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

Case no. CH/99/2696

Arif BRKIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 8 October 2001 with the following members present:

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

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

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

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

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina of Bosniak origin. The case concerns his failed attempts to resume work as a dentist and oral surgeon in the Medical Centre of Livno where he worked until 21 July 1993. He was expelled from work during the Bosniak-Croat conflict in the region due to the application of martial law. From that day until the present he has not been allowed to resume work and has never received any written decision on his removal from work. The applicant appears to be the only oral surgeon in Canton 10.

2. The case raises issues under Article 6 of the Convention, Article 1 of Protocol No. 1 to the Convention and in regard to discrimination in the exercise of the right to work and related rights protected by Article 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR") and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD").

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced on 13 July 1999 and registered on 26 July 1999.

4. In a letter of 13 September 1999 the Dental Association of Bosnia and Herzegovina expressed its support of the application since the applicant is a recognised specialist and expert in oral surgery.

5. During the December 1999 session the Panel decided to transmit the case to the respondent Party for observations on the admissibility and merits.

6. The Federation submitted observations on 15 February and 4 May 2000, 12 April and 29 June 2001. The applicant submitted additional observations on 10 March and 27 June 2000, 4 June, 21 June and 13 July 2001.

7. The Chamber considered the admissibility and merits on the case on 6 June, 5 September and 8 October 2001 and adopted the present decision on the latter date.

III. FACTS

A. The particular facts of the case

8. During 1992 the applicant was taken to the Ministry of Interior for questioning. The police came repeatedly to his apartment and searched it.

9. The Medical Centre employed the applicant as a dentist and a specialist of oral surgery from 1 January 1971 until 21 July 1993 when he was expelled from work due to the Bosniak-Croat conflict in Livno. The applicant appears to have been the only oral surgeon practising in Canton 10. He was barred from coming to work together with twelve other physicians and medical workers, all of Bosniak origin. None of the people received any official or written decision on their discharge.

10. On 27 July 1993 the HVO (Croat Defence Council) enforced a law by which all persons who took part in the "rebellion" against the authorities were discharged from employment. If relatives of workers took part in the rebellion, the workers could be forced to accept other jobs or be placed on unpaid leave.

11. Since the time of the Bosniak-Croat conflict the Minister of Health of the Republic of Croatia has sent physicians and other medical staff to the Medical Centre in Livno in order to support its work. After the applicant's discharge, the Medical Centre temporarily employed another oral surgeon from the Republic of Croatia. As long as the Medical Centre had no oral surgeon available, it sent its patients to Split and Mostar.

12. The applicant has not received any payments and has not been included in the health insurance scheme since at least mid-1994.

13. On 9 March 1998 the applicant initiated civil court proceedings before the Municipal Court of Livno seeking a decision to order the Medical Centre to re-employ him. He also requested the Court to order the Centre to pay him compensation for pecuniary damage from 21 July 1993 until such time as he would be re-instated, including interest and all contributions stemming from his employment.

14. The Municipal Court held one preliminary hearing on 23 February 1999. It then postponed further proceedings for an indefinite time ordering the applicant to submit a written request to the Medical Centre for re-employment as provided by internal rules of the Centre. The applicant complied with the court's order but did not receive any answer from the Medical Centre.

15. In September 1999 the Minister of Justice of Canton 10 was removed from office by decision of the High Representative because of continuous discrimination of Bosniaks in judicial and administrative proceedings.

16. The Institution of the Ombudsman for the Federation of Bosnia and Herzegovina tried to resolve the legal and working status of the applicant by encouraging the parties to reach an agreement. However, an agreement between the applicant and the Medical Centre in Livno could not be reached. The Ombudsman then requested the Municipal Court to schedule a new hearing. The Municipal Court did not proceed with the applicant's case until 20 March 2001 when it held another hearing. The Court issued a decision in which it declared that the court procedure was suspended and referred the case to the Cantonal Commission for Implementation of Article 143 of the Law on Labour.

17. The Medical Centre has re-employed four persons of Bosniak origin who were put on the waiting list during the war. The Medical Centre still has no oral surgeon and is currently providing special training in this subject to a physician of Croat origin in order to fill the vacancy in the future.

B. Particular written evidence – the OSCE Report

18. The Human Rights Department of the Organisation for Security and Co-operation in Europe ("OSCE") in June 1999 published a report on Employment Discrimination in Bosnia and Herzegovina and gave a regional overview of discrimination reported in Canton 10. The report states that practically every non-Croat in the area of Livno was laid off or dismissed between July and October 1993. No members of the Croat majority population in the Livno area were placed on waiting lists, nor were they dismissed.

IV. RELEVANT LEGAL PROVISIONS

A. The Law on Working Relations

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

20. Article 7 paragraph 1 of this Law provided that an employee could be put on a waiting list if the need for his or her work had temporarily ceased to exist because the workload had been reduced during the state of war or in case of a direct threat of war, and at the longest until these circumstances cease to exist. An employee put on the waiting list was entitled to pecuniary compensation. The exact amount was to be defined by the management, i.e. the employer, in accordance with the financial situation of the employer (Article 7 paragraph 2). The contributions for health insurance and retirement and disability insurance were calculated on the basis of the aforementioned pecuniary compensation (Article 7 paragraph 3). The obligation to pay such contributions remained incumbent on the employer (Article 7 paragraph 4).

B. Laws applied on the territory of the former "Croat Republic of Herceg-Bosna"

21. The Chamber notes that with respect to the present case, by citing laws of the "Croat Republic of Herceg-Bosna", the Chamber does not intend to imply any recognition of the existence of the "Croat Community of Herceg-Bosna" or the "Croat Republic of Herceg-Bosna". The Chamber also does not intend to take any position, nor does it need to take any position to reach its conclusions, on the relationship between or preferential validity or applicability of these laws as compared to the laws applicable in the Federation of Bosnia and Herzegovina.

1. The Decree on Labour Relations on the territory of Herceg-Bosna

22. The HVO of the Croat Republic of Herceg-Bosna on 9 December 1992 issued the "Decree on labour relations on the territory of Herceg-Bosna during the state of war or immediate threat of war" (Official Gazette of "Herceg-Bosna" no. 9/1992).

23. Article 1 of the Decree confirmed that the Law on Fundamental Rights in Working Relations and the Law on Labour of the Republic of Bosnia and Herzegovina shall be applied on the territory of the Croat Community of Herceg-Bosna.

24. Article 12 provided that the labour relation of an employee of a company was to be terminated:
- if he participated or has participated in the hostile activities on the side of the aggressor or
- if he did not appear at his post for three consecutive days without justified reason.

25. Pursuant to Article 23, companies and employers were obliged to harmonise their acts with the provisions of this Decree.

2. The Decision on the Manner of Implementing and Executing the Working Duty and its amendment

26. Article 5 of the Municipal Decision on the Manner of Implementing and Executing the Working Duty in the Territory of the Livno Municipality, issued on 2 June 1992, provided that employees could be exempted from their working duty if their residence was located close to an area of war activities; in order to prevent defeatism, subversive activities and on other precautionary grounds; and in other cases where deemed necessary. Article 6 of this Decision stipulated that in such cases a procedural decision was to be issued by the manager of the organisation or the employer, and that the employee was to be exempted from working duty until the cessation of the circumstances which had caused the exemption.

27. On 27 July 1993 the municipal HVO rendered a decision on the amendments to the Decision on the Manner of Enforcement and Executing the Working Duty in the Territory of the Livno Municipality with regard to the events of the "rebellion" of 21 July 1993. The decision was to be delivered to, *inter alia*, all companies, state institutions and legal persons in the Municipality.

28. Article 1 of the decision, in relevant part, reads as follows:

> "The Decision on the Way of Enforcement and Executing the Working Duty in the Territory of the Livno Municipality, number 01-023-91 of 2 July 1992 shall be amended in such a way that after Article 5 four new Articles marked as 5a. – 5.d are added.
> …
> Article 5.b)
> (1) The procedural decision on termination of employment with the date of 21 July 1993 shall be delivered to all workers for whom it is established by operative processing that they are guilty for direct taking part, preparation and organisation of the rebellion.
> (2) The Military Police, HVO and Police … shall give the data on workers after the operative processing to the directors of companies and heads of state institutions.
> Article 5.c)

(1) Workers for whom it is established that they, or any of their close family members, did not take part in any manner in the rebellion shall continue to work.

(2) If someone of the worker's close family members took directly part in the rebellion, such worker shall be sent on unpaid leave (stay of labour relation).

(3) Directors and heads of companies and state institutions and other legal persons are authorised to assign the workers referred to in paragraph 1 of the Article to other tasks depending on the needs of the working process or to put them on the waiting list with paid allowance to the amount of 60% of personal income.

…"

29. Article 3 of the decision provided as follows:

"This decision enters into force on the date when it is passed, and it shall be published in the Official Gazette of the Livno Municipality."

C. The Law on Fundamental Rights in Working Relations

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

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

D. The Law on Labour

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

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

"(1) A person seeking employment, as well as a person who becomes employed, shall not be discriminated against on the basis of race, colour, sex, language, religion, political or other opinion, ethnic or social origin, financial situation, birth or any other circumstance, membership or non-membership in a political party, membership or non-membership in a trade union, and physical or mental impairment in respect of recruitment, training, promotion, terms and conditions of employment, cancellation of the labour contract or other issues arising out of labour relations.

(2) Paragraph 1 of this Article shall not exclude the following differences:

1. which are made in good faith based upon requirements of particular a job;
2. which are made in good faith based on incapability of a person to perform tasks required for a particular job or to undertake training required, provided that the employer or person securing professional training has made reasonable efforts to adjust the job or the training which such person is on, or to provide suitable alternative employment or training, if possible;
3. activities that have as an objective the improvement of the position of persons who are in unfavourable economic, social, educational or physical position.

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

1. Persons whose rights are violated may submit a complaint before the competent court in relation to the infringement of their rights;
2. If the complainant presents obvious evidence of discrimination prohibited by this Article, the defendant is obliged to present evidence that such differential treatment was not made on the discriminatory grounds;
3. If the court finds that the allegations of the plaintiff are well-founded, it shall order the application of the provisions of this Article, including employment, reinstatement to a previous position or restoration of all rights arising out of the labour contract."

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

"(1) 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.

(2) An employee who was employed on 31 December 1991 and who, within three months from the effective date of this law, addressed in written form or directly the employer for the purpose of establishing the legal and working status, and has not accepted employment from another employer during this period, shall also be considered a laid off employee.

(3) While laid off, the employee shall be entitled to compensation in the amount specified by the employer.

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

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

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

...

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

34. Article 145 of the Law on Labour provides that:

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

35. In the Law on Labour, a new Article 143a was added that reads as follows:

"(1) An employee believing that his employer violated a right of his arising from paragraph 1 and 2 of Article 143, may within 90 days from the entry into force of the Law on Amendments to Labour Law, introduce a claim to the Cantonal Commission for Implementation of Article 143 of the Law on Labour (hereinafter the "Cantonal Commission"), established by the Cantonal Minister competent for Labour Affairs (hereinafter the "Cantonal Minister").

(2) The Federal Commission for Implementation of Article 143 (hereinafter the 'Federal Commission'), which is established by the Federal Minister, shall decide on the complaints against the procedural decisions of the Cantonal Commission.

(3) In case the Cantonal Commission is not performing the tasks for which it is established, the Federal Commission shall take over the jurisdiction of the Cantonal Commission.

(4) If a procedure pertaining to the rights of the employee under paragraphs 1 and 2 of Article 143 has been instituted before a Court, this Court shall refer the case to the Cantonal Commission, and issue a decision on suspension of the procedure.

36. The new Article 143b provides as follows:

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

37. The new Article 143c provides as follows:

> "The Federal/Cantonal Commission may:
>
> 1. hear the employee, employer and their representatives;
> 2. summon witnesses and experts;
> 3. request appropriate authority organs and employers to submit all relevant information.
>
> Decisions of the Federal/Cantonal Commission shall be:
>
> 1. final and subject to the court's review in accordance with the law;
> 2. legally based;
> 3. transmitted to the applicant within 7 days."

38. The Law on Amendments to the Labour Law furthermore provides the following Articles 52, 53 and 54:

> "Article 52
>
> This Law shall not affect contracts and payments done between an employer and his employee in the application of Article 143 of the Law on Labour prior to the date of entry into force of this Law.
>
> Article 53
>
> This Law shall not affect final decisions issued by the Court in the period prior to the entry into force of this Law in application of Article 143 of the Law on Labour.
>
> Article 54
>
> Procedures of realisation and protection of employees' rights initiated prior to the entry into force of this Law shall be completed according to the regulations applicable on the territory of the Federation prior to the entry into force of this Law, if it is more favourable to the employee, with the exception of Article 143 of the Law on Labour."

E. The Law on Civil Proceedings

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

V. COMPLAINTS

40. The applicant alleges a violation of his right to respect for his private and family life and his home as guaranteed under Article 8 of the Convention, his right to a fair hearing under Article 6 of the European Convention and his right to peaceful enjoyment of his possessions under Article 1 of Protocol No. 1. He also alleges discrimination in the exercise of his right to work.

41. The applicant alleges that the Municipal Court in Livno is biased and inefficient in that it did not decide upon his lawsuit.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

42. The respondent Party raises the objection of incompetence *ratione temporis* for all events that occurred before 14 December 1995. It further denied responsibility for the acts of the Medical Centre.

43. In its observations, the respondent Party gives as the reason for the applicant's removal from work that the labour relations between him and the employer "temporarily ceased due to the decrease in the scope of work in the Medical Centre of Livno ... during the state of war or immediate threat of war, but not for longer than these circumstances lasted". The respondent Party asserts that the applicant has the status of employee on the waiting list.

44. The Federation claims that at the end of October 1994 the applicant was invited to resume his position as an oral surgeon but refused to do so.

B. The applicant

45. The applicant maintains his claims and asserts that he was not allowed to come to work on the basis of provisions that were passed by the HVO in order to "cleanse" the Medical Centre of all Bosniaks.

46. The applicant further denies the claim of the respondent Party that he was ever invited to resume work and argues that the respondent Party does not substantiate its allegations. He further points out that the representative of the Medical Centre, the defendant in the domestic court proceedings, did not assert that he was offered to be re-employed.

VII. OPINION OF THE CHAMBER

A. Admissibility

1. Competence *ratione personae*

47. 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 set forth 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.

48. The Chamber also recalls the undertaking of the Parties to the Agreement to secure the rights and freedoms mentioned in the Agreement to all persons within their jurisdiction. This undertaking not only obliges a Party to refrain from violating those rights and freedoms, but also imposes on that Party a positive obligation to ensure and protect those rights (see case no. CH/96/1, *Matanović,* decision on the merits of 6 August 1997, paragraph 56, Decisions 1996-97).

49. The Federation argues that it cannot be held responsible for the applicant's situation, as it was not in control of the acts of the Medical Centre.

50. There is no evidence that the Federation explicitly instructed the Centre to take any of the decisions about which the applicant is complaining. However, it appears indisputable that the Medical Centre is a public institution. It is clear to the Chamber that public bodies for which the Federation is responsible have a direct influence on any acts and omissions of the Centre. Therefore, the impugned acts and omissions are attributable to the Federation for the purposes of the Agreement. It follows from the obligations that the Federation has assumed under Article II that it has to take, for the purposes of securing the rights under the Agreement, all necessary steps to gain and

exert effective control over all forms and levels of public authority exercised within its jurisdiction. A submission that the Federation is unable to influence authorities of a certain Canton cannot serve as an excuse to evade responsibility.

51. For the above reasons, the Chamber rejects the Federation's argument that it cannot be held responsible for the alleged acts in question.

2. Competence *ratione temporis*

52. The Chamber will next address the question to what extent it is competent *ratione temporis* to consider this case, bearing in mind that some of the alleged violations occurred before the entry into force of the Agreement on 14 December 1995. In accordance with generally accepted principles of international law, the Agreement cannot be applied retroactively. It is thus outside the competence of the 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., *Matanović*, case no. CH/96/1, decision on the admissibility of 13 September 1996, Decisions on Admissibility and Merits March 1996 – December 1997).

53. Evidence relating to such events may, however, be relevant as a background to events occurring after the Agreement entered into force (see case no. CH/97/42, e.g., *Eraković*, decision on admissibility and merits of 15 January 1999, paragraph 37, Decisions 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/96/8, *Bastijanović*, decision on the admissibility of 4 February 1997, Decisions 1996-97).

54. In the present case, the applicant complains primarily about the Medical Centre preventing him from coming to work since 21 July 1993, the hiring of another physician temporarily to do the work for which he is qualified, and the subsequent refusal to re-employ him. The alleged "termination" 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. The applicant alleges that he was never properly informed of his discharge. Additionally, the applicant began court proceedings in 1998 and the Ombudsman as a third party tried to resolve the dispute over his labour status. The employer's and the Municipal Court's inactivity has caused a continuous situation which might have violated the applicant's rights after the Agreement entered into force. To this extent, the situation therefore falls within the Chamber's competence *ratione temporis*.

55. Furthermore, the respondent Party asserts that the applicant was placed on the waiting list prior to the entry into force of the Agreement on 14 December 1995. As the respondent Party, through its authorities, failed to transmit any decision to the applicant about his employment status, he was also not informed about his possible inclusion on the waiting list. This failure of the Federation cannot be held against the applicant. The Chamber decided in the *Zahirović* case that the "continuing placement has not terminated his working relationship … Therefore, the applicant's grievance in respect of his placement on the waiting list and inability to go back to work relates to a situation which has continued after 14 December 1995. To this extent, the situation therefore falls within the Chamber's competence *ratione temporis"* (see case no. CH/97/67, *Zahirović*, decision on the admissibility and merits of 8 July 1997, paragraph 106, Decisions January – July 1999).

56. The Chamber further found: "In so far as the application relates to … decisions as such to stop paying the applicant's salary and related contributions, the Chamber lacks competence *ratione temporis.* This decision has nonetheless produced effects which have continued up to this date. Accordingly, the Chamber is competent to examine the fact that the applicant's salary and related contributions have not been paid after 14 December 1995" (see *Zahirović*, loc. cit., paragraph 107). The same applies to the case currently before the Chamber.

3. Requirement to exhaust effective domestic remedies

57. The Chamber must next consider whether, for the purpose of Article VIII(2)(a) of the Agreement, any "effective remedy" was available to the applicant in respect of 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.

58. In the present case, the applicant initiated court proceedings in March of 1998 to have his labour status resolved. A year later, on 23 February 1999, a preliminary hearing was held before the Municipal Court. It took the court more than two years to schedule another public hearing on 20 March 2001, the only outcome of which was that the court procedures were abandoned. After more than three years' inactivity, the court was under the obligation, pursuant to the recently inserted Article 143a of the Law on Labour, to refer the case to the Commission. The applicant is not required to initiate any further proceedings under this law. Accordingly, there is no additional remedy available to the applicant that he should be required to exhaust.

4. Admissibility as regards Article 8 of the Convention

59. The applicant claims that he has been deprived of his right to respect for his private and family life and his home as guaranteed under Article 8 of the Convention by his removal from his position in the Medical Centre. However, these rights are generally considered to protect the individual against arbitrary interference by the public authorities and to oblige the state to ensure respect for private and family life (see Eur. Court HR, *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 17, paragraph 32). Article 8 therefore encompasses primarily the right to privacy, the right to live, as far as one wishes, protected from publicity and to develop relationships with other human beings. The rights listed in Article 8 do not concern the right to work as well as the protection against unemployment and other related rights and material claims.

60. Accordingly, the application is inadmissible as manifestly ill-founded insofar as it concerns the alleged violation of Article 8 of the Convention.

5. Conclusion on Admissibility

61. In conclusion, the Chamber accepts this case as being admissible insofar as it is directed against acts or omissions which have either occurred or continued after the entry into force of the Agreement on 14 December 1995. The Chamber rejects this application as being inadmissible in so far as it relates to events prior to 14 December 1995 and as it relates to an alleged violation of Article 8 of the Convention. The Chamber notes that no other ground for inadmissibility of the application has been established. It therefore considers the application admissible with regard to possible violations of the applicant's rights under Articles 6 and 13 of the Convention, Article 1 to Protocol No. 1 of the Convention and of Article II(2)(b) of the Agreement in conjunction with Articles 6 and 7 ICESCR and Article 5 CERD.

B. Merits

62. 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.

63. Under Article II of the Agreement, the Chamber has jurisdiction to consider (a) alleged or apparent violations of human rights as provided in the Convention and its protocols and (b) alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the 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.

64. The basis of discrimination findings in Bosnia often rests upon the perceived ethnic or national differences expressed in terms such as Bosniak, Croat and Serb. Therefore, the Chamber uses this terminology in discrimination cases without endorsing it. By Bosniak, the Chamber refers only to persons who can be considered to have a Bosnian Muslim cultural heritage.

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

65. The Chamber has held in *Hermas* (case no. CH/97/45, decision on admissibility and merits of 16 January 1998, paragraph 118, Decisions and Reports 1998) that the prohibition of discrimination is a central objective of the Dayton Peace Agreement to which the Chamber must attach particular importance. Article II(2)(b) affords to it the jurisdiction to consider alleged or apparent discrimination on any ground in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to the Agreement, amongst others the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.

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

> Article 6(1) of the ICESCR:
>
> "The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."
>
> Article 7 of the ICESCR:
>
> "The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
>
> (a) Remuneration which provides all workers, as a minimum, with:
>
> (i) fair wages and equal remuneration for work of equal value without distinction of any kind, …
> (ii) a decent living for themselves and their families in accordance with the provisions of the present Covenant; …"
>
> Article 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

67. The Chamber will now examine which acts and omissions affecting the applicant can be imputed to the Federation. The respondent Party did not dispute the applicant's employment relationship with the Medical Centre but asserts that he was moved to the waiting list, thereby obtaining a special status as foreseen by the special legislation applicable in a state of war or immediate threat of war.

68. The Chamber has already found itself competent to examine the fact that the applicant either has remained on the waiting list after 14 December 1995 or has maintained his employment status with the Medical Centre. Acts and omissions possibly attracting the responsibility of the Federation under the Agreement include the applicant's remaining on the waiting list while the Medical Centre temporarily employed another oral surgeon from the Republic of Croatia and later granted advanced training to a physician to qualify as an oral surgeon, the cessation of any payment to the applicant and the alleged failure of the Federation's authorities and courts to act in the applicant's case.

69. All these acts come within the ambit of Articles 6(1) and 7(a)(i) and (ii) of the ICESCR, Article 5(e)(i) of the CERD, so that the Chamber is called upon to examine whether the Federation has failed to discharge its positive obligation to secure protection of those rights without discrimination.

(b) Differential treatment and possible justification thereof

70. Before examining whether there has been discrimination contrary to the Agreement the Chamber recalls the jurisprudence of the European Court of Human Rights and the United Nations Human Rights Committee, whose findings reflect the general principles of international law with respect to the prohibition of discrimination. Both bodies have consistently considered it necessary first to determine whether the applicant was treated differently from others in the same or relevantly similar situations. Any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

71. There is a particular onus on the respondent Party to justify otherwise prohibited differential treatment which is based on any of the grounds explicitly enumerated in Article I(14) of the Agreement. In previous cases, the Chamber has taken a similar approach (see the *Hermas* decision, loc.cit., paragraphs 86 et seq., and case no. CH/97/46, *Kevešević*, decision of 12 September 1998, paragraph 92, Decisions and Reports 1998; and *Đ.M.*, case no. CH/98/756, decision of 14 May 1999, paragraph 72, Decisions January - July 1999).

72. The applicant argues that he was not re-employed solely because of his Bosniak origin. The Federation, for its part, contends, on the one hand that he was placed and kept on his employer's waiting list because of the reduced workload due to the war. On the other hand, the Federation concedes that the Centre never formally notified the applicant in writing of his placement on the waiting list, which cannot be considered lawful. The Federation in its final observations puts forward the assertion that in October 1994 the applicant was invited to return to his position as oral surgeon. In response to the last observations of the Federation, the applicant states that the respondent Party has not substantiated its allegations. He further points out that the representative of the defendant in the domestic court proceedings did not allege that he was offered re-employment.

73. The Chamber fails to understand how someone who was, and still is, the only oral surgeon in the region could have been sent home and be placed on his employer's waiting list because of reduced workload when at the same time there was nobody else to take over his work. It appears to the Chamber that the Centre's decision to place the applicant on the waiting list or to dismiss him

was not inspired by war circumstances that influenced the amount and the nature of the Centre's work. Assuming that the HVO's "Decree on Labour Relations on the Territory of Herceg-Bosna" and the "Decision on the Manner of Enforcement and Executing the Working Duty in the Territory of the Livno Municipality" could possibly be applied, to be of Bosniak origin was not in itself a sufficient precondition to be laid off or to be put on the waiting list, although Bosniaks were intended to be the targets of these provisions. Nothing in the documents presented to the Chamber or in the respondent Party's observations indicates that the applicant participated in any kind of "rebellion" which otherwise could have been relied on to apply the above mentioned decree and decision of the HVO. Taking into account the circumstances described, the Chamber concludes that the real reason to put the applicant on a waiting list was the fact that he, as a Bosniak, was not perceived to welcome the rule of the HVO over the Livno territory. Legal provisions that took account of the special circumstances of the war could therefore not have been applied in the case of the applicant. Consequently, the removal of the applicant from the Medical Centre and his placement on the waiting list was illegal.

74. The Chamber agrees with the applicant's argument that it is for the Federation to prove that the applicant received the alleged invitation to resume his work. Since the representative of the Medical Centre failed to put forward before the domestic courts the argument that the applicant was invited to continue to work as an oral surgeon, the Chamber cannot find it established that the Medical Centre ever actually offered the position to the applicant. If the Medical Centre actually invited the applicant but he refused to go back to his position, the Chamber fails to understand why the Medical Centre then kept him on the waiting list. The Medical Centre could have effectively terminated the working relations with the applicant and thereby discharged itself of all further obligations. Further, the Federation did not specify the date when the applicant refused to accept the alleged offer of the Medical Centre. It is also inconsistent with the Federation's allegations that the applicant, instead of accepting an offer of re-employment, pursued legal remedies to regain his position. It follows that the Medical Centre did not intend to re-employ the applicant. It is unacceptable that the Centre now provides advanced training to other medical staff in order to fill a vacancy as long as the applicant remains on the waiting list. The Medical Centre should instead have called him back to work if it needed a physician for this post because people on the waiting list technically still remain employees of the Centre.

75. 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 continued after 14 December 1995. It can therefore not adjudicate whether it was discriminatory to discharge the applicant from his employment due to his Bosniak origin. The Chamber finds it established, however, that only Bosniaks remained on the waiting list after 14 December 1995. In this respect there has been, at least from this date onwards, differential treatment of the applicant in comparison with his colleagues of other ethnic or national origins. In its subsequent examination, the Chamber must nevertheless take account of those events occurring before 14 December 1995 which led to the applicant's placement on the waiting list.

76. When the special war-related circumstances ceased to exist, the conditions for keeping employees on the waiting list could no longer be applied and the Centre should have recalled the applicant to work. The Chamber notes that the Bosniak-Croat war ended with the Washington Agreement of March 1994 and that officially the state of war in Bosnia and Herzegovina ceased at the end of 1995. Since the applicant's removal the Minister of Health of the Republic of Croatia sent physicians and other medical staff to the Medical Centre in Livno to support its work. After the applicant's discharge the Medical Centre temporarily employed another oral surgeon from the Republic of Croatia. When the Medical Centre has no oral surgeon available, it sends its patients to Split and Mostar. This shows that the Medical Centre needs an oral surgeon but has not invited the applicant to return to work. It strongly suggests that there is an ongoing discriminatory resentment towards the applicant due to his Bosniak origin. The respondent Party does not give any other reason for the Medical Centre's refusal to re-instate the applicant into his working relations.

77. The Chamber furthermore notes that the discriminatory treatment of the applicant by the Centre seems to have continued until today without any inspection or other intervention by officials of the Federation or other competent authorities, such as the local governing bodies of the Livno Municipality or Canton 10. The Federation claims that four Bosniaks on the waiting list were called

back to work after the war. However, this fact does not exclude the finding of discrimination, as the applicant was nonetheless treated differently as compared to medical staff of Croat origin. Their rights were never restricted compared with the applicant's, who, as a Bosniak employee, was directly affected by differential treatment.

78. In the light of all these considerations the Chamber finds it established that the applicant has been subjected to differential treatment in comparison with colleagues of Croat origin. The Chamber finds no evidence showing that the applicant's treatment has been objectively justified in pursuance of any legal provisions during and after the war. The respondent Party has failed to show that its authorities have taken reasonable steps to investigate the matter and, if necessary, take legal action against the Centre. The Chamber, therefore, finds that the Federation's authorities in Canton 10 have either actively – through the director of the Medical Centre – or at the very least passively – by not acting either through this organ or any other officials – discriminated against the applicant due to his Bosniak origin, or tolerated such discrimination.

79. This discrimination relates to the enjoyment of the right to work, i.e. the right of the applicant to gain his living by work which he freely chooses, to the enjoyment of just and favourable conditions of work and to protection against unemployment. Although the applicant's employment contract with the Medical Centre remained valid**,** he has been discriminated against in the enjoyment of his right to equal remuneration, which would have provided him with a decent living for himself and his family.

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

2. Article 6 of the Convention

81. The applicant further argues that there has been a violation of Article 6 of the Convention in that he has been denied his right to a fair hearing within a reasonable time before an independent and impartial tribunal.

82. In relevant part, Article 6 paragraph 1 of the Convention provides as follows:

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

(a) Applicability of Article 6

83. 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 eg., *Massa v. Italy* judgment of 24 August 1993, Series A No 265-B page 20 paragraph 26). Although the applicant was an employee of a public institution, it is the nature of his work that his job responsibilities as a physician did not involve the exercise of public power. The Chamber therefore considers that the applicant is not excluded from protection under Article 6(1) as he was not a person whose duties concerned "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 *Pellegrin v. France* judgment of the European Court of Human Rights of 8 December 1999, published in Reports of Judgments and Decisions 1999).

(b) Length of proceedings

84. The Chamber recalls that the applicant initiated proceedings before the Municipal Court on 9 March 1998, and that that court rendered a decision on 20 March 2001 in which it referred the case to the Cantonal Commission for Implementation of Article 143 of the Law on Labour. Since the latter date no further action has been taken in the proceedings.

85. When assessing the length of proceedings for the purposes of Article 6 paragraph 1 of the Convention, the Chamber must take into account, *inter alia*, 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 10, Decisions and Reports 1998). The issue in the applicant's case is whether his working relationship was terminated in accordance with the law or whether he was improperly placed on the waiting list. Although there are a number of factual disputes in this case, the issue is not of a particularly complex nature. There is no indication that the length of the proceedings can be imputed to the applicant. The respondent Party has not provided any explanation from which it would appear that the delays could not be imputed to the judicial authorities of the respondent Party itself.

86. The failure to bring proceedings to a conclusion within a reasonable time is further compounded by the fact 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. 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, paragraph 39 above).

87. Moreover, if the domestic court had established in its decision that the applicant was still an employee and must therefore be reinstated, it would have given the applicant the possibility to pursue his monetary claims. With the present decision of the Municipal Court the applicant can only expect, at best, to realise a substantially reduced compensation in the proceedings before the Commission under Article 143 of the Law on Labour. According to Article 145 of the Law on Labour, the applicant has still the right to pursue all his claimed rights without opting to have his case heard before the Commission with its limited jurisdiction, due to the fact that he initiated his lawsuit before Article 143 of the Law on Labour came into force. In these circumstances, the Chamber considers that the conduct of the Municipal Court has caused the delay in the proceedings in question.

88. It follows that there has been a violation of the applicant's right to a hearing within a reasonable time under Article 6 paragraph 1 of the Convention, for which the Federation of Bosnia and Herzegovina is responsible.

(c) Independent and impartial tribunal

89. In view of the above finding there is no need to inquire further whether the Livno Municipal Court lacks independence, nor to examine whether it was biased against the applicant.

3. Article 13 of the Convention

90. The applicant's allegations may also be interpreted in the sense that he has been the victim of a breach of Article 13 of the Convention, as there is no effective remedy available to him.

91. However, the guarantees afforded by Article 13 of the Convention are less strict than those provided by Article 6 paragraph 1. Thus, having regard to its finding of a violation under the latter provision, the Chamber considers it unnecessary to examine the complaint also under Article 13 of the Convention.

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

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

5. Conclusion on the Merits

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

VIII. REMEDIES

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

95. In his application the applicant seeks reinstatement into his position. On 10 March 2000 the applicant further requested that the Federation be ordered to compensate him for lost income and related contributions that were not paid after his removal from the Medical Centre. He claims a total of 326,900 German Marks ("DEM") for pecuniary damage based mainly on lost income and compensation for the loss of his professional skills, since he has not been working as an oral surgeon for more than seven years until the date of his request. Specifically, he seeks, for the period from July 1993 until 1 March 2000, DEM 1,000 per month in salary plus contributions amounting to 92 % of his salary, compensation for lost meal vouchers, vacation bonuses, compensation on the basis of the number of years of services he would have worked for the Centre and legal interest on the unpaid income. For the loss of professional skills he claims compensation of DEM 20,000 per year since his removal from the Medical Centre.

96. The Federation objects to the claim and submits that there is no basis for any compensation as it considers the application ill-founded.

97. 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(1) and 7(a)(i)(ii) ICESCR and Article 5(e)(i) CERD and by violating his right to a fair hearing within a reasonable time under Article 6 of the Convention. Therefore, the Chamber finds it appropriate to order remedies, including the payment of pecuniary and non-pecuniary compensation.

98. The Chamber will order the Federation to undertake immediate steps to ensure that the applicant is no longer discriminated against in his right to work and to just and favourable conditions of work, and that he be offered the possibility of resuming his work on terms appropriate to his former position and equal to those enjoyed by other employees with similar qualifications as specialised physicians.

99. The Chamber considers it reasonable to hold on account of the breaches found that the applicant has suffered loss of opportunity in connection with employment and mental suffering stemming from the uncertainty surrounding his employment status. The Chamber is of the opinion that the Federation authorities should have undertaken all possible steps to resolve the applicant's situation. That being so, the Chamber, on an equitable basis, considers that from the date the Chamber has jurisdiction, 14 December 1995, until the delivery of this decision on 12 October 2001, the applicant should be awarded 500 Convertible Marks (*Konvertibilnih Maraka,* "KM") for each month as compensation for lost income. Accordingly, he will be awarded a total of KM 35,000.

100. Considering that the applicant for a long time has continued to suffer loss of opportunity to practise his skills as oral surgeon, the Chamber finds that the loss of professional skills of the applicant would furthermore be remedied by ordering the Federation to award him KM 10,000 as recognition of the pecuniary and non-pecuniary damage. The fact that the applicant after he will have resumed work, may temporarily need to refresh his professional skills by receiving additional training in order to meet today's standards of oral surgery shall not be held against him.

101. Additionally, the Chamber will award 10 % interest on the sum referred to in paragraphs 99 and 100. The interest shall be paid for these sums as of the date of the expiry of a one-month time

period set for the implementation of the present decision.

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

IX. CONCLUSION

103. For these reasons, the Chamber decides,

1. unanimously, to declare admissible the applicant's complaint under Articles 6 and 13 of the Convention, Article 1 to Protocol No. 1 of the Convention and of Article II(2)(b) of the Agreement in conjunction with Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination insofar as it relates to events that occurred after 14 December 1995;

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

3. unanimously, that the applicant has been discriminated against in the enjoyment of his right to work as guaranteed by Articles 6(1) and 7(a)(i) and (ii) of the International Covenant on Economic, Social and Cultural Rights, as well as in the enjoyment of his rights to work, to free choice of employment and to protection against unemployment under Article 5(e)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination in conjunction with Article II(2)(b) of the Human Rights Agreement, the Federation of Bosnia and Herzegovina thereby being in violation of Article I of the Agreement;

4. 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 violation of Article I of the Agreement;

5. unanimously, that in view of the finding of a violation under Article 6 of the Convention, it is not necessary to rule on the complaints under Article 13;

6. unanimously, that in view of the finding of discrimination in the enjoyment of the rights protected by Article 7(a)(i) and (ii) of the ICESCR and Article 5(e)(i) CERD, it is not necessary to examine the applicant's complaint also under Article 1 of Protocol No. 1 to the Convention.

7. unanimously, to order the Federation to take all necessary steps to ensure that the applicant is immediately offered the possibility to resume his work as oral surgeon on terms appropriate to his former position and equally enjoyed by others with similar qualification as specialised physicians without suffering any further discrimination;

8. unanimously, to order the Federation of Bosnia and Herzegovina to pay the applicant until 12 November 2001 the amount of 45,000 Convertible Marks (forty five thousand *Konvertibilnih Maraka*) by way of compensation for pecuniary and non-pecuniary damages;

9. unanimously, to order the Federation of Bosnia and Herzegovina to pay the applicant simple interest at a rate of 10 (ten) per cent per annum over the sum stated in conclusion no. 8 or any unpaid portion thereof from 12 November 2001 until the date of settlement in full;

10. unanimously, to order the Federation of Bosnia and Herzegovina to pay to the applicant KM 50 for each day at the end of each month, from 12 November 2001 until the applicant is offered to resume his work on terms appropriate to his former position and equally enjoyed by others with similar qualification as a specialised physician, including simple interest of 10 (ten) per cent per annum;

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

(signed)
Ulrich GARMS
Registrar

(signed)
Michèle PICARD
President of the First Panel