Trade and International Communications. This Ministry issued the procedural decision on non-appointment on 1 December 1996, by which the applicant was entitled to all working relation rights for non-appointed workers. Bosnia and Herzegovina claims that although the Ministry may have "legally employed the applicant for an indefinite period", he was "still legally employed by the Energoinvest Company". Furthermore, he was not a full-time employee of the Ministry and there was a surplus of workers.

49. Bosnia and Herzegovina asserts that the Ministry of Foreign Trade and International Communications unsuccessfully requested the applicant to provide it with "his personal documents" from the Energoinvest Company needed for the establishment of working relations. It was further essential for the payments to the Pension and Invalid Insurance and the registration of his working periods into his workbook.

50. Bosnia and Herzegovina claims that the applicant had a waiting list status at Energoinvest and that he received payments not only from the Ministry of Foreign Trade and International Communications but also from this company. On this ground the Ministry issued the decision severing his labour relations with it on 16 June 1997.

51. Bosnia and Herzegovina further alleges that the applicant, because it was convenient for him to receive salaries from both Energoinvest and the Ministry, never intended to establish working relations with the Ministry.

B. The Federation of Bosnia and Herzegovina

52. The Federation submits that it cannot be held responsible for the acts complained of as only organs of Bosnia and Herzegovina issued the relevant decisions on the basis of its legislation. Secondly, the applicant was employed with authorities of Bosnia and Herzegovina. Accordingly, the Federation submits that it has no standing to be a respondent Party before the Human Rights Chamber in this case.

53. The Federation further claims that the case is inadmissible because the applicant has not exhausted available domestic remedies.

54. With regard to Article 6 of the Convention, the Federation argues that the manner in which the authorities are dealing with the case and the special circumstances justify the length of the proceedings. It argues that a number of relevant facts are in dispute, making the case difficult to decide. Consequently, in its submission, the courts of the Federation cannot be expected to reach a speedy decision.

55. In its last observations the Federation stated that it considers the delay of the public hearing as contrary to the requirements of Article 6 of the Convention. It therefore proposed to the Municipal Court I of Sarajevo to have the hearing that was scheduled for 28 November 2001, before that date. The Agent of the Federation informed the Chamber that the Municipal Court accepted its proposal and rescheduled the hearing for 15 October 2001. The Federation concludes that by this conduct it provides the condition to meet the requirement to have the public hearing "within a reasonable time".

C. The Applicant

56. The applicant alleges that already in May 1996, after the Minister on 18 April 1996 informed the employees that the work in the Ministry would be re-organised as the immediate threat of war had ceased, it was decided that somebody else who had not even participated in that procedure would replace him.

57. The applicant asserts that he has not received any wages from Energoinvest since April 1991. Since that time he was on the waiting list of this enterprise and, in that capacity, received humanitarian aid as a laid-off employee but nothing on the basis of labour relations. He further points out that no double payment of contributions had occurred. Energoinvest administered his workbook until 1997 but paid no contributions to the pension fund for the years of 1993, 1994 and 1997.

58. The applicant states furthermore that from October 1993 until May 1996 he was subject to working obligations under the so-called war regulations. At that time, the majority of employees did not have workbooks because they were not obtainable. After the official end of the war he continued working and was formally taken over by the Ministry. As he learnt at the end of November 1996 about the outcome of the selection procedure, that he would not be assigned to a post anymore, it would have made no sense to submit the workbook. Moreover, he claims that during his work for the Ministry and during the assignment procedure he was never requested to submit the workbook. With his consent, the Ministry then issued the decision on non-assignment of 1 December 1996. The applicant claims that this decision was issued exclusively because of redundancy reasons and not because of workbooks.

59. The applicant asserts that the decision of 16 June 1997, regarding the annulment of his labour relations with the Ministry, was issued in an arbitrary manner and has no legal base.

60. He further states that although labour disputes are urgent matters pursuant to law, the court proceedings are still pending. He claims that at the hearing on 20 March 2001, because he feared that proceedings would be delayed indefinitely by the defendant State authorities and the court, he unsuccessfully proposed to reach a settlement upon which he would withdraw his lawsuit and Bosnia and Herzegovina would conclude an employment contract with him lasting one year.

VII. OPINION OF THE CHAMBER

A. Admissibility

61. Before considering the merits of the case the Chamber must decide whether to accept it, ascertaining whether it has competence *ratione personae* over the parties and taking into account the criteria for admissibility set out in Article VIII (2) of the Agreement.

1. Competence *ratione personae*

62. The Chamber has jurisdiction over applications directed against the Parties to the Agreement, namely Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska. This jurisdiction, as defined in Article II of the Agreement, extends to violations of the rights and freedoms provided for in the relevant international agreements, where such a violation is alleged or appears to have been committed by the Parties, including by any official or organ of the Parties, Cantons, Municipalities or any individual acting under the authority of such an official or organ.

63. The Federation argues that it cannot be held responsible for the acts complained of as only organs of Bosnia and Herzegovina issued the relevant decisions on the basis of its legislation, and due to the fact that the applicant only had employment relations with the authorities of Bosnia and Herzegovina.

64. The Chamber notes that the courts of the Federation held hearings in proceedings initiated before them by the applicant. That being so, it can examine the court's conduct of the proceedings provided that the other criteria set out in Article VIII(2) of the Agreement are met.

65. It is clear that the Federation cannot be held responsible for acts of the authorities of Bosnia and Herzegovina concerning the applicant's employment relations with the Ministries. On the other hand, the Federation was required to comply with the procedural guarantees of Article 6 of the Convention. The Chamber will therefore only consider the responsibility of Bosnia and Herzegovina under Article 1 of Protocol No. 1 to the Convention and likewise only the Federation's responsibility under Article 6 of the Convention.

2. Requirement to exhaust effective domestic remedies

66. In the present case both respondent Parties object to the admissibility of the application on the ground that the domestic remedies provided by law have not been exhausted. The Chamber must therefore consider whether, for the purpose of Article VIII(2)(a) of the Agreement, any "effective remedy" was available to the applicant in respect of his complaints and, in the affirmative, whether he 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 his application based on the Agreement and to satisfy the Chamber that the remedy was an effective one.

67. In the *Blentić* case (case no. CH/96/17, decision on admissibility and merits delivered on 3 December 1997, paragraphs 19-21, with further references, Decisions on Admissibility and Merits 1996-1997) the Chamber considered this admissibility criterion in the light of the corresponding requirement to exhaust domestic remedies in the former Article 26 of the Convention (now Article 35(1) of the Convention). The Chamber found that such remedies must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. The Chamber, moreover, considered that in applying the rule on exhaustion it is necessary to take realistic account not only of the existence of formal remedies in the legal system of the respondent Party concerned but also of the general legal and political context in which they operate as well as of personal circumstances of the applicant.

68. The Chamber notes that the applicant lodged complaints and written requests for decisions to Ministries of Bosnia and Herzegovina, on 30 June 1997 to the Ministry of Justice and General Administration and on 2 July 1997 to the Ministry for Foreign Trade and International Communications. Neither Ministry has issued a decision to this day. Bosnia and Herzegovina has not stated that either Ministry lacks competence to give a decision in the applicant's case. It would appear to the Chamber, however, that the Ministry for Foreign Trade and International Communications of Bosnia and Herzegovina, being the Ministry from which the decision complained about emanates, was competent to reconsider the decision in question even assuming that the Ministry of Justice was not. A judicial remedy at the level of Bosnia and Herzegovina is unavailable to the applicant. Despite the entry into force, on 8 December 2000, of a Law on the Court of Bosnia and Herzegovina, such a court has not yet been set up.

69. Bosnia and Herzegovina concedes that as long as such a court does not exist, the courts of the Federation are competent to decide the applicant's case. In light of this concession, the Chamber accepts that in a case such as the present proceedings before the competent courts of the Federation of Bosnia and Herzegovina should in principle qualify as an effective remedy as long as the Court of Bosnia and Herzegovina is not operational.

70. The applicant filed lawsuits with the courts of the Federation of Bosnia and Herzegovina. The Supreme Court of the Federation, to which the applicant first addressed his claim (on 15 October 1997), gave a decision on 18 November 1998 referring the case to the Municipal Court I of Sarajevo. The latter court eventually dismissed it, on 17 March 1999, on the ground that another case raising similar and related issues (that is the case referred to in paragraphs 20 above) was pending before it.

71. Meanwhile, on 7 November 1997, the applicant initiated labour dispute proceedings before the Municipal Court I of Sarajevo. This court gave a decision on 28 April 1999 dismissing the

applicant's claims. An appeal lodged against this decision led to a decision of the Cantonal Court dated 20 March 2000 referring the case back to the Municipal Court, where it is still pending. Several hearings were rescheduled due to the failure of the representative of Bosnia and Herzegovina to turn up. The representative's absence from these hearings has not been explained to the Chamber's satisfaction.

72. It is no defence for Bosnia and Herzegovina to state that the domestic remedies have not been exhausted where the lack of a final decision determining the applicant's claims has been caused by the failure of its administration to decide or the failure of its authorities to participate constructively in judicial proceedings.

73. As the facts reflect, the applicant has been a party to many hearings before the courts of the Federation in an effort to have his rights determined with respect to his labour relations with ministries of Bosnia and Herzegovina. The applicant has been pursuing his claim for four years and it is still ongoing. The courts have for no apparent reason failed in their responsibility to issue decisions in the applicant's case. The failure of the courts to bring the applicant's case to a conclusion leads the Chamber to find that an effective remedy is not available to him (see, *inter alia*, case no. CH/99/3050, *Mujagić*, decision on admissibility and merits, delivered on 9 March 2001).

74. The above considerations lead the Chamber to find that an effective remedy, properly so called, was not available to the applicant. It cannot therefore be found that the applicant failed to exhaust the effective domestic remedies as required by Article VIII(2)(a) of the Agreement.

3. Admissibility as regards complaints of discrimination

75. Under Article II(2)(b) of the Agreement, the Chamber has jurisdiction to consider alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the 16 international agreements listed in the Appendix. The applicant claims that he was not treated equally before the law as guaranteed under Article 26 of the International Convenant on Civil and Political Rights which read as follows:

> "All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

76. Furthermore, the applicant alleges violations under Article 14 of the ICCPR concerning procedural guarantees in trials, which in conjunction with Article II(2)(b) of the Agreement must be examined in view of discrimination as likewise Article 14 of the Convention under which the application was transmitted to the respondent Parties.

77. The applicant states that ten employees of the Ministry, including himself, received a decision by which their employment would be terminated on 2 December 1997 if they did not receive an assignment before that day. He claims that the subsequent annulment of this decision regarding his employment on 16 June 1997 was illegal and discriminatory, considering that none of the decisions relating to his other nine colleagues were cancelled and that they continued to be paid all wages until 2 December 1997.

78. The Chamber considers that even if it can be established that the termination of the applicant's employment was not in accordance with the law and that he was thereby treated differently from other employees, this in itself cannot be construed as discrimination. Discrimination presupposes differential treatment on the basis of perceived social categories or characteristics as described, for present purposes, in Article II(2)(b) of the Agreement.

79. The Chamber concludes that, as the applicant does not allege that he was treated differently on grounds described in Article II(2)(b) of the Agreement or any other grounds, his complaint concerning discrimination in the exercise of the right to be protected under Article 26 of the ICCPR is manifestly ill-founded. It follows that, in light of the above, the Chamber also considers the

applicant's complaint of a violation of procedural guarantees in civil trials protected under Article 14 of the ICCPR in conjunction with Article II(2)(b) of the Agreement and likewise Article 14 of the Convention are inadmissible as manifestly ill-founded.

4. Conclusion on Admissibility

80. The Chamber finds that there are no other grounds for declaring the application inadmissible. The case is to be declared admissible in respect of the applicant's complaint under Article 1 of Protocol No. 1 to the Convention in respect of Bosnia and Herzegovina and Article 6 of the Convention in respect of the Federation of Bosnia and Herzegovina. The application will be declared inadmissible in respect of the applicant's complaints regarding discrimination in the exercise of his rights under Articles 14 and 26 of the ICCPR and concerning Article 14 of the Convention. The case is also inadmissible with regard to the applicant's complaint against Bosnia and Herzegovina under Article 6 of the Convention and against the Federation under Article 1 of Protocol No. 1 to the Convention.

B. Merits

81. Under Article XI of the Agreement, the Chamber must next address whether the facts established above 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 recognised human rights and fundamental freedoms", including the rights and freedoms provided for in the Convention.

1. Article 1 of Protocol No. 1 to the Convention

82. The applicant complains that his right to peaceful enjoyment of his possessions has been violated as a result of the Minister's decision of 16 June 1997. Article 1 of Protocol No. 1 reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

83. It is not disputed that the Ministry's decision of 1 December 1996 gave the applicant an unconditional right to a salary and related rights for the period from 1 December 1996 until 2 December 1997. The Convention institutions have held that contractual rights constitute a possession if they have an economic value and a certain degree of concreteness (see, *inter alia*, European Commission of Human Rights, *Association of General Practitioners v. Denmark* 62 DR 226 at 234 [1989]). Therefore the applicant's claim constitutes an asset and amounts to a "possession" within the meaning of the first sentence of Article 1. This right may be regarded as an "existing" possession within the ambit of Article 1 of Protocol No. 1 to the Convention. Since the applicant was not paid in the period after February 1997 until December 1997, when his working relationship originally was to end, he has a claim to those "possessions".

84. On 16 June 1997 the Minister of Foreign Trade and International Communications issued a decision by which the decisions of 1 February and 1 December 1996 were annulled. The decision further stated that the applicant's working relations with this Ministry must be regarded as non-existent as of 21 January 1996, the date when he was transferred to it. The reason given was that, from 16 December 1993 until the date of issuance of the 16 June 1997 decision, the applicant had failed to submit the necessary documents in relation to his working status and could therefore not be registered in the Pension and Disability Insurance Fund.

85. The Chamber considers that the decision of 16 June 1997 on the annulment of the applicant's formal transfer to the Ministry and the annulment of the decision on non-assignment of 1 December 1996 and the consequent denial of his claims to payment, constitute a "deprivation" of his possessions.

86. The Chamber must examine whether this interference can be justified. For this to be the case, it must be in the public interest and subject to conditions provided for by domestic law and general principles of international law. This means, for present purposes, that the deprivation must have a basis in national law.

87. The Chamber notes that the decision of 16 June 1997, which retroactively cancelled the applicant's formal transfer to the Ministry of 1 February 1996 and annulled his claims for payment of his salary, did not refer to any domestic legal provisions. The stated grounds on which it was based were the impossibility to register him in the Pension and Disability Insurance Fund of Sarajevo because the applicant had failed to submit the necessary documents in relation to his working status (see paragraph 15 above).

88. The ground stated in the decision, namely the impossibility of registering the applicant in the Pension Fund, is not found among the enumeration of possible reasons to terminate a government employee's employment as set out in the pertinent legislation. Serious doubts therefore arise as to the legality of the decision.

89. The Chamber finds the applicant's argument persuasive that, as he was employed under a war regulation at a time when workbooks were not obtainable, he continued working at the Ministry and did not need to expect to have his labour relations questioned due to the absence of a workbook. The Ministry, as stated in the decision, was aware that the applicant was temporarily assigned from Energoinvest to the Ministry, which was not contrary to the Law on Labour Relations. That being so, the Ministry must have been aware of the possibility that this company might still have been administering his documents, including the workbook. The Chamber is convinced that if the Ministry had tried to obtain the "necessary documents" from the applicant and Energoinvest, it would have very likely received them.

90. However, the non-payment of contributions would appear irrelevant to the applicant's right to be paid his salary. Moreover, it is to the disadvantage of the employee when the employer withholds contributions for the Pension and Disability Insurance Fund. It is not consistent to argue that because there were no payments made for his benefit, his employment relations could likewise be annulled.

91. The Chamber therefore cannot accept the legality under national law of the declaratory statement in the operative part of the decision of 16 June 1997 that the applicant's labour relations were not established from 21 January 1996 on. The Ministry kept the applicant at work and profited from his work until mid-June 1996, that is, after it was transformed on 21 January 1996 into the Ministry of Foreign Trade and International Communications. He could therefore be, at least implicitly, regarded as an employee of Bosnia and Herzegovina. Moreover, the applicant's status was confirmed by his formal transferral to the new Ministry and his employment as a legal adviser on 1 February 1996. The retroactive annulment or cancellation of the applicant's labour relations cannot be considered as legally valid because the reason given in the decision of 16 June 1997 failed to apply. In regard to the cessation of the war, the Ministry informed its employees in April 1996 that it would carry out a recruitment process by which the employees could seek to find re-assignment. The applicant agreed that his employment would be terminated on 2 December 1997 if he did not receive an assignment to another post before that day. As he did not, the applicant remained an employee of the Ministry until 2 December 1997.

92. The Agents of Bosnia and Herzegovina before the Chamber and its representative in the lawsuit of the applicant against the Ministry bring forward new arguments, which are not mentioned in the decision of 16 June 1997, in support of the annulment of the formal transfer of the applicant to the Ministry and the decision on his non-assignment until 2 December 1997. Mainly, they allege that the applicant received salaries and contributions from both Energoinvest and the Ministry. The Chamber notes that the decision at issue was not based on such reasoning.

93. The applicant maintains that he did not receive any benefits on the basis of labour relations with Energoinvest but concedes that he received humanitarian aid as a laid off worker. The Chamber notes that Bosnia and Herzegovina has not participated in the proceedings before the Chamber since the last observations it submitted on 9 December 1998 and therefore did not elucidate the facts on this point. In any event, in the absence of any evidence of an arrangement between Energoinvest and the Ministry for avoiding payment of double salaries and contributions, or of legal provisions regulating such matters, there is no link between the applicant's entitlement to payments from Energoinvest, assuming that such an entitlement existed, and the applicant's entitlement to salary from the Ministry.

94. Bosnia and Herzegovina's annulment of the applicant's claim for payment of his salaries was therefore not subject to conditions provided for by law as required by the second sentence of the first paragraph of Article 1 of Protocol No. 1. This is in itself sufficient to find that the deprivation of the applicant's right to peaceful enjoyment of his possessions was not justified. Accordingly, on the evidence available, the Chamber finds that Bosnia and Herzegovina has violated the rights of the applicant under Article 1 of Protocol No. 1 to the Convention.

2. Article 6 of the Convention

95. The Chamber will continue to consider, under Article II(2)(a) of the Agreement, the allegation that there has been a violation by the Federation of Bosnia and Herzegovina of Article 6 of the Convention in that the proceedings in the applicant's case have not been completed within a reasonable time. The relevant part of Article 6 paragraph 1 provides as follows:

> "In the determination of his civil rights and obligations. . ., everyone is entitled to a ... hearing within a reasonable time..."

96. The Chamber notes that the European Court of Human Rights held in the past that Article 6(1) does not extend to "disputes relating to the recruitment, careers and termination of civil servants" (see, e.g., Eur. Court HR, *Massa v. Italy*, judgment of 24 August 1993, Series A no. 265-B, page 20, paragraph 26). The case law in this area had become convoluted and difficult to apply. Therefore, the Court recently adopted a functional approach to analysing this issue (i.e. based on an examination of the jobs and duties of a particular applicant). Keeping in mind the importance of the protections afforded by Article 6, the Court has adopted a restrictive interpretation. Specifically, the Court has found that the only persons excluded from Article 6(1) protection are those applicants whose duties involve "direct or indirect participation in the exercise of powers conferred by public law and duties assigned to safeguard the general interests of the State or of other public authorities" (see Eur. Court HR, *Pellegrin v. France*, judgment of 8 December 1999, Reports of Judgments and Decisions 1999).

97. The Chamber notes that the respondent Party did not raise an objection of this nature at any point during the proceedings. Accordingly, the Chamber sees no reason to hold that the applicant is excluded from the protection of Article 6 of the Convention.

98. The Chamber recalls that the applicant initiated his labour dispute on 7 November 1997. It is from this date that the Chamber must consider the reasonableness of the length of proceedings under Article 6. The proceedings have lasted for almost four years as of October 2001.

99. When assessing the reasonableness of the length of proceedings, for the purpose of Article 6 paragraph 1 of the Convention, the Chamber must take into account, *inter alia*, the complexity of the case, the conduct of the applicant and the authorities, and the matter at stake for the applicant (see, e.g., case no. CH/97/54, *Mitrović*, decision on admissibility of 10 June 1998, paragraph 12, Decisions and Reports 1998).

100. The issue in the applicant's case is whether the annulment of his working relationship by the decision of 16 June 1997 was in accordance with the law. Although there are a number of factual disputes in this case, the Chamber cannot find that the issue is of a particularly complex nature that would justify prolonged proceedings.

101. On the other hand, the Chamber notes that the applicant's conduct before the court may have contributed, to some extent, to the length of the proceedings before the Federation's courts. However, it is obvious that the applicant has no interest in delaying the proceedings. The Chamber does not question the applicant's submission that because he feared that proceedings would be delayed indefinitely by the defendant State authorities and the court, he proposed to reach a settlement. The statement by the Federation that the applicant has contributed to the delay, because, during the last hearing on 19 July 2001 he presented new evidence and the court had to grant the defendant a period for filing a response, may engage the applicant's responsibility but not to the extent of explaining why the proceedings have dragged on for four years.

102. The Chamber notes that there were numerous hearings and the periods between them have been quite long. Furthermore, the applicant's case is pending before the Municipal Court I of Sarajevo for the second time. On 20 March 2000, i.e., almost one and a half years ago, the Cantonal Court annulled the first-instance decision and referred the case back to the this court for re-hearing. The reason given was that the Municipal Court wrongly and incompletely established the factual state of the case and did not establish a legal basis for the decision of the Ministry of 16 June 1997 by which the obligation for the payment of wages was cancelled. With the decision of the Cantonal Court as a base, it cannot be considered reasonable that the end of the proceedings before the Municipal Court is not yet in sight.

103. In the circumstances of the present case, the Chamber finds that there has been a violation of the applicant's right to a fair hearing within a reasonable time under Article 6 paragraph 1 of the Convention, for which the Federation of Bosnia and Herzegovina is responsible.

3. Conclusion on the Merits

104. In conclusion, Bosnia and Herzegovina has violated the rights of the applicant under Article 1 of Protocol No. 1 to the Convention. Further, there has been a violation by the Federation of Bosnia and Herzegovina of Article 6 of the Convention in that the proceedings for the determination of the applicant's civil rights and obligations have not been concluded within a reasonable time.

VIII. REMEDIES

105. Under Article XI(b) of the Agreement the Chamber must next address the question of what steps shall be taken by the respondent Parties to remedy breaches of the Agreement which it has found.

106. The applicant requests that Bosnia and Herzegovina be ordered to pay nine months worth of salary amounting to KM 7,000 for the period from 1 March 1997 until 2 December 1997 and claims simple interest at an unspecified rate.

107. The Chamber has found Bosnia and Herzegovina to be in breach of its obligation to ensure the applicant's right to peaceful enjoyment of his possessions as guaranteed in Article 1 of Protocol No. 1 to the Convention. It finds it appropriate to order Bosnia and Herzegovina to pay to the applicant the claimed amount of salaries within one month of the date of delivery of this decision. Moreover, the Chamber finds it equitable to order Bosnia and Herzegovina to pay to the applicant 10 per cent interest per annum as from 1997, the year he should have received his salary from the Ministry. The outstanding salary of KM 7,000 and simple interest of ten per cent on this sum for the time period of four years amounts to KM 9,800 in total, which the Chamber will order Bosnia and Herzegovina to pay to the applicant.

108. Additionally, the Chamber will award simple interest at an annual rate of 10 per cent on the sum awarded to be paid to the applicant in paragraph 107 or any unpaid portion thereof. Interest shall be paid as of 12 November 2001 until the date of settlement in full.

109. In the circumstances of the case and having in mind that the Agent of the Federation before the Chamber made an effort to reduce the delay of the proceedings before the Municipal Court I of Sarajevo, the Chamber considers that the finding of a violation of the applicant's rights to have

proceedings "within a reasonable time" as guaranteed by Article 6 paragraph 1 of the Convention constitutes a sufficient remedy. No orders in this regard will therefore be directed to the Federation of Bosnia and Herzegovina.

IX. CONCLUSIONS

110. For the reasons given above, the Chamber decides:

1. unanimously, to declare the application admissible against Bosnia and Herzegovina insofar as it concerns the alleged violation of Article 1 of Protocol No. 1 to the Convention;

2. unanimously, to declare the application admissible against the Federation of Bosnia and Herzegovina insofar as it concerns the alleged violation of Article 6 of the Convention,

3. by 11 votes to 1, to declare the remainder of the application inadmissible;

4. unanimously, that the decision of the Minister of Foreign Trade and International Communications of Bosnia and Herzegovina of 16 June 1997 constitutes a violation of the applicant's right to peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1 to the Convention, Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

5. unanimously, that the applicant's right to the determination of his civil rights and obligations within a reasonable time guaranteed by Article 6 paragraph 1 of the Convention has been violated, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

6. unanimously, to order Bosnia and Herzegovina to pay to the applicant, not later than 12 November 2001, the sum of 9,800 (nine thousand eight hundred) Convertible Marks (*Konvertibilnih Maraka*) as compensation in respect of the established violation of Article 1 of Protocol No. 1 to the Convention.

7. unanimously, to order Bosnia and Herzegovina to pay simple interest at the rate of 10 (ten) per cent per annum over the above sum mentioned in conclusion no. 6 or any unpaid portion thereof from 12 November 2001 until the date of settlement in full;

8. unanimously, that the finding of a violation of Article 6 of the Convention by the Federation of Bosnia and Herzegovina constitutes sufficient satisfaction; and

9. unanimously, to order Bosnia and Herzegovina to report to it by 30 November 2001 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 Chamber

Annex I Partly dissenting opinion of Mr. Jakob Möller

ANNEX I

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the partly dissenting opinion of Mr. Jakob Möller.

PARTLY DISSENTING OPINION OF MR. JAKOB MÖLLER

Part A.3. of the Chamber's Opinion (paragraphs 75 to 79) deals with the question of admissibility of the applicant's claim of discrimination. I cannot associate myself with the reasoning set out in paragraphs 78 and 79 leading to the conclusion that the claim of discrimination is declared inadmissible as manifestly ill-founded. In my view, the claim has been sufficiently substantiated for the purpose of admissibility and should have been examined on the merits.

Accordingly, I was unable to support the corresponding conclusion no. 3 in paragraph 110 of the Chamber's decision.

(signed)
Jakob Möller