DECISION ON ADMISSIBILITY AND MERITS
(delivered on 6 April 2001)

Case no. CH/98/1018

Zoran POGARČIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 3 April 2001 with the following members present:

Mr. Giovanni GRASSO, President
Mr. Viktor MASENKO-MAVI, Vice-President
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Vitomir POPOVIĆ
Mr. Mato TADIĆ

Mr. Peter KEMPEES, 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 is a 62 year-old man of Croat national origin. He is a mechanical engineer who taught classes in technical drawing and basics of technique and production at the School of Electrical Engineering in Sarajevo (hereinafter "the School") for almost 30 years. The applicant was unable to continue working at the School on or around 31 May 1992 when the war hostilities made it impossible for him to get to work in Sarajevo. He was living in the suburb of Grbavica, which was then held by Bosnian Serb forces.

2. At the end of the hostilities, the applicant reported to the School and requested reinstatement. He was not reinstated. On 13 September 1996 the Labour Inspector issued a procedural decision finding that the School had violated the applicant's rights under Article 10 of the Law on Labour Relations During the State of War or the Immediate Threat of War (OG R BiH 21/92) and Article 23 paragraph 2 of the Law on Fundamental Rights in Working Relations (OGSFRJ 60/89 and 42/90). Accordingly, the School was ordered to resolve the applicant's labour status. In accordance with the order of the Labour Inspector, on 25 October 1996, the School issued a procedural decision authorising the applicant's leave without pay from 30 April 1992 until 10 June 1996 and placing him on a waiting list, thereafter. The stated reason for putting him on the waiting list was that there were not enough classes for him to teach and that he was not qualified to teach technical drawing.

3. The applicant appealed to the School against the 25 October 1996 decision. The School did not respond. On 24 December 1996 the applicant submitted a complaint to the Court of First Instance II in Sarajevo challenging the 25 October 1996 decision. As far as the Chamber is aware, these proceedings are still pending before that court today[1].

4. The applicant complains that he has been discriminated against because of his national origin in his right to employment. He also complains of the fact that there has been no significant development in the proceedings before the court for over four years.

II. PROCEEDINGS BEFORE THE CHAMBER

5. The application was introduced on 9 October 1998 and registered on that same day.

6. At its session in June 1999 the Chamber, sitting in Panel II, decided, pursuant to Rule 49(3)(b) of the Rules of Procedure, to transmit the application to the respondent Party for its observations on admissibility and merits.

7. The Federation submitted its observations on 17 August 1999. The applicant replied and submitted a claim for compensation on 1 November 1999. The Federation submitted observations on the compensation claim on 4 January 2000. In response to requests for additional information from the Chamber, the Federation submitted further observations on 11 October 2000, 3 January and 23 January 2001. Further observations were received from the applicant on 26 October 2000, 26 January and 12 February 2001. On 28 February 2001 the applicant confirmed that the proceeding before the Municipal Court II were still pending.

8. The Second Panel deliberated on the case on 8 March and 3 April 2001 and adopted the present decision on the latter date.

[1] It should be noted that in 1997 the Court of First Instance II in Sarajevo was renamed the Municipal Court II, Sarajevo.

III. ESTABLISHMENT OF THE FACTS

9. The applicant is a 62 year-old man of Croat national origin. He is a mechanical engineer and has taught classes in technical drawing and basics of technique and production for almost 30 years at the school of Electrical Engineering in Sarajevo ("the School"). From 1988 through 1990 the applicant was declared "thecnically redundant" due to reduced workload at the School. Pursuant to paragraph 1, Article 21 of the Law on Fundamental Rights Arising from Employment, the applicant found work at another school in Ilidža. The applicant's employment at the school in Ilidža was regulated by a contract between the School in Sarajevo and the school in Ilidža. The contract indicates that the applicant's labour rights will continue to be regulated by the School in Sarajevo. There is no indication in that contract that the applicant's employment was terminated.

10. The applicant states that during the second half of 1991 he returned to the School in Sarajevo and taught a course called Defence and Protection until 31 May 1992 when the war hostilities made it impossible for him to continue working. He was living in the suburb of Grbavica, which was then held by Bosnian Serb forces.

11. By a procedural decision dated 28 September 1992, the School terminated the employment of the applicant, as well as 42 other persons. The reason stated for their termination was unjustified absence and failure to carry out their work for twenty (20) days. The respondent Party states that of the 43 persons whose employment were terminated, 5 were of Bosniak origin, 26 were of Serbian origin, and 12 were of Croat origin. The applicant alleges that he only received a copy of this procedural decision on 13 October 2000, when the Chamber forwarded it to him.

12. After the war, on 15 February 1996, the applicant states that he reported to the School and requested reinstatement. However, he was not reinstated. The applicant alleges that he was told that another teacher would be covering his classes because he had not been able to come to work during the state of war. By a decision of the School dated 27 June 1996, the school stated that "insight into the registry and official documentation of the school confirmed that the applicant worked in the School until 30 April 1992." However, since, according to the School, the curricula had been reduced there was no need for a teacher with the applicant's qualifications and that the class of technical drawing was being taught by another teacher. The School referred to a decision issued by the Republic Institution for Development, Training and Education issued in December of 1988, that established that the applicant was qualified to teach within the mechanical profession in secondary schools for vocational education. It appears that the applicant had applied to the Institute for this decision as a result of having being declared redundant.

13. In June of 1996, the applicant submitted a petition to the Labour Inspector regarding his employment status. The Labour Inspector investigated his case. On 13 September 1996 the Labour Inspector issued a procedural decision finding that the School had, in fact, violated the applicant's labour rights. Specifically, the Labour Inspector found that the applicant's rights had been violated under Article 10 of the Law on Labour Relations During the State of War or the Immediate Threat of War (OG R BiH 21/91) and under Article 23 paragraph 2 of the Law on Fundamental Rights in Working Relations (OG SFRJ 60/89 and 42/92). Accordingly, the Labour Inspector ordered the School to refer the applicant to unpaid leave for the period of time that the applicant was unable to come to work due to the war hostilities and to resolve the applicant's employment rights under the law.

14. In accordance with the procedural decision of the Labour Inspector, the School issued a procedural decision on 25 October 1996 authorising the applicant's leave without pay from 30 April 1992 to 10 June 1996 and placing him on the waiting list thereafter. The reason stated for placing him on the waiting list was "reduced workload". The School further asserted that a person with a degree in mechanical engineering could not teach technical drawing and, therefore, there was no need for the applicant. It should be noted that documents later submitted by the respondent Party to the Chamber, in fact, indicate that a person with a degree in mechanical engineering is qualified to teach technical drawing.

15. The applicant appealed against the 25 October 1996 decision, placing him on the waiting list, within the prescribed time-limit. He argued that he was, in fact, qualified to teach courses in the School and that he should be re-employed. The School did not respond.

16. On 24 December 1996 the applicant submitted a complaint to the Court of First Instance II in Sarajevo (later called the Municipal Court II) challenging the procedural decision that placed him on the waiting list. He provided further information to the Court on 22 May 1997 informing the Court that the School had "employed several employees for duties which the plaintiff was supposed to and could have performed, and therefore violated the rights of the plaintiff." The applicant further asked the Court to order the School to alter his unpaid leave status so as to reflect the fact that the state of war ended on 31 December 1995 and that he was placed on the waiting list effective 1 January 1996. Further, the applicant requested compensation in the amount of his full salary effective 15 February 1996.

17. In May 1998, the School submitted papers to the Municipal Court II. The School argued, for the first time, that the applicant had been deemed "technically redundant" in 1989 and in that decision it was stated that the applicant taught elements of technique and production, not technical drawing. The School further argued that the course of technical drawing was being taught by another teacher assigned on 15 February 1996 and accordingly there was no position for him. In those papers, the School acknowledges, however, that a person with a degree in mechanical engineering is qualified to teach technical drawing. Finally, the School questions the applicant's whereabouts during the war since the applicant claims to have come to the School requesting reinstatement on 15 February 1996 and Grbavica was only re-integrated into Bosnia and Herzegovina in April of 1996.

18. On 30 July 1998 the School advertised vacancies for teachers with the applicant's qualifications whilst the applicant remained on the waiting list. Additionally, the applicant alleged that the number of courses being taught in technical drawing had increased since he was placed on the waiting list and that another teacher had been hired to teach those courses. This was recently confirmed by the respondent Party.

19. On 11 April 2000 the School filed a counter-claim. The School requested that the Municipal Court II annul the procedural decision of the School of 25 October 1996 and allow the School to issue a decision finding that the applicant's employment was terminated as of 30 September 1990. The School argued that it is entitled to this decision because the applicant had been declared redundant in 1988[2], a fact that allegedly the applicant had kept from the Labour Inspector. According to the School, under Article 21 of the Law on Fundamental Rights on Working Relations, the applicant's employment could have been terminated within two years of having been declared redundant if he failed to use his rights under Article 21 of the Labour Law. In response, the applicant claimed, and there is evidence, that he availed himself of his rights under Article 21.[3] Further, he states that he did not hide this information from the labour inspector.

20. Numerous hearings have been held in the applicant's case before the Municipal Court II. However, the case is still pending and there have been three different judges assigned to the case. Further, in light of the information regarding the fact that the applicant had been declared "technically redundant" in 1989, the Labour Inspector reopened the case in April 2000 and has not completed his investigation.

21. In response to questions submitted by the Chamber, the respondent Party states that since 1995 the school is comprised of teachers with the following ethnic origins: 2 teachers of Serb origin, 4 teachers of Croat origin, and 34 persons of Bosniak Origin. With respect to the 43 employees whose employment were terminated by the procedural decision of 28 September 1992 (see paragraph 11 above), only one person, who is of Bosniak origin, has been re-employed.

IV. RELEVANT DOMESTIC LAW

[2] It should be noted that in the papers it submitted to the Court in 1998, the School stated that the applicant had been declared technically redundant in 1989 not 1988.

[3] It should be noted that in its observations, the Federation argues that by a procedural decision of 31 May 1992, the applicant's employment was terminated for his failure to use his rights under Article 21. The Federation was unable to provide a copy of that decision.

A. Employment legislation

22. The following three laws were in force in the Federation until the entry into force of a new Labour Law on 5 November 1999.

1. 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), taken over as a law of the Republic of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RBiH – no. 2/92);

2. The Former Socialist Republic Law on Working Relations (Official Gazette of the Socialist Republic of Bosnia and Herzegovina no. 20/90), as applicable in accordance with the provision on the continuation of laws as contained in Article 2 of Annex II to the Constitution of Bosnia and Herzegovina (Annex 4 to the Agreement);

3. The Decree with Force of Law on Labour Relations during the State of War and Immediate Threat of War (OG RBiH no. 21/92 of 23 November 1992), adopted as the Law on Labour Relations by the Assembly of the Republic of Bosnia and Herzegovina (OG RBiH no. 13/94).

23. As indicated above, the above laws were replaced by a new Labour Law (OG FbiH 43/99) which entered into force on 5 November 1999. The Law was amended by the Law on Amendments to the Labour Law (OG FbiH 32/00) which entered into force on 7 September 2000.

24. Article 21 of the Law on Fundamental Rights in Working Relations provided that:

"Employee whose services are no longer required due to technological or other advancement that is contributing to the increase of productivity and improves the success of the organisation, i.e. of the employer, cannot get the cancellation of his employment until he is provided with, in accordance with the criteria determined by the law and general acts, i.e. work agreements, one of the following working rights:

1. right to work in other organisation, i.e., with the employer on the basis of the agreement between the competent bodies, on the working assignment that corresponds to his knowledge and skill, i.e., his working ability;

…
Employee that is not provided with one of the rights from para. 1 of this Article is entitled to pecuniary compensation in, at least, the amount of guaranteed personal income until the conditions for realisation of his right are obtained, up to two years the longest."

25. Article 23 paragraph 2 of the Law on Fundamental Rights in Working Relations provided that:

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

26. Article 10 of the Law on Labour Relations During the State of War provided that:

"An employee can be sent on unpaid leave due to his inability to come to work in the following cases:

if he lives or if his working place is on occupied territory or on territory where fighting is taking place.

…
Unpaid leave can last until the termination of the circumstance mentioned above, if the employee demonstrates, within 15 days after the termination of these circumstances, that he

or she was not able to come to work earlier. During the unpaid leave all rights and obligations of the employee under the employment are suspended."

27. Article 15 of the Law on Labour Relations During the State of War provided that:

"The employment is terminated, if, while under a compulsory work order, the employee stayed away from work for more than 20 consecutive days without good cause, or if he took the side of the aggressor against the Republic of Bosnia and Herzegovina."

28. Article 5 of the new Labour Law provides that:

"A person seeking employment, as well as a person who becomes employed, shall not be discriminated against based on race, color, sex, language, political or other opinion, ethnic or social background, 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.

29. Article 143 of the new Labour Law provides that:

"An employee who has the status of a laid off employee on the effective date of this law shall retain that status no longer than six months of the effective date of this law (5 May 2000), unless the employer invites the employee to work before the expiry of this deadline"

....
"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 had not accepted employment from another employer during this period, shall also be considered a laid off employee."

...
"While laid off, the employee shall be entitled to a compensation in the amount specified by the employer"

...
"If a laid off employee is not invited to work within the deadline referred to in paragraphs 1 and 2 of this Article, his or her employment shall be terminated with a right to severance pay which shall not be less than two thirds of the average monthly salary paid at the level of the Federation valid at the time of enactment of this Law, as published by the Federal Statistics Bureau, for up to five years of working experience, and with an additional one third of the average monthly salary for persons with 6-10 years of working experience, and a further one third for persons with 11-19 years of working experience, and further one third of the average monthly salary for those with 20 or more years of working experience." (Article 50 of the Law on Amendments to Labour Law)

...
"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."

30. Article 51 of the Law on Amendments to Labour Law:

In the Labour Law, a new Article 143a shall be added to read as follows:

"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 Commission, established in accordance with Article 143b, that his violated right be protected."

"If a procedure pertaining to the rights of the employee under paragraph 1 and 2 of the Article 143 has been instituted before a Court, this Court shall refer the case to the Commission, established in accordance with Article 143b, and interrupt the procedure."

B. The Law on Civil Procedure

31. 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 pay special attention to the need to solve such disputes as a matter of urgency. The new Law on Civil Proceedings contains the same provision in Article 426 (OG FBiH no. 42/98).

V. COMPLAINTS

32. The applicant alleges that he was discriminated against in his right to work on the ground of his ethnic origin. He asserts that workers of Bosniak origin have been employed, rehired, or given overtime assignments, whilst he remained on the waiting list and that the School advertised vacancy announcements for positions with similar qualifications as the ones he held.

33. The applicant further complains that there has been a violation of Article 6 of the European Convention of Human Rights (hereinafter"ECHR") in that he has been denied his right to a fair hearing within a reasonable time as a result of the Municipal Court II's failure to ensure participation by the School or render a decision for over four (4) years.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. Admissibility

34. The Federation claims that the case is inadmissible because the applicant has not exhausted available domestic remedies. The Federation argues that the applicant could have filed an appeal to an administrative body dealing with labour disputes. Instead, the applicant submitted on, 24 December 1996, a complaint to the then Court of First Instance II in Sarajevo

35. The Federation further claims that the 6-month rule has not been complied with, as there has not been a final decision from which the applicant could apply to the Chamber.

2. Merits

36. Firstly, the respondent Party submits that the applicant has not provided any evidence that he has been discriminated against in this matter. The Federation then points out that a number of relevant facts are in dispute, making the case difficult to decide. Secondly, the respondent Party concedes that the applicant was referred to unpaid leave as of 30 April 1992 and that he was placed on the waiting list on 10 June 1996. However, they state that the applicant was declared redundant by a decision of the school counsel dated 7 June 1990 because the subject he was teaching, "basics of technique and production," was removed from the curriculum. Accordingly, the School had issued a decision terminating the applicant's employment on 31 May 1992. In response to the Chamber's request for a copy of that decision, the respondent Party provided a procedural decision of 28 September 1992 terminating the applicant's employment on different grounds. The respondent Party alleges that the 31 May 1992 decision was destroyed during the war.

37. Thirdly, the respondent Party states that the Labour Inspector's decision requiring that the applicant's labour rights be assessed under Article 10 of the Decree with the Force of Law was

incorrect since the applicant's employment had been terminated on 31 May 1992 and the Decree came into force on 23 November 1992. Further, that the applicant was declared redundant as early as 1989 and his employment should have been terminated already on 21 June 1991 in accordance with Article 21 of the Law on Fundamental Rights Arising from the Employment and Articles 6-11 of the Law on Labour Relations. Accordingly, the respondent Party claims that the applicant's employment was legally terminated and illegally re-established as a result of the decision of the Labour Inspector.

38. Fourthly, the respondent Party states, in its observations of 17 August 1999, that the class to which the applicant claims he should be reinstated, technical drawing, was assigned to a teacher of non-Bosniak descent before the applicant was put on the waiting list. However, when asked directly by the Chamber for the name of the person who has been teaching technical drawing since 1995, the respondent Party stated that it was Mirsada Kršlć, who is of Bosniak origin. In further observations, the respondent Party then stated that starting from the school year 1997/98 Desanka Zaimović, who is of Serb origin, has been teaching technical drawing. The Federations further states that Ms. Zaimović was engaged by the School on 2 February 1997. However, the respondent Party has not submitted conclusive evidence to establish when Ms. Zaimović was engaged.

39. With respect to the applicant's complaint regarding the length of proceedings under Article 6, the respondent Party claims that the length of the proceedings is due in large part to the actions of the applicant. The respondent Party states that he has prolonged the proceedings by amending his claim on 22 May 1997. Further, the Federations states that the applicant has received favourable court decisions that he has not had implemented. The respondent Party seems to be referring to the 25 October 1996 decision of the School, not court decisions.

B. The Applicant

40. The applicant maintains that the course of technical drawing was initially taught by Mirsada Kršić, a woman of Bosniak origin, since February 1996. Further, he asserts that Ms. Kršić taught these classes in addition to her full employment in other subjects. The applicant complained to the School about the fact that Ms. Kršić was teaching in addition to her full workload. The School responded by hiring Desanka Zaimović in February 1997. The applicant further maintains that the number of classes being taught in technical drawing has increased from 8 to 18 between 1996 and 1999. In fact, during the 1996-1997 school year, the applicant alleges that three engineers left the school and the school had to reduce the number of classes taught in engineering. Classes in technical drawing were not taught for one and one half months during the 1996-1997 school year.

41. The applicant further points out that he used his rights under Article 21 and was, in fact, teaching at the School at the end of 1991. Finally, he points out that, according to the Law on Civil Procedure, employment disputes are to be dealt with urgently. The applicant asks to be reinstated and for compensation in the amount of 30,000 KM. The applicant further states that on 15 January 2000 the School stopped paying him any compensation. He states that since the end of 1996, he received approximately 75 KM per month for one year, 100 KM per month for 2 years and 200 KM per month for 8 months.

VII. OPINION OF THE CHAMBER

A. Admissibility

1. Requirement to exhaust effective domestic remedies

42. Before considering the merits of the case the Chamber must decide whether to accept the case, taking into account the criteria for admissibility set out in Article VIII (2) of the Agreement. According to Article VIII(2)(a), the Chamber shall take into account whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted. In this regard, it is incumbent on the respondent Party, arguing non-exhaustion to show that there was a remedy available to the applicant and to satisfy the Chamber that the remedy was an effective one.

43. In the present case, the Federation argues that the applicant had at his disposal effective remedies that have not yet been exhausted. Specifically, the Federation argues that the applicant could have filed an appeal to an administrative body dealing with labour disputes. However, the Chamber notes that the applicant was not required to bring his complaint before an administrative body. This was not a prerequisite to filing a lawsuit with the Court of First Instance II.

44. As noted above, the applicant applied to the Labour Inspector in June of 1996 to have his labour status resolved. In response to the Labour Inspector's decision, the School issued a procedural decision on 25 October 1996. However, unsatisfied with the fact that he was placed on a waiting list, because the applicant alleges that there were courses available that he was qualified to teach, the applicant appealed against that decision, in a timely manner, to the School without success. He then initiated proceedings before the then Court of First Instance II in Sarajevo on 24 December 1996. The case is still pending, over four (4) years later. The Court is under an obligation, pursuant to Article 51 paragraph 2 of the Law on Amendments to the new Labour Law, to refer the case to the Commission. The applicant is not required to initiate any further proceedings under this law. Accordingly, the Chamber does not consider that there is any additional remedy available to the applicant that he should be required to exhaust. It follows that, in this regard, the Federation's arguments must be rejected.

2. Competence *ratione temporis*

45. The Chamber will next address, *sua sponte*, the question to what extent it is competent *ratione temporis* to consider this case, bearing in mind that some of the impugned acts occurred before the entry into force of the Agreement on 14 December 1995. In accordance with generally accepted principles of international law, the Agreement cannot be applied retroactively. It is thus outside the competence of the Chamber *ratione temporis* to decide whether events occurring before the entry into force of the Agreement gave rise to violations of human rights (see, e.g., case no. CH/96/1 *Matanović,* decision on admissibility of 13 September 1996, at section IV, Decisions 1996-97). However, evidence relating to such events may be relevant as a background to events occurring after the Agreement entered into force (see, e.g., case no. CH/97/42, *Eraković*, decision on admissibility and merits of 15 January 1999, paragraph 37, Decisions and Reports January – July 1999). Moreover, in so far as an applicant alleges a continuing violation of his rights after 14 December 1995, the case may fall within the Chamber's competence *ratione temporis.* (see case no. CH/97/67, *Zahirović*, decision on admissibility and merits of 10 June 1999, paragraph 106, Decisions and Reports January-July 1999).

46. In the present case, the applicant complains primarily against the 25 October 1996 decision placing him on the waiting list, when others have been hired to teach courses for which he is qualified, and the School's subsequent removal of the applicant from the waiting list, without being re-employed. Therefore, the thrust of the applicant's complaints relate to acts that occurred after 14 December 1995. To this extent, the situation therefore falls within the Chamber's competence *ratione temporis*.

47. In response to the applicant's allegations, the respondent Party has given several different reasons for the initial termination of his employment, and has argued that the 25 October 1996 decision was illegal and incorrect, in light of the initial termination of the applicant's employment. The alleged termination(s) of the applicant's employment occurred prior to 14 December 1995. However, according to legal norms of 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 or her dismissal. In this case, the applicant alleges, and the respondent Party has not denied, that he was never properly informed of the reasons for his dismissal. In fact, the only time he received a written procedural decision concerning his dismissal was when it was forwarded to him, in October 2000, by the Chamber. In any event, the applicant began court proceedings in 1996 after the School attempted to resolve his labour status and relegated him to the waiting list. The applicant's grievances relate therefore to a situation that took place after the Agreement entered into force. The Chamber is therefore competent *ratione temporis* to examine this case in so far at it relates to events that occurred after 14 December 1995. (see e.g., case no. CH/98/948, *Mitrović,* decision on admissibility of 7 September 1999, paragraph 23, Decisions and Reports July-December 1999).

48. The Chamber finds that there are no other grounds for declaring the application inadmissible. Accordingly, the case is to be declared admissible.

B. Merits

49. 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.

50. Under Article II of the Agreement, the Chamber has jurisdiction to consider (a) alleged or apparent violations of human rights as provided in the ECHR and its protocols and (b) alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the 16 international agreements listed in the Appendix. Under Article I(14) of the Agreement, the Parties shall secure to all persons within their jurisdiction the enjoyment of the aforementioned rights and freedoms without discrimination on any ground such as sex, race, colour, language, religion, political, or other opinion, national or social origin, association with a national minority, property, birth or other status.

51. The Chamber has held in the case of *Hermas* (case no. CH/97/45, decision on admissibility and merits delivered on 18 February 1998, paragraph 118, Decisions and Reports 1998) that the prohibition on discrimination is a central objective of the General Framework Agreement to which the Chamber must attach particular importance. Under Article II(2)(b) it has jurisdiction to consider alleged or apparent discrimination in the enjoyment of the rights and freedoms provided for in, inter alia, the International Covenant on Economic Social and Cultural Rights (hereinafter "ICESCR") and the Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD").

1. Discrimination in the enjoyment of the right to work, free choice of employment and protection against unemployment, as guaranteed by ICESCR and the CERD

52. The Chamber will first consider the allegation of discrimination under Article II(2)(b) of the Agreement in relation to Article 6(1) of the ICESCR and Articles 1(1) and 5(e)(i) of the CERD which, as far as relevant, reads 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 1(1) of the CERD:
>
> "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."
>
> Article 5 of the CERD:
>
> "In compliance with the fundamental obligations laid down in Article 2 of this Convention, 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

53. The Chamber will now examine which precise acts and omissions affecting the applicant can be imputed to the Federation. The Chamber has already found itself competent to examine the fact that the applicant was placed on the waiting list after 14 December 1995. Further acts possibly attracting the responsibility of the Federation under the Agreement include the School's hiring of a new teacher to teach a class for which the applicant was qualified whilst the applicant remained on the waiting list; the School's vacancy announcement for a teacher to teach classes for which the applicants is qualified; and the cessation of payment to the applicant of compensation and contributions to the pension fund and for social security.

54. All these acts comprise an interference with the applicant's rights under Article 6(1) of the ICESCR and under Article 5(e)(I) of the CERD, as well as a potential failure of the Federation's positive obligation to secure protection of those rights without discrimination.

(b) Differential treatment and possible justification

55. In order to determine whether the applicant has been discriminated against, the Chamber must first determine whether the applicant was treated differently from others in the same or a relevantly similar situation. 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 (see e.g. cases nos. CH/97/67, *Zahirović*, decision on admissibility and merits delivered on 8 July 1999, paragraph 120, Decisions and Reports January-July 1999; *Rajić*, decision on admissibility and merits delivered on 7 April 2000, paragraph 53, Decisions and Reports January-July 2000).

56. There is a particular onus on the respondent Party to justify otherwise prohibited differential treatment based on any ground mentioned in Article I(14) of the Agreement or in Article 1 of the CERD, such as race, colour and ethnic or national origin. In previous cases, the Chamber has taken a similar approach (see e.g., the above-mentioned *Hermas* decision paragraphs 86 et seq., case no. CH/97/46, Kevešević, decision on the merits delivered on 10 September 1998, paragraph 92, Decisions and Reports 1998; and case no. CH/98/756, D.M., decision on admissibility and merits delivered on 14 May 1999, paragraph 72, Decisions and Reports January-July 1999).

57. The applicant has essentially argued that he was placed and kept on a waiting list merely due to his Croat origin. The Federation has argued, for its part, several different reasons for the actions of the School vis-à-vis the applicant's employment. First, the Federation argues that the applicant was put on the waiting list because he was not qualified to teach technical drawing; second, the Federation argues that there was no need for the applicant because the number of classes for which he was qualified had decreased; and finally, the Federation argues that the Labour Inspector's decision of 13 September 1996, which obligated the School to regulate the applicant's employment status, was based on an incorrect establishment of the facts. Namely, the Federation states that the applicant's employment had been terminated on 31 May 1992 because he had been declared "technically redundant" in 1990 and had failed to use his rights under Article 21 of the Law on Fundamental Rights in Working Relations, and therefore he never should have been put on the waiting list in the first place.

58. The Chamber has already delimited its competence *ratione temporis* and can only consider the alleged discrimination in so far as it is alleged to have taken place or continued after 14 December 1995. It cannot therefore adjudicate whether any of the stated reasons for the applicant's termination were discriminatory. In its subsequent examination, the Chamber must nevertheless take account of those events occurring before 14 December 1995 that led to the applicant's placement on the waiting list.

59. The respondent Party states that the applicant's employment was terminated on 31 May 1992 because he had been declared redundant in 1990. However, the respondent Party was unable to supply a copy of that decision. It supplied a copy of the 28 September 1992 decision upon which the applicant's employment was terminated on different grounds. Regardless, of whether there ever was a 31 May 1992 decision, the Chamber finds it of little relevance, as it would have been superseded by the decision of 28 September 1992, in any event. Furthermore, the Chamber finds it curious that the applicant's employment would have been terminated in September of 1992 if there already had been a procedural decision terminating his employment in May of 1992.

60. Accordingly, with respect to the initial termination of the applicant's employment, the Chamber finds it established that 43 persons' (including the applicant's) employment were terminated by the procedural decision of 28 September 1992 on the purported grounds of "unjustified absence and failure to carry out their work for 20 days." Of those 43 persons, 26 were of Serb origin, 12 were of Croat origin, and 5 were of Bosniak origin. It is also established that of those 43 persons, only one person has been re-employed and that person is of Bosniak origin.

61. As found by the Labour Inspector, the applicant's Labour Relations should have been regulated according to Article 10 of the Decree with the Force of Law During the State of War or Immediate State of War. Regardless, of whether the 28 September 1992 decision was in accordance with the law, the Chamber finds that this decision had a disparate impact on persons of non-Bosniak origin and resulted in the differential treatment of non-Bosniaks subsequent to 14 December 1995 because the majority of employees who were required to reapply for their jobs after the war ended were non-Bosniaks.

62. With respect to the applicant being placed and remaining on the waiting list since 10 June 1996, the Chamber notes that the respondent Party has provided different and contradictory reasons for the interference with the applicant's rights. At various stages of the proceedings before both the domestic court and the Chamber the reasons put forward by the respondent Party and the School have either been rescinded and/or contradicted.

63. In its decision of 27 June 1996, the School confirmed that the applicant was qualified to teach technical drawing. However, due to a reduced workload the School stated that there was no need for the applicant. Subsequently, in its observations the respondent Party confirmed, what the applicant had stated, namely, that the number of classes in technical drawing has increased since 1996. Then in its procedural decision of 25 October 1996, the School's stated reason for placing the applicant on the waiting list was that that the applicant, who is a mechanical engineer, was not qualified to teach technical drawing. Then the respondent Party subsequently acknowledged that he was qualified. Finally, the respondent Party alleged that the procedural decision placing the applicant on the waiting list, in the first place, was illegal because the applicant had been declared redundant and his employment terminated as a result. As such, the respondent Party argues, his labour relations should not have been regulated in the way the Labour Inspector ordered. However, the respondent Party has provided no evidence for this. In fact, the evidence establishes that the applicant's employment was not terminated based on the fact that he had been declared redundant.

64. Further, the respondent Party conceded that Desanka Zaimović a person of Serb origin married to a person of Bosniak origin was employed after the applicant was already placed on the waiting list. Additionally, on 15 January 2000 the School stopped paying the applicant any compensation at all. The respondent Party has not provided the Chamber with a justification for this action.

65. The Chamber finds that the net result of the above stated is that the respondent Party has provided no credible reason for either placing the applicant on the waiting list in the first place, keeping him on the waiting list since 10 June 1996, or stopping his compensation payments. Accordingly, the Chamber cannot accept the Federations arguments that the applicant's differential treatment was justified on any ground.

66. The Chamber furthermore notes, that the respondent Party stated that the post for teaching technical drawing had been filled by a person of "non-bosniak" origin. After requesting the name of

this person, on several occasions, the respondent Party finally conceded that initially the course was taught by Mirsad Kršlć, who is of Bosniak origin, and it was later taught by Desanka Zaimović, a person of Serb origin who is apparently married to a person of Bosniak origin. Further, it is established that since 1995, only 2 persons of Serb origin and 4 persons of Croat origin have been employed by the School in comparison with 34 persons of Bosniak origin. Additionally, of those 43 persons, whose employment had been terminated by the decision of 28 September 1992, only one person was rehired and that person was of Bosniak origin. These facts, coupled with the respondent Party's contradictory statements in this case, strongly suggest that there has been discriminatory treatment of the applicant based on his Croat origin.

67. The Chamber, therefore, concludes that that the applicant has been discriminated against on the ground of national and ethnic origin in his enjoyment of the right to work under Article 6 of the ICESCR and Article 5 of the new Labour Law.

68. The application also raises an issue under Article 5(e)(i) of the CERD. That provision, in conjunction with Article 1 of the CERD, obliges a state to prohibit racial discrimination, i.e. also on the grounds of national or ethnic origin, in the enjoyment of the rights to work, to free choice of employment and to protection against unemployment. The Chamber has already found that the applicant was subject to differential treatment in his right to work according to Article 6 of the ICESCR. It has also established that this treatment was the result of discrimination on the ground of his national and ethnic origin.

69. The Chamber therefore finds it established that the applicant has been discriminated against also in the enjoyment of his rights as guaranteed by Article 5(e)(i) of the CERD, in particular his right to protection against unemployment.

70. In light of the above, the Federation is 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 treaties in question.

2. Article 6 of the Convention

71. The Chamber will continue to consider, under Article II(2)(a) of the Agreement, the allegation that there has been a violation of Article 6 of the Convention in that the proceedings in the applicant's case have not been determined 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 fair. . hearing within a reasonable time…"

72. In the first instance, the Chamber must examine whether the resolution of the applicant's employment status concerns a "civil right" within the meaning of Article 6 of the Convention. Although the applicant was an employee of a public institution, his employment was regulated by the Law on Labour Relations which applied to employment relations in general. In the present case, the Chamber finds that there is a dispute before the Municipal Court II in Sarajevo relating to the applicant's working relations, thereby affecting a civil right of the applicant (see e.g., case no. CH/97/50, *Rajić*, decision on admissibility and merits of 7 April 2000, paragraph 66, Decisions and Reports January-July 2000). Article 6(1) therefore applies to the proceedings before the Municipal Court II in Sarajevo.

73. The Chamber has already noted that the applicant initiated proceedings before that Court on 24 December 1996. 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 approximately four years and three months as of April 2001.

74. 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).

75. The issues in the applicant's case are whether his working relationship was terminated in accordance with the law and whether he was improperly placed on the waiting list. Although there are a number of factual disputes in this case, the Chamber cannot find that the issues are of a particularly complex nature. The Chamber further notes that there is no indication that the length of the proceedings can be imputed to the applicant. The statement by the respondent Party that the applicant has contributed to the delay, because he asserted a second claim in 1997, does not establish that he has contributed to the length of the proceedings. The respondent Party has not provided any explanation from which it would appear that the delays could not be imputed to the judicial authorities and the respondent Party itself.

76. In fact, the Chamber takes note that the School has significantly prolonged the proceedings by continuously changing its defence in this case both before the domestic court and the Chamber. A review of the documents establish that, initially the School stated that the applicant's employment was terminated because of his failure to appear for work for 20 consecutive days during the war, and that during that time another teacher was teaching the courses he was qualified to teach. Then in a procedural decision of 27 June 1996, the School confirmed that the applicant worked in the School until 30 April 1992 and that he was qualified to teach technical drawing, however, due to a reduced workload, there was no need for the applicant. However, in subsequent observations provided to the Chamber, the respondent Party confirmed the applicant's allegation, that, in fact, the number of courses being taught in technical drawing has increased since 1995. In fact, at least one new teacher was engaged, after the applicant was placed on the waiting list, to teach classes for which the applicant was qualified.

77. Thereafter, in its procedural decision of 25 October 1996, the School stated that the applicant was not, in fact, qualified to teach technical drawing, and therefore there was no need for him. In subsequent documents submitted to the Chamber, it is evident that the applicant is and has been, qualified. Thereafter, the School asked that the Municipal Court II issue a decision dismissing the applicant retroactive to 30 September 1990, due to the fact that the applicant had been declared redundant in 1988, and failed to use his rights under Article 21 of the Labour Law. However, in its observations to the Chamber, the respondent Party states that the applicant had, in fact, been dismissed by a procedural decision dated, 31 May 1992, for failure to use his rights under Article 21. When asked for a copy of that procedural decision, the respondent Party submitted a procedural decision, dated 28 September 1992, wherein the applicant and forty-two (42) other persons were dismissed for unjustified absence and failure to carry out their work for twenty (20) days. (see paragraphs 10-19 above).

78, In light of the above, it clearly cannot be found that the applicant has contributed to the delay. The respondent Party's argument on this point must be firmly rejected.

79. The Chamber also notes that an employee who considers that his working relationship was wrongly terminated has an important personal interest in a speedy outcome of the dispute and in securing a judicial decision on the lawfulness of this measure considering that his very livelihood depends on it. Further, domestic law requires that matters concerning employment are to be resolved as a matter of urgency (see Article 426 of the Law on Civil Proceedings, Official Gazette of the FBiH no. 42/98). The Chamber therefore finds that what was at stake for the applicant called for particular speed.

80. 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.

VIII. REMEDIES

81. Under Article XI(b) of the Agreement the Chamber must next address the question of what steps shall be taken by the Federation of Bosnia and Herzegovina to remedy breaches of the Agreement which it has found.

82. The applicant requests that the Federation be ordered to reinstate him and pay him compensation in the amount of 30,000 KM. This number seems to amount to approximately 500 KM for each month of unemployment. The Federation objects to this request on the grounds that it is not specified.

83. The Chamber finds that the applicant's claim for compensation cannot be rejected on the above stated ground. The Chamber has found the Federation in breach of its obligations under the Agreement by discriminating against the applicant on the basis of national and ethnic origin in the enjoyment of his rights under Article 6 of the ICESR and Article 5(e)(i) of the CERD and by violating his right to a fair hearing within a reasonable time under Article 6 of the ECHR. Therefore, the Chamber finds it appropriate to award the applicant pecuniary compensation for lost income.

84. The Chamber notes that, according to the Official Gazette of the Federation of Bosnia and Herzegovina (nos. 5/97, 4/98, 5/99, 500/99 and 501/2000), the average net salary in "non-economic employment relationships" (including school teachers) amounted to KM 239 in 1996, to KM 348 in 1997, to KM 406 in 1998, to 435.80 KM 1999, and to 412.72 KM in 2000.[4] Having regard to the general depreciation due to inflation and the fact that the net average salary does not include contributions to pension funds, the Chamber considers that applicant's claim of approximately 500 KM for each month of unemployment is, as a whole, reasonable (see case no. CH/97/90, *Rajić,* delivered on 7 April 2000 Decisions and Reports January-August 2000). However, the applicant states that from approximately the end of 1996 until 15 January 2000 he received some compensation from the School. He states that he received approximately 75 KM per month for one year, 100 KM per month for 2 years and then 200 KM per month for 8 months. Accordingly, over the course of 3 years and 8 months, the applicant received a total of 4,900 KM. The Chamber finds it appropriate to subtract these amounts from the total award. From June 1996 until and including April 2001 the total amount of lost salary amounts to 29,500 KM. Having deducted the payment of 4,900 KM the Chamber awards the applicant 24, 600 KM in pecuniary compensation for lost income and unpaid contributions from June 1996, the first time the applicant applied to the School in writing for reinstatement, up to and including, April 2001.

85. In the present case, the Chamber also finds it appropriate to order the respondent Party to undertake immediate steps to ensure that the applicant is no longer discriminated against in his right to work, and that he be offered the possibility of resuming his work, or a fair and just retirement, on terms equal with those enjoyed by other employees and commensurate with his qualifications as a teacher, and in any event not later than three months after the date when this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure.

86. The Chamber considers it appropriate that the respondent Party must pay to the applicant the sum of KM 500 per month for each month the applicant continues not to be reinstated into his employment or until another settlement between the Parties is reached. This sum is payable beginning from 1 May 2001.

87. Additionally, the Chamber has found the Federation in breach of its obligations under the Agreement with respect to the applicant's right to a fair hearing within a reasonable time. As a result, the applicant has suffered some non-pecuniary damage stemming from the absence of a final decision regarding his employment status. However, taking into account the award for compensation for material damages, the Chamber considers that the finding of a violation would provide just and sufficient satisfaction for moral damages.

IX. CONCLUSION

For these reasons, the Chamber decides

1. unanimously to declare the application admissible:

[4] It should be noted that all employment categories were calculated together for the year 2000.

2. unanimously, that the applicant has been discriminated against in the enjoyment of his right to work as guaranteed by Article 6 of the International Covenant on Economic, Social and Cultural Rights, as well as in the enjoyment of his right 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, the Federation of Bosnia and Herzegovina thereby being in violation of Article I of the Human Rights Agreement;

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

4. unanimously to order the Federation of Bosnia and Herzegovina to pay 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 o Procedure, the sum of 24,600 KM by way of compensation for lost income and unpaid contributions;

5. unanimously to order that the Federation of Bosnia and Herzegovina, through its authorities, undertake immediate steps to ensure that the applicant is no longer discriminated against in his right to work, and that he be offered the possibility of resuming his work or a fair and just retirement on terms equal with those enjoyed by other employees and commensurate with his qualifications as a teacher;

6. unanimously to order the Federation of Bosnia and Herzegovina to pay, beginning from 1 May 2001, the sum of KM 500 per month for each month the applicant continues not to be reinstated into his employment or until another settlement between the Parties is reached;

7. unanimously to order that simple interest at an annual rate of 10% (ten percent) will be payable over the above sums or any unpaid portion thereof from the day of expiry of the above mentioned one-month period until the date of settlement;

8. unanimously, that the award for compensation for material damages provides just and sufficient satisfaction with regard to the non-pecuniary damages;

9. unanimously to order the Federation of Bosnia and Herzegovina to report to it within three months after the date when this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure on the steps taken by it to comply with the above order.

(signed)
Peter KEMPEES
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel