



**DECISION ON ADMISSIBILITY AND MERITS**  
(delivered on 7 April 2000)

**Cases nos. CH/98/706, CH/98/740 and CH/98/776**

**Zijad ŠEĆERBEGOVIĆ, Josip BIOČIĆ and Nikola OROZ**

**against**

**BOSNIA AND HERZEGOVINA**  
**and**  
**THE FEDERATION OF BOSNIA AND HERZEGOVINA**

The Human Rights Chamber for Bosnia and Herzegovina, sitting in Plenary on 9 March 2000 with the following members present:

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

Mr. Anders MÅNSSON, Registrar  
Ms. Olga KAPIĆ, Deputy Registrar

Having considered the aforementioned applications 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 Article XI of the Agreement and Rules 52, 57 and 58 of the Chamber’s Rules of Procedure:

## I. INTRODUCTION

1. The applicants are citizens of Bosnia and Herzegovina living in the territory of the Federation of Bosnia and Herzegovina. They are former officers of the Yugoslav National Army (“JNA”) who retired before 1992. Until the outbreak of the war in Bosnia and Herzegovina they received their pensions from the Institute for Social Insurance of Army Insurees in Belgrade (hereinafter “the JNA Pension Fund”), to which they had paid contributions during their life as active soldiers. Between February and April 1992 the applicants ceased to receive payments from the JNA Pension Fund. In September 1992 the Republic of Bosnia and Herzegovina issued a decree to the effect that pensioners of the JNA would be paid a pension amounting to 50 percent of their previous pension. This decision was confirmed by a law of the Republic of Bosnia and Herzegovina passed in June 1994 and by Article 139 of the Law on Pensions and Disability Insurance of the Federation of Bosnia and Herzegovina, which entered into force on 31 July 1998.

2. The applications raise issues under Article 1 of Protocol No. 1 to the European Convention on Human Rights, and of discrimination in the enjoyment of the right guaranteed by Article 9 of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).

## II. PROCEEDINGS BEFORE THE CHAMBER

3. The applications were introduced between 17 June and 16 July 1998 and registered on the date of their submission. The applicants are not represented by lawyers.

4. The Second Panel considered the three applications on 15 January 1999 and decided to transmit them to the respondent Parties for their observations on the admissibility and merits of the cases. The application by Mr. Šećerbegović was directed only against Bosnia and Herzegovina, but the Chamber decided *proprio motu* to transmit it also to the Federation of Bosnia and Herzegovina (“the Federation”).

5. Observations from both respondent Parties were received on 26 March 1999. Additional observations by Bosnia and Herzegovina were received on 7 April 1999.

6. The respondent Parties’ observations were transmitted to the applicants on 15 April 1999. The Chamber received written replies including a compensation claim from two of the applicants (Mr. Šećerbegović and Mr. Biočić). The Federation responded to the compensation claims on 18 June 1999. These responses were transmitted for information to the respective applicants and to Bosnia and Herzegovina.

7. On 6 September 1999 the Second Panel relinquished jurisdiction over the present cases in favour of the Plenary Chamber. On 27 September 1999 the Chamber invited the Office of the Human Rights Ombudsperson for Bosnia and Herzegovina (“Ombudsperson”) to intervene as *amica curiae* in the written proceedings before the Chamber concerning these cases.

8. On 27 October 1999 the Ombudsperson informed the Chamber that she would not intervene in the proceedings before the Chamber concerning “JNA pension” cases, because this matter had been examined in her Special Report (No. 2859/99) on *The Right of the Peaceful Enjoyment of Possessions and Discrimination in the Enjoyment of this Right with Respect to Article 139 of the Law on Pension and Disability Insurance*. However, when on 25 January 2000 the Chamber invited the Ombudsperson to act as *amica curiae* at the public hearing to be held on 9 February 2000, she accepted.

9. On 9 February 2000 the Chamber held a public hearing on the admissibility and merits of the applications. The applicants appeared in person. The State of Bosnia and Herzegovina was represented by Mr. Jusuf Halilagić and the Federation of Bosnia and Herzegovina by Ms. Seada Palavrić and Ms. Branka Fetahagić. The representatives of the respondent Parties were assisted by the following experts: Mr. Miralem Viđen, Assistant to the Director of the Social Fund for Pension and Disability Insurance of Bosnia and Herzegovina, Ms. Nedžmija Resić, Chief of the Department for the

Realisation of Rights with the Social Fund for Pension and Disability Insurance of Bosnia and Herzegovina, Ms. Nasiha Ibrulj, Deputy Director of the Agency for Pension and Disability Insurance of Bosnia and Herzegovina, and Mr. Mirsad Mesić, Deputy Minister in charge of pension and disability insurance in the Federal Ministry of Social Affairs, Refugees and Displaced Persons. The Ombudsperson, acting as *amica curiae*, was represented by Mr. Nedim Osmanagić and Ms. Sanela Paripović.

10. On 18 and 24 February 2000 the Federation made additional submissions to the Chamber in reply to questions asked at the public hearing.

11. On 21 February 2000 the Ombudsperson submitted a written *amica curiae* intervention substantially restating her oral intervention at the public hearing and her Special Report of 26 May 1999 (see paragraph 8 above).

12. The plenary Chamber deliberated on the cases on 8 December 1999 and 12 January, 8 and 9 February and 7 and 9 March 2000. On the latter date it decided to formally join the applications and adopted the present decision.

### III. ESTABLISHMENT OF THE FACTS

#### A. The facts of the individual cases

##### 1. Case no. CH/98/706 Zijad Šećerbegović

13. The applicant, born in 1926, is a citizen of Bosnia and Herzegovina living in Sarajevo. He fought as a partisan during the Second World War and then became a JNA officer. He retired as of 1 January 1969 with the rank of a sergeant major. Since April 1992, due to the hostilities in Bosnia and Herzegovina, the applicant has not received any payments on account of his pension from the JNA Pension Fund. In June 1992 the applicant was requested by the Pension and Disability Fund of the Republic of Bosnia and Herzegovina to submit the procedural decision determining his pension rights. Since then he has been receiving an amount equivalent to 50 percent of his original pension from the Pension and Disability Insurance Fund of Bosnia and Herzegovina (the "PIO BiH", see paragraph 38 below) in Sarajevo, as subsequently adjusted in accordance with the applicable Federation legislation. Since January 1998 the applicant has been receiving a monthly pension of 222.10 Convertible Marks (*Konvertibilnih Maraka*; KM). The applicant states that he encounters great difficulties to live decently and support his family on his pension.

##### 2. Case no. CH/98/740 Josip Biočić

14. The applicant, born in 1935, is a citizen of Bosnia and Herzegovina living in Sarajevo. As of 1 January 1987 the applicant retired from active service in the JNA with the rank of a first class captain. In February 1992 he stopped receiving payments on account of his pension from the JNA Pension Fund. Since June 1992 he has been receiving from the PIO BiH an amount equivalent to 50 percent of his original pension, as determined on the basis of the slip of the last payment from the JNA Pension Fund and as subsequently adjusted in accordance with the applicable Federation legislation. The applicant did not receive any decision concerning this payment. At an unspecified date he requested the Sarajevo PIO BiH to issue a decision establishing the amount of the pension he is entitled to. On 28 April 1999 the applicant was informed by letter that, as a retired member of the JNA living in Bosnia and Herzegovina, he had been taken over by the PIO BiH and was entitled to receive from the Fund 50 percent of his previous pension. The applicant currently receives a monthly pension of KM 272. The applicant states that it is very difficult for him to live decently on a pension in that amount.

##### 3. Case no. CH/98/776 Nikola Oroz

15. The applicant, born in 1928, is a citizen of Bosnia and Herzegovina living in Sarajevo. As of 1 January 1979 he retired as a JNA officer with the rank of a first class sergeant major. In March

1992 he stopped receiving payments on account of his pension from the JNA Pension Fund. Since June 1992 he has been receiving from the PIO BiH an amount equivalent to 50 percent of his original pension, as determined on the basis of the slip of the last payment from the JNA Pension Fund and as subsequently adjusted in accordance with the applicable Federation legislation. The applicant did not receive any decision concerning this payment. He currently receives a monthly pension of KM 244.10. Also this applicant states that it is very difficult for him to live decently and support his family on the basis of a pension in that amount.

**B. Relevant domestic legislation**

**1. Legislation concerning the pension system, in particular JNA pensions**

**(a) Legislation of the Socialist Federal Republic of Yugoslavia and of the Socialist Republic of Bosnia and Herzegovina**

*(i) Civilian pensions*

16. According to Article 281 paragraph 3 of the 1974 Constitution of the Socialist Federal Republic of Yugoslavia ("SFRY"), the SFRY established the fundamental rights of the workers with regard to pensions and social security. This constitutional provision was implemented through the Law on Fundamental Rights of Pension and Disability Insurance (Official Gazette of the SFRY – hereinafter "OG SFRY" – nos. 23/82, 77/82, 75/85, 8/87, 65/87, 44/90 and 84/90).

17. The regulation of the pension system beyond the principles established in the SFRY law was within the competence of the republics of the SFRY, so that each Republic had its own pension legislation and its own (public) pension fund. In the Socialist Republic of Bosnia and Herzegovina ("SRBiH") pensions were governed by the Law on Pension and Disability Insurance (Official Gazette of the SRBiH nos. 38/90 and 22/91).

18. All employees, except for the military personnel of the JNA, paid into the pension fund of their republic of residence. This applied also to the employees of the ministries and agencies of the Federal Government. The pension funds in the republics worked together closely. If an individual worked and contributed into a pension fund in one republic, he or she could choose to retire in a second republic and still receive his or her pension from the first republic's pension fund through the distribution system of the second republic. If an individual lived and worked and therefore paid his contributions in more than one republic throughout his working life, upon retirement he would be entitled to receive his pension from the fund to which he had contributed most.

*(ii) Military pensions*

19. According to Article 281 paragraph 6 of the 1974 Constitution of the SFRY, the SFRY regulated and secured through the federal authorities the pension rights of the military staff of the JNA and of the members of their families.

20. The specific aspects of military pensions were regulated by the Law on Pensions and Disability Insurance of Insured Military Personnel (OG SFRY nos. 7/85, 74/87 and 20/89). This law provided for several mechanisms which rendered the pension treatment of former JNA military personnel more favourable than that of other categories. For the purpose of their pension treatment JNA pensioners were generally credited 15 months of service for every year of actual service. Moreover, the determination of the salary relevant to the calculation of the amount of the pension was more favourable than for the other categories of pensioners (in the case of the JNA pension the basis for calculation was the salary of the last December in active service, while for the other categories the basis was the average of the ten consecutive years with the highest income, now raised to the consecutive fifteen years with the highest income by the 1998 Federation Law on Pension and Disability Insurance).

21. The JNA military employees paid their contributions to and received their pensions from the JNA Pension Fund. This was the only pension fund existing at the Federal level.

**(b) Legislation of the Republic of Bosnia and Herzegovina**

22. The SFRY Law on Pensions and Disability Insurance of Insured Military Personnel was taken over as a law of the Republic of Bosnia and Herzegovina by the Decree with force of law on the Adoption and the Application of Federal Laws applicable in Bosnia and Herzegovina as Republic Laws (Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter “OG RBiH” – no. 2/92).

23. Article 5 of the Decree with Force of Law on Pension and Disability Insurance During the State of War or Immediate Threat of War (OG RBiH nos. 16/92 and 8/93) of 18 September 1992, however, provided:

“(1) The Fund decides on the right to pension and disability insurance of the military insurees who are citizens of the Republic of Bosnia and Herzegovina and who reside within the territory of the Republic of Bosnia and Herzegovina.

(2) The pensions of military insurees are paid in the amount of 50 percent of the pension as determined in accordance with the Law on Pensions and Disability Insurance of Insured Military Personnel and are adjusted to the amount and in the way established by the Law on Fundamental Rights of Pension and Disability Insurance and the Law on Pension and Disability Insurance.

(3) The pensions of military insurees are paid in the amount and in the way determined in paragraph 2 of this Article, starting with April 1992.”

24. This provision was amended by the Law on the Amendments and Changes to the Decree with Force of Law on Pensions and Disability Insurance During the State of War or Immediate Threat of War (OG RBiH no. 13/94) which entered into force on 9 June 1994. Article 2 of this Law reads:

“Article 5 is amended as follows:

‘Pensions of Insured Military Personnel of the former JNA who are citizens of the Republic and who reside within the territory of the Republic (hereinafter “Insured Military Personnel”) will be paid 50 percent of the pension established under the Law on Pensions and Disability Insurance of Insured Military Personnel.

Where the pension of Insured Military Personnel established under the Law on Pensions and Disability Insurance of Insured Military Personnel is lower than the guaranteed pension established under the Law on Pensions and Disability Insurance (hereinafter “guaranteed pension”), pensions will be paid in the amount established under the Law on Pensions and Disability Insurance of Insured Military Personnel.

Where the pension established under the Law on Pensions and Disability Insurance of Insured Military Personnel is higher than the guaranteed pension, and by the application of paragraph 1 of this Article is an amount lower than the guaranteed pension, the amount of the guaranteed pension will be paid.’”

**(c) Legislation of the Federation of Bosnia and Herzegovina**

25. Article III(1) of the Constitution of Bosnia and Herzegovina (Annex 4 to the General Framework Agreement) establishes the matters that are the responsibility of the institutions of (the State of) Bosnia and Herzegovina. Article III(3)(a) provides that all governmental functions and powers not expressly assigned in the Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities, i.e. the Federation of Bosnia and Herzegovina and the Republika Srpska. The pension system is not among the matters listed in Article III(1).

26. On 31 July 1998 the Law on Pensions and Disability Insurance of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina – hereinafter “OG FBiH” – no. 29/98) came into force. Article 4 establishes:

“Pension and disability insurance shall be funded, in accordance with this law, from contributions and other resources”.

27. Article 139 is the provision concerning JNA pensioners. It reads:

“To the military insured members of the former JNA, who are citizens of Bosnia and Herzegovina residing within the territory of the Federation, the pension will be paid in the amount of 50 percent of the amount of the pension determined in accordance with the rules on pension and disability insurance of the military insured in force until the day of coming into force of this law”.

28. Article 140 provides for the cases in which the pension as determined under the preceding Article is below the guaranteed minimum pension. It reads:

“If the pension of the military insured of former JNA, determined in accordance with the military insured rules, is below the minimum guaranteed pension determined in the Article 72 of this law, the pension will be paid in the amount defined in accordance with the military insured rules.

If the pension determined in accordance to the military insured rules amounts to more than the minimum pension guaranteed by this law, but is below the guaranteed minimum pension after application of paragraph 1 of Article 139 of this law, the pension will be paid in the amount of guaranteed minimum pension determined by this law.”

29. Article 141 provides:

“If the holder of the insurance, e.g. the insured, does not have at his disposal the records on his salary in order to determine the pension basis of the military insured of the former JNA, the pension will be determined on the basis of the average pension of the pensioners holding the same rank as the insured pension being determined.”

30. Article 148 of the law envisages that separate legislation shall provide for compensation for the difference between the amounts pensioners were entitled to and the amounts actually paid from 1992 to the entry into force of the law, i.e. the arrears accumulated within the pension system in that period. On 23 October 1998 the Law on Claims in the Process of Privatisation on the Ground of Difference in Payment to the Holders of Pension and Disability Insurance Rights (OG FBiH no. 41/98) entered into force. This law entitles pensioners to receive certificates to be used in the privatisation process for the part of their pension that has remained unpaid. At the public hearing the Federation clarified that the 50 percent of the original pension that was not paid out to the JNA pensioners since June 1992 does not constitute an arrears owed to them for the purposes of this law. The applicants are therefore not entitled to certificates to use in the privatisation process on account of the 50 percent of their JNA pension that was not paid out to them.

31. As to the pension treatment of those employees of the JNA who subsequently served in the Army of the Republic of Bosnia and Herzegovina or in the Army of the Federation, and who have retired or will retire after 30 July 1998, the Federation submits that their pension is determined in full accordance with the Federation Law on Pension and Disability Insurance. For these pensioners, the length of the service in the JNA before 6 April 1992 is taken into account in order to determine whether they fulfil the conditions to be entitled to a pension, but not for the purposes of calculating the amount to which they are entitled.

32. Those former JNA employees who subsequently served in the Army of the Republic of Bosnia and Herzegovina or in the Army of the Federation, and who retired before 30 July 1998, receive credit for the time served in the JNA also for the purposes of calculating the amount to which they are entitled.

## **2. The Law on Administrative Proceedings**

33. According to Article 68 of the SRBiH Law on Pension and Invalidation Insurance (see paragraph 17 above), rights from the pension and invalidity insurance are to be exercised, unless otherwise provided, in accordance with the Law on Administrative Proceedings. This provision was taken over into Article 7 of the Federation Law on Pension and Invalidation Insurance.

34. Under Article 216 paragraph 2 of the Law on Administrative Proceedings (OG FBiH no. 2/98), the competent administrative organ has to issue a decision within 60 days upon receipt of a request to this effect. Article 216 paragraph 3 provides for an appeal to the administrative appellate body if a decision is not issued within this time-limit (appeal against “silence of the administration”).

## **3. The Law on Administrative Disputes**

35. Article 1 of the Law on Administrative Disputes (OG FBiH no. 2/98) provides that the courts shall decide in administrative disputes on the lawfulness of administrative acts concerning rights and obligations of citizens and legal persons.

36. Article 22 paragraph 3 provides that an administrative dispute may be instituted also if the administrative second instance organ fails to render a decision within the prescribed time limit, whether the appeal to it was against a decision or against the first instance organ’s silence.

## **C. General factual background concerning the pension system in Bosnia and Herzegovina**

37. The following information is based on the submissions of the respondent Parties, on the report “Falling Through the Cracks: the Bosnian Pension System and its Current problems” issued by the Organization for Security and Co-operation in Europe (OSCE) – Mission to Bosnia and Herzegovina, and on statistical data contained in the economic *Newsletter* of the Office of the High Representative (OHR) of February 2000.

38. During the war, the Pension and Disability Insurance Fund of the Republic of Bosnia and Herzegovina split into three separate funds, headquartered in Sarajevo, West Mostar and Pale, each fund becoming exclusively competent for the pensioners living within its region. The 1998 Federation Law on Pension and Disability Insurance provides for the continued existence of two pension funds within the Federation on a transitional basis (Article 5 of the Law). Unless otherwise specified, the Chamber has in the following disregarded the separate existence of two funds within the Federation, as it is not relevant to its decision and as it was mostly ignored by the Parties in their submissions. All three applicants receive payments from the fund headquartered in Sarajevo, and the Chamber shall refer to it as the Pension and Disability Insurance Fund of Bosnia and Herzegovina (“PIO BiH”).

39. The assets and obligations of the JNA Pension Fund in Belgrade are among the subjects of the Yugoslav succession negotiations. The Chamber has not received any information as to when the negotiations on this issue are expected to be concluded, or whether they actually have at all begun.

40. It appears, however, that during and after the war the JNA Pension Fund continued to pay pensions to the JNA pensioners living in the Republika Srpska. Moreover, in the course of the public hearing, the representatives of the Federation stated that there had been numerous cases of “double dipping” by JNA pensioners living in the Federation. These JNA pensioners were allegedly receiving payments from the PIO BiH in Sarajevo under Article 5 of the 1992 Decree and Article 139 of the 1998 Law on Pension and Disability Insurance, and at the same time collected their pension (in Yugoslav dinars) from the JNA Pension Fund in Belgrade through members of their immediate family duly authorised to that effect, until the PIO BiH requested and received from the JNA Pension Fund a list of its beneficiaries. It has not been argued that the applicants were involved in any “double dipping” incidents.

41. The representatives of the respondent Parties also brought to the Chamber’s attention the case of a JNA pensioner living in Grbavica, a part of Sarajevo that was under control of the Bosnian Serb authorities during the war and until March 1996, when it was integrated into the Federation

territory. This JNA pensioner received his full pension in Yugoslav dinars from the JNA Pension Fund in Belgrade until May 1999, when he asked to be registered with the PIO BiH, as the value of his full pension converted into KM was by that time lower than the 50 percent of his pension he is now receiving from the PIO BiH.

42. According to the Federation, approximately 1,500 JNA pensioners are currently receiving pension payments from the Federation. The average monthly pension of the JNA pensioners, i.e. the average benefit paid to JNA pensioners in accordance with Article 139 of the Federation Law on Pension and Disability Insurance, amounts to about KM 325, according to the information submitted at the public hearing. This is about 80 percent higher than the average of the pensions paid to all other categories of pensioners, which amounts to KM 180. According to the representatives of the Federation, the maximum monthly pension paid by the PIO BiH amounts to KM 613.

43. The economic *Newsletter* published by the OHR in February 2000 contains the following data concerning the income distribution structure of the beneficiaries of the Sarajevo-based PIO BiH:

Monthly amount of the pension in KM	No. of pensioners
less than 117	57,829
117-170	67,347
170-190	18,871
190-250	41,867
250-400	30,386
400-550	4,008
550-613	800
Total no. of pensioners:	221,108

44. According to information provided by the Federation, in September 1999 the average pension paid by the PIO BiH under the 1998 Law on Pension and Disability Insurance to former JNA personnel that subsequently served in the Army of the Republic of Bosnia and Herzegovina or in the Army of the Federation, amounted to KM 573.50.

45. According to the respondent Party, one of the conditions imposed by the World Bank for its continued financial support is that the PIO BiH may not indebt itself, which also means that it may not receive means from sources different than the contributions paid. The gap between contributions collected and pensions due, however, is around 4 million KM per month. On 24 February 2000 the Federation stated that the PIO BiH is currently paying the pensions due in September 1999.

#### **IV. COMPLAINTS**

46. The applicants allege a violation of their right to receive the full pension in accordance with the procedural decisions on their retirement. They also complain that they are being discriminated against on the ground that they served in the JNA.

#### **V. SUBMISSIONS OF THE PARTIES**

##### **A. Bosnia and Herzegovina**

###### **1. As to admissibility**

47. Bosnia and Herzegovina asks the Chamber to declare the applications inadmissible on the ground that the applicants failed to avail themselves of the available domestic remedies. It points to the possibility to appeal against administrative decisions under the Law on Administrative Proceedings and to initiate court proceedings under the Law on Administrative Disputes, if no favourable decision is obtained in the administrative appeals proceedings.



48. Bosnia and Herzegovina also asks the Chamber to declare the application inadmissible on the ground of incompetence *ratione temporis* in combination with the ground of non-compliance with the six-month time-limit set forth in Article VIII(2)(a) of the Agreement. It appears to argue that the Chamber lacks competence to examine the complaints because the alleged violation of the applicants' rights began in June 1992, before the entry into force of the Agreement. At the same time, Bosnia and Herzegovina acknowledges that the alleged violation consists of a continuing situation and concludes that the applicants should have submitted their complaints at the latest six months after the entry into force of the Agreement.

49. At the public hearing, Bosnia and Herzegovina furthermore submitted that pensions are not among the matters within the responsibilities of the Institutions of the State of Bosnia and Herzegovina listed in Article III of the Constitution of Bosnia and Herzegovina (Annex 4 to the General Framework Agreement), and that it can therefore not be held responsible for the matter complained of by the applicants.

## **2. As to the merits**

50. Bosnia and Herzegovina has not formally made submissions on the merits of the applications. It has argued, however, that at the beginning of the war in Bosnia and Herzegovina the Republic Government was faced with the need to ensure that the JNA pensioners living in its territory, who had ceased to receive their pension payments from the JNA Pension Fund in Belgrade, had means to survive. In order to determine the amount these JNA pensioners should receive, the fact that they were pensioners of the JNA Pension Fund was taken into account on the one hand, and the average pension of Bosnian citizens on the other hand. It was accordingly decided to pay the JNA pensioners 50 percent of the pension to which they were entitled from the JNA Pension Fund, an amount at that time still 70 percent higher than the average pension in Bosnia and Herzegovina.

51. Bosnia and Herzegovina further submits that once the succession to the property of the SFRY, among it the assets of the JNA Pension Fund will be completed, JNA pensioners who are citizens of Bosnia and Herzegovina shall again receive the full pension to which they are entitled under the SFRY Law on Pension and Disability Insurance of the Military.

## **B. The Federation of Bosnia and Herzegovina**

### **1. As to admissibility**

52. As Bosnia and Herzegovina, the Federation asks the Chamber to declare the applications inadmissible on the ground that they are outside the Chamber's competence *ratione temporis*. The Federation argues that, as the applications were lodged before the entry into force of the Federation Law on Pension and Disability Insurance on 31 July 1998, they must be considered to be directed against the Decree of 18 September 1992. Therefore, as the Agreement cannot be applied retroactively, the Chamber has no competence to examine the matter.

53. It is further argued that the Decree of 18 September 1992 has to be considered the "final decision" in the applicants' cases for the purpose of Article VIII(2)(a) of the Agreement. Accordingly, the applicants failed to submit their cases within six months of such final decision and the applications are inadmissible on that ground, too.

54. As the other respondent Party, the Federation also argues that the applicants have not exhausted the available domestic remedies. It acknowledges that the applicants did not receive any procedural decision determining the reduced amount of their pension. It argues, however, that, according to Article 5 of the Law on Pension and Disability Insurance, the applicants should have received a procedural decision determining the amount of their pension and that, according to Article 68 of the same law, disputes concerning pension rights are to be solved in accordance with the Law on Administrative Proceedings. Therefore, it is argued that in the absence of an administrative decision determining the reduction of their pension, the applicants should have availed themselves of the remedies against silence of the administration (Article 216 of the Law on Administrative Proceedings). If no favourable decision had been obtained in the administrative appeals proceedings,

they could have initiated court proceedings under the Law on Administrative Disputes (against an unfavourable decision as well as against persistent silence of the administration).

## **2. As to the merits**

55. With regard to the merits of the complaints, the Federation argues that, at least until the succession negotiations are concluded, the applicants have a pension claim arising from their service in the JNA against the JNA Pension Fund in Belgrade, which is still functioning and paying pensions to the JNA pensioners residing in the Federal Republic of Yugoslavia, in the Republika Srpska and, it appears, in some instances also in the Federation. As the applicants never paid contributions to the PIO BiH, this fund does not have any documents relating to their employment and contribution history. The amount to be paid to the applicants was determined on the basis of the slip relating to the last pension payment received from Belgrade. Accordingly, the applicants are not, even currently, insurees of the PIO BiH. The Federation concludes that the applicants do not have a claim against the PIO BiH or against the Federation that constitutes a possession within the meaning of Article 1 of Protocol No. 1 to the Convention.

56. Should the Chamber find that the applicants do have a claim against the PIO BiH or against the Federation that constitutes a possession within the meaning of Article 1 of Protocol No. 1, the Federation submits that the reduced payment is justified in the light of the extremely difficult financial situation of the PIO BiH, which is not even in a position to pay the full pension to its own insurees, and of the greatly privileged pension treatment the applicants enjoyed under the SFRY legislation. There would, accordingly, be an overriding public interest justifying the interference, if there is any, with the applicants' pension rights.

57. As to the complaint of discrimination, the Federation argues that the payment to the JNA pensioners who reside in the Federation of only 50 percent of their original pension is fully justified in the light of the above considerations. Namely, that these pensioners contributed to the JNA Pension Fund, and not to the PIO BiH, that the PIO BiH is in serious financial difficulties and can hardly pay the full pensions to its insurees, and, finally, that notwithstanding the 50 percent reduction the average pension of a JNA pensioner is still 75 percent higher than the average pension paid by the PIO BiH. The Federation concludes that there is no discrimination against the applicants.

## **C. The applicants**

### **1. As to admissibility**

58. The applicants state that they never received a procedural decision determining the amount of their pension as reduced of 50 percent against which they could have appealed. Mr. Biočić stresses that he requested from PIO BiH a procedural decision determining his pension rights, but only received a letter in reply. The applicants therefore conclude that no remedy against the reduction was available to them.

### **2. As to the merits**

59. The applicants confirm their complaints. They submit that they should not be put at a disadvantage for having stayed in Sarajevo during and after the war and that they should not have to bear the consequences of the delays in the succession negotiations.

## **D. The Ombudsperson**

60. The Chamber has considered both the Ombudsperson's Special Report (No. 2859/99) on *The Right of the Peaceful Enjoyment of Possessions and Discrimination in the Enjoyment of this Right with Respect to Article 139 of the Law on Pension and Disability Insurance* of 26 May 1999 ("the Special Report") and her oral and written *amica curiae* submissions of 9 and 21 February 2000 respectively. In the proceedings that led to the issuing of the Special Report, the Ombudsperson could not take into account any arguments made by the respondent Party, as the Federation, which was the only respondent Party in those proceedings, failed to submit observations. In her *amica*

*curiae* submissions to the Chamber the Ombudsperson chose not to address the arguments made by the respondent Parties, with the exception of the Federation's claim that the applicants had failed to exhaust the available domestic remedies.

### **1. As to admissibility**

61. The Ombudsperson states that no effective remedy against the reduction in the pension payments was available to the applicants. She submits that, as there was no dispute as to the original full amount of the applicants' pensions, there was no issue to be determined in the course of administrative proceedings. Regarding the possibility to initiate court proceedings in order to obtain payment of the pensions in the full amount, the Ombudsperson submits that no success was reasonably to be expected from such action, as the courts would have applied the law. On the other hand, she adds, the legal system of the Federation leaves no possibility to the applicants, as individuals, to challenge a law.

### **2. As to the merits**

62. The Ombudsperson submits that, by taking over the SFRY Law on Pension and Disability Insurance with no changes except for the 50 percent reduction of the amount to be paid to the JNA pensioners, the Republic of Bosnia and Herzegovina and, as of 14 December 1995, the Federation fully accepted the rights of the JNA pensioners under this law and their corresponding obligation. Therefore, the 50 percent reduction constitutes a deprivation of possessions of the applicants. According to the Ombudsperson, this deprivation is rendered particularly serious by the fact that it has lasted already seven years (at the time of her Special Report) and that the applicants had no possibility to protect their acquired pension rights. She concludes that no fair balance was struck between the reasons for the measure and the right of the JNA pensioners and that therefore Article 139 of the Federation Law on Pension and Disability Insurance violates the JNA pensioners rights guaranteed by Article 1 to Protocol No. 1.

63. The Ombudsperson further notes that the reduction at issue does not affect the pensions of the military pensioners of the Army of the Republic of Bosnia and Herzegovina, of the Army of the Federation of Bosnia and Herzegovina or of the civilian pensioners. The Ombudsperson recalls that in the proceedings before her Office no reasons for this differential treatment were adduced. She therefore concludes that the JNA pensioners are being discriminated against in the enjoyment of their right to peacefully enjoy their possessions on the ground of their status. This opinion was confirmed during and after the public hearing.

## **VI. OPINION OF THE CHAMBER**

### **A. Admissibility**

64. Before considering the cases on their merits the Chamber must decide whether to accept them, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. Under Article VIII(2)(c) the Chamber shall dismiss any application which it considers incompatible with the Agreement. Under Article VIII(2)(a) the Chamber shall consider whether effective remedies exist and the applicants have demonstrated that they have been exhausted, and whether the application was submitted within six months of the final decision in the applicants' cases.

### **1. Competence *ratione temporis***

65. The Chamber will first address the question to what extent it is competent *ratione temporis* to consider the present cases, bearing in mind that according to generally accepted principles of international law and to its own case-law, it is outside its competence to decide whether events occurring before the coming into force of the Agreement on 14 December 1995 involve violations of human rights (see e.g. case no. CH/96/1, *Matanović*, decision on the merits delivered on 6 August 1997, paragraph 32, Decisions on Admissibility and Merits 1996-1997).

66. Bosnia and Herzegovina argues that the only action it has taken affecting the applicants is the enactment of the Decree of 18 September 1992 and of the Law of 9 June 1994. The Federation argues that, as the applications were submitted before 31 July 1998, the date of entry into force of the Federation Law on Pension and Invalidity Insurance, they can only be directed against the 1992 Decree. Both respondent Parties conclude that the applications are outside the Chamber's competence *ratione temporis*.

67. The Chamber recalls, however, that the respondent Parties are under an obligation to ensure that their legal system is in conformity with the obligations arising from the Convention (see Eur. Court H.R., *De Becker v. Belgium* judgment of 27 March 1962, Series A no. 4, pp. 24-26). The Chamber is therefore competent to examine whether the application of legislation enacted before 14 December 1995, in the case at hand the application of the Decree of 18 September 1992, has given rise after 14 December 1995 to a violation of the applicants' rights guaranteed by the Agreement. Moreover, the situation complained of by the applicants has been confirmed by Article 139 of the Federation Law on Pension and Disability Insurance, which entered into force on 31 July 1998. The objections to the Chamber's competence *ratione temporis* to examine the applications are therefore rejected.

## **2. Competence *ratione personae***

68. The applicant Mr. Šećerbegović directed his application against Bosnia and Herzegovina. The applicants Mr. Biočić and Mr. Oroz directed theirs against both Bosnia and Herzegovina and the Federation. The Chamber transmitted all three cases to both respondent Parties.

69. The Chamber notes that pensions are not among the matters within the responsibilities of the Institutions of the State of Bosnia and Herzegovina listed in Article III of the Constitution of Bosnia and Herzegovina (Annex 4 to the General Framework Agreement). However, until 31 July 1998, when the Federation Law on Pensions and Disability Insurance entered into force, the payment to the applicants of 50 percent of their JNA pension was due to legislation enacted by organs of the Republic of Bosnia and Herzegovina, which, according to Article I paragraph 1 of the Constitution, is to "continue its legal existence under international law as a state", henceforth named "Bosnia and Herzegovina".

70. The Chamber recalls that also in the "JNA apartment cases" it was called upon to decide whether legislation enacted by organs of the Republic of Bosnia and Herzegovina in subject matters that under the Constitution are within the competence of the Entities, gives rise to responsibility of Bosnia and Herzegovina (see cases nos. CH/96/3, 8 and 9, *Medan, Baštijanović and Marković*, decision on the merits delivered on 7 November 1997, paragraphs 44-47, Decisions on Admissibility and Merits 1996-97). However, in those cases the former institutions of the Republic, including the legislative institutions, had continued to operate after the entry into force of the State Constitution, while the legislative organs provided for in the Constitutions of both the State and the Federation had not yet been established. On 22 December 1995 the Presidency of the Republic had issued the Decree which annulled the applicants' purchase contracts. This Decree was adopted as law by the Assembly of the Republic of Bosnia and Herzegovina on 16 January 1996. The Chamber found that in so far as the former institutions of the Republic, including the legislative institutions, continued to operate, they functioned as institutions of the continuing State of Bosnia and Herzegovina, which was therefore responsible for their acts. It concluded that since institutions of the State were responsible for passing the legislation which annulled the applicants' contracts, the State was responsible for the violations of Article 1 of Protocol No. 1 which the Chamber found (see *Medan, Bastijanović and Marković*, paragraph 47).

71. In the present case, however, the State of Bosnia and Herzegovina has not taken any legislative or administrative action affecting the applicants, nor have institutions of the Republic of Bosnia and Herzegovina done so since the entry into force of the Agreement. The Chamber therefore concludes that no responsibility for the matters complained of can attach to Bosnia and Herzegovina and that it has no competence *ratione personae* to continue consideration of the applications insofar as they are directed against Bosnia and Herzegovina.

### 3. Exhaustion of domestic remedies and compliance with the six months rule

72. Both respondent Parties ask the Chamber to declare the application inadmissible under Article VIII(2)(a) of the Agreement. The Federation, in particular, argues that, according to Article 5 of the Law on Pension and Disability Insurance, the applicants should have received a procedural decision determining the amount of their pension. The Federation further argues that, according to Article 68 of the Law on Pension and Disability Insurance, disputes concerning the pension rights are to be solved in accordance with the Law on Administrative Proceedings. In the absence of an administrative decision determining the reduction of their pension, the applicants should have availed themselves of the remedies against silence of the administration (Article 216 of the Law on Administrative Proceedings). If no favourable decision had been obtained in the administrative appeals proceedings, they could have initiated court proceedings under the Law on Administrative Disputes (against an unfavourable decision as well as against persistent silence of the administration).

73. The Ombudsperson argued:

“The question arises whether the administrative proceedings invoked by the Governments could be considered as remedies which the applicants could be reasonably expected to pursue. The Ombudsperson notes that the applicants’ rights to their pensions (including the model of accounting the particular basis of the pensions) had already been determined by the relevant competent authorities. The wording of Article 5 of the Law on Pension and Disability Insurance (‘Official Gazette RBiH’ 16/92, 8/93 and 13/94) and Article 139 of the Law on Pension and Disability Insurance (‘Official Gazette FBiH’ 29/98) does not disclose any doubts in that respect. Consequently, it appears that there was no dispute in relation to the full amounts of the applicants’ pensions and, therefore, no issue left to be determined under the Law on Administrative Proceedings. Assuming that the applicants had initiated civil proceedings before the court seeking payment of their pensions in full amount, no success appears to be obtainable since the court would apply the Law. On the other hand, domestic legal system left no possibility to the applicants, as individuals, to challenge the Law.”

74. The Chamber agrees in substance with the Ombudsperson’s argument as to the practicability for individuals to challenge the constitutionality of domestic laws. It also notes that the respondent Parties have not submitted to the Chamber a single case of a JNA pensioner who would have availed himself successfully of the remedies indicated by them. On the contrary, the applicant Mr. Biočić has attempted without success to obtain a procedural decision from the PIO BiH determining the amount of his pension. The Chamber therefore concludes that there was no domestic remedy the applicants could be requested to pursue for the purposes of Article VIII(2)(a) of the Agreement.

75. The respondent Parties further submit that the applications are inadmissible because the applicants did not lodge their applications within six months of the entry into force of the Law of 18 September 1992, which, according to the Federation, was the final decision in their case, or, according to Bosnia and Herzegovina, within six months of the entry into force of the Agreement.

76. The Chamber notes that the complaints in the present cases concern a situation that has lasted for nearly eight years and is still continuing. In such a case the six-month period starts to run from the moment when the situation complained of ceases to exist (see the European Commission of Human Rights’ decision of 19 January 1989 in *Macedo v. Portugal*, application no. 11660/85, D.R. 59, p. 85). This has not yet occurred and the six-month time-limit is therefore inapplicable in the applicants’ cases and the objection is rejected.

### 4. Conclusion as to admissibility

77. The Chamber concludes that the applications are admissible insofar as they are directed against the Federation, while they are dismissed as incompatible *ratione personae* with the Agreement insofar as they are directed against Bosnia and Herzegovina.

**B. Merits**

78. Under Article XI of the Agreement the Chamber must next address the question whether the facts established above indicate a breach by the Federation of its obligations under the Agreement. In terms of Article I of the Agreement the Parties are obliged to “secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms”, including the rights and freedoms provided for in the Convention and the other instruments listed in the Appendix to the Agreement.

79. Under Article II of the Agreement, the Chamber has competence 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 international agreements listed in the Appendix (including the Convention).

80. The applicants complain that the respondent Parties violate their rights guaranteed under the Agreement by the failure to pay them their JNA pension in the full amount. The Chamber shall first consider this complaint under Article II(2)(a) of the Agreement and Article 1 of Protocol No. 1 to the Convention, protecting the right to one’s possessions. The Chamber shall secondly consider the complaint as a complaint of discrimination in the enjoyment of the right to social security, under Article II(2)(b) of the Agreement and Article 9 of the ICESCR.

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

81. The applicants complain that the fact that they receive only 50 percent of their original JNA pension constitutes a violation of Article 1 of Protocol No. 1 to the Convention, which reads:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

82. The Chamber notes that the European Commission of Human Rights has held that where a person has contributed to an old age pension fund, this may give rise to a property right in a portion of such a fund, and a modification of the pension rights under such a system could in principle raise an issue under Article 1 of Protocol No. 1 to the Convention. The Commission has, however, also held that the Convention does not guarantee a right to a specific social welfare benefit (see, e.g., *Müller v. Austria*, decision of 1 October 1975, application no. 5849/72, D.R. 3, p. 31; and *Tricković v. Slovenia*, application no. 39914/98, decision of 27 May 1998). In particular, the Commission has stressed that there is no right to receive social welfare benefits in a specific amount. The European Court of Human Rights has stated that the right to a certain social security benefit – in so far as it is provided for in the applicable legislation – is a pecuniary right for the purposes of Article 1 of Protocol No. 1 (Eur. Court H.R., *Gaygusuz v. Austria*, judgment of 31 August 1996, Reports of Judgments and Decisions 1996-IV, paragraph 41).

83. The applicants argue that they are entitled to receive from the PIO BiH the full amount of their JNA pension. In her Special Report the Ombudsperson found that Article 139 of the 1998 Federation Law on Pension and Disability Insurance deprives the applicants of a possession, namely the half of their JNA pension that is not paid out to them by the PIO BiH.

84. The Chamber notes that the language both of Article 5 of the 1992 Decree, as amended by Article 2 of the 1994 Law, and of Article 139 of the 1998 Law might be interpreted in the sense that the Republic of Bosnia and Herzegovina first, and then the Federation, took over the obligation of the JNA Pension Fund to pay the applicants’ JNA pensions and then decided to pay only 50 percent of the amount due. The amended Article 5 of the 1992 Decree (see paragraph 24 above) provided:

“Pensions of Insured Military Personnel of the former JNA who are citizens of the Republic and who reside within the territory of the Republic (...) will be paid 50 percent of the pension established under the Law on Pensions and Disability Insurance of Insured Military Personnel”.

Article 139 of the 1998 Law (see paragraph 27 above) reads:

“To the military insured members of the former JNA, who are citizens of Bosnia and Herzegovina residing within the territory of the Federation, the pension will be paid in the amount of 50 percent of the amount of the pension in accordance to the rules on pension and disability insurance of the military insured being in force until the day of coming into force of this Law”.

85. The Chamber further notes that the letter by the PIO BiH to Mr. Biočić of 28 April 1999 informed the applicant that, as a retired member of the JNA living in Bosnia and Herzegovina, he had been taken over by the PIO BiH and was entitled to receive from that fund 50 percent of his previous pension (see paragraph 14 above).

86. The Chamber recalls that at the public hearing the representative of Bosnia and Herzegovina explained that the decision to pay JNA pensioners a pension in the amount of 50 percent of the pension they were entitled to under the Law on Pensions and Disability Insurance of Insured Military Personnel was taken in order to ensure that these persons, who at the outbreak of the war had ceased to receive their pension payments, had the means to survive. The Federation has repeatedly argued that Article 5 of the 1992 Decree and Article 139 of the 1998 Law were enacted for “humanitarian reasons”, and not because the Republic of Bosnia and Herzegovina or the Federation were under an obligation to pay the JNA pensions to their citizens or residents.

87. Both respondent Parties have stressed that the assets of the Belgrade JNA Pension Fund are among the subjects of the succession negotiations, and that until the issue of succession to those assets is solved, the applicants maintain a claim for their pensions towards the JNA Pension Fund.

88. The Chamber notes that the applicants have not paid any contributions to the PIO BiH in Sarajevo, nor to any other pension fund in the Republic of Bosnia and Herzegovina or in the Federation. They had no legal relation to the PIO BiH before the issuing of the 1992 Decree with Force of Law on Pension and Disability Insurance During the State of War or Immediate Threat of War. Moreover, the competent authorities of the Federation do not have access to the employment record of the former JNA employees, so that they would not be in a position to determine the entitlement of these pensioners and the amount to which they are entitled under provisions - different from Articles 139 to 141 - of the Federation Law on Pension and Disability Insurance.

89. The Chamber concludes that the applicants have no claims against the PIO BiH or against the Federation beyond those attributed to them by the 1992 Decree and 1998 Law, which could be regarded as a possession under Article 1 of Protocol No. 1 to the Convention. The applicants' claim towards the JNA Pension Fund, which is not at issue before the Chamber, appears to remain untouched by the mentioned legislation. Accordingly, the Chamber concludes that the applications do not reveal any interference with the applicants' possessions by the Federation and, accordingly, no violation of Article 1 of Protocol No. 1 to the Convention.

## **2. Discrimination in the enjoyment of the right to social security guaranteed by Article 9 of the ICESCR**

90. The applicants complain that they are the only category of pensioners who suffers a 50 percent reduction of the pension payments. The applicant Mr. Sečerbegović expressly alleges that this different treatment is due to the fact that former members of the JNA are perceived as “enemies” in present Bosnia and Herzegovina. The applicants also complain that their pensions have been reduced while those of the pensioners of the Army of the Federation are, so they assert, particularly privileged.

91. The Ombudsperson found in her Special Report that under Article 139 of the Federation Law on Pension and Disability Insurance the JNA pensioners were treated differently from the military pensioners of the Army of the Republic of Bosnia and Herzegovina, of the Army of the Federation and from the civilian pensioners. She further found that this difference in treatment was not based on an objective and reasonable justification and concluded that the JNA pensioners were being discriminated against on the ground of their status.

92. The Chamber has considered the applicants' complaints as allegations of discrimination in the enjoyment of the right guaranteed by Article 9 of the ICESCR, which reads:

"The States Parties to the present Covenant recognise the right of everyone to social security, including social insurance."

93. In order to determine whether the applicants have been discriminated against, the Chamber must first determine whether the applicants were 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 (see case no. CH/97/67, *Zahirović*, decision on admissibility and merits delivered on 8 July 1999, paragraph 120, Decisions January-July 1999).

94. In accordance with the approach outlined above, the Chamber has considered whether the other categories of pensioners mentioned by the applicants and the Ombudsperson constitute "others in the same or relevantly similar situations". As to the civilian pensioners, the Chamber is of the opinion that they are not in a relevantly similar position. Firstly, the civilian pensioners paid their contributions into the PIO BiH and thereby acquired a right to a pension from that fund in accordance with the provisions of the SRBiH Law on Pension and Disability Insurance, as subsequently taken over and amended by the Republic of Bosnia and Herzegovina and the Federation. Secondly, the JNA pension scheme contained mechanisms that rendered it unique and very favourable. The Chamber recalls that JNA pensioners were generally credited 15 months of service for every year of actual service for the purposes of the calculation of the years of service attained. Moreover, the determination of the salary relevant as basis for the calculation of the amount of the pension was significantly more favourable than for the other categories of pensioners (see paragraph 20 above). In the light of these considerations, the Chamber concludes that no issue of differential treatment of the applicants, and therefore no issue of discrimination in the enjoyment of the right to social security, arises in relation to the civilian pensioners, as these do not constitute a relevantly comparable group.

95. The Chamber additionally notes that the pensions the applicants receive from the PIO BiH are higher than the average pension paid by that fund to its insurees, by 23 percent in the case of Mr. Šećerbegović, by 35 percent in the case of Mr. Oroz and of 51 percent by Mr. Biočić. Considering that the applicants did not contribute to the PIO BiH, and considering that the fund is not able to meet its obligations towards its insurees (see 45 above), the Chamber does not find that the applications could reveal any possible discrimination in the enjoyment of the right to social security, even if the civilian pensioners were to be considered a comparable group.

96. The situation is different in relation to the former JNA members who retired after having served in the Army of the Republic of Bosnia and Herzegovina or the Army of the Federation, in particular those who retired before 30 July 1998 (see paragraphs 31 and 32 above). The latter category apparently receives the full pension as established under the Federation Law on Pension and Disability Insurance and full credit is given for the time served in the JNA, both for the purpose of the determination of the entitlement and of the amount of the pension to which they are entitled. The Chamber notes that the mechanism by which this category's entitlement to pension is calculated has not been completely clarified. The fact, however, that the average pension of the pensioners of the Army of the Republic of Bosnia and Herzegovina and of the Army of the Federation amounts to KM 573.50, whereas the average pension of the JNA pensioners is KM 325, the maximum pension obtainable being KM 613, leaves little doubt as to the favourable treatment of these pensioners.



97. These statistical data show that the veterans of the war in Bosnia and Herzegovina are put in a position of considerable economic advantage in comparison to the entire remaining population of the Federation, and not only as compared to members of the JNA who retired before 1992 and did not join the Army of the Republic of Bosnia and Herzegovina, the HVO or the Army of the Federation. Furthermore, the JNA pensioners who joined these armed forces served either the government of the Republic of Bosnia and Herzegovina or of the Federation and thereby established a legal relationship to one or both of these governments. The Chamber notes that the privileged treatment of veterans is a feature that is not peculiar to the society of the post-war Federation of Bosnia and Herzegovina. Also the applicant Mr. Šećerbegović received double credit for the years served as a soldier during the Second World War for the purposes of his entitlement to his pension, a benefit the other two applicants did not enjoy.

98. In the light of these considerations, the Chamber concludes that the difference in treatment between the JNA pensioners on the one hand and the pensioners of the Army of the Republic of Bosnia and Herzegovina and the Army of the Federation on the other hand, including the former JNA members who served in these armed forces, has an objective justification in that the members of the second group are former soldiers of the armed forces of the country or government whose pension fund is paying their pensions. As the applicants still receive a pension that is higher than the average pension paid by the PIO BiH, the Chamber does not find that the Federation government exceeded its margin of appreciation in not extending the favourable treatment granted to its own pensioners to the JNA pensioners. The Chamber thus considers that there is no discrimination of the applicants in the enjoyment of the right to social security in comparison to the military pensioners of the Army of the Republic of Bosnia and Herzegovina and the Army of the Federation either.

99. To sum up, the Chamber finds that the position of the applicants, and of the JNA pensioners in general, within the pension and social security system of the Federation of Bosnia and Herzegovina is characterised by elements which exclude any comparison to the civilian pensioners as a group in the same or a relevantly similar position. As to the difference in treatment with regard to the pensioners of the Army of the Republic of Bosnia and Herzegovina and the Army of the Federation, the Chamber finds that the difference in treatment is justifiable in the light of the above considerations. The Chamber thus concludes that the cases before it do not disclose discrimination against the applicants.

## VII. CONCLUSIONS

100. For the above reasons the Chamber decides,

1. unanimously, to declare the applications admissible insofar as they are directed against the Federation of Bosnia and Herzegovina;
2. by 11 votes to 3, to declare the applications inadmissible insofar as they are directed against Bosnia and Herzegovina;
3. by 13 votes to 1, that there has been no violation of the applicants' right to peacefully enjoy their possessions under Article 1 of Protocol No. 1 to the European Convention on Human Rights;
4. by 13 votes to 1, that the applicants have not been discriminated against in the enjoyment of their right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights.

(signed)  
Anders MÅNSSON  
Registrar of the Chamber

(signed)  
Michèle PICARD  
President of the Chamber

Annex                      Dissenting Opinion of Mr. Viktor Masenko-Mavi

## ANNEX

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Viktor Masenko-Mavi.

### DISSENTING OPINION OF MR. VIKTOR MASENKO-MAVI

I am unable to share the opinion of my colleagues that there has been no violation of the applicants' rights secured to them by the relevant international instruments. In my opinion, it is very unfortunate that the Chamber has reached completely different conclusions than the Human Rights Ombudsperson for Bosnia and Herzegovina in her Special Report No. 2859/99 on the situation of military pensioners, in particular the former members of the JNA. I find it unfortunate because

- a) this is a typical case of discrimination, involving the responsibility of both the State and Federation of Bosnia and Herzegovina;
- b) the Chamber has found that such an important acquired right as the right to a pension can be degraded into some sort of "social aid" or "humanitarian assistance";
- c) the Chamber has, in fact, admitted that a particular group of persons treated with suspicion and hostility can be subjected to differential treatment, without any reasonable motivation, in the enjoyment of rights secured to others not so classified; and
- d) the Chamber's decision establishes a precedent of a questionable nature, which runs counter to the spirit and letter of the human rights arrangements under the General Framework Agreement.

The facts of the cases are not controversial or in dispute. In 1992 the Republic of Bosnia and Herzegovina adopted a decree with legal force on pensions during the state of war, which established, without any motivation, that pensions of the military insured persons should be paid in the amount of 50 percent of the pension. This decree was subsequently, in 1994, confirmed as a law of the Republic. The new law of the Federation of 1998 on pension and disability insurance has reaffirmed the same principle of reduced payment, also without any motivation. All of the applicants retired long before the hostilities in Bosnia and Herzegovina. Thus, they were not involved in these hostilities. Furthermore, until 1992 they received the established amount of pension.

#### As to admissibility

I cannot accept the reasoning of the majority on the responsibility of the State of Bosnia and Herzegovina, according to which the Chamber has no competence *ratione personae* to consider the cases in so far as they are directed against the State (see paragraphs 68-71). In my opinion, the whole issue of the State's responsibility in the emerging practice of the Chamber (see, for example, cases nos. CH/96/3, 8 and 9, *Medan, Bastijanović* and *Marković*, and case no. 97/67, *Zahirović*) is based on arguments of a rather questionable nature. Both in the present cases and in other cases, the Chamber has used paragraph 1 of Article III of the Constitution of Bosnia and Herzegovina as its guiding principle in determining the State's responsibility. Accordingly, if matters complained of are not within the responsibility of the institutions of the State listed in this paragraph there are no grounds for imputing responsibility for any of the alleged or apparent violations to Bosnia and Herzegovina. The only exception that might involve the responsibility of the State, according to the Chamber's practice, is the fact that even after 14 December 1995 the former institutions of the Republic of Bosnia and Herzegovina continued to operate as institutions of the "new" (but at the same time continuing) State of Bosnia and Herzegovina established according to the General Framework Agreement.

This extremely restrictive interpretation of State responsibility, based almost exclusively on the provision which deals with the division of competencies between the State and the entities, is an erroneous one. The mere fact that some matters are within the responsibilities of the State and others are within the responsibilities of the entities cannot absolve the State or the entities from some of those fundamental obligations which relate to the protection of human rights and basic values of a democratic society. Neither the State nor the entities can be relieved from these obligations. They cannot be subsumed by any kind of separation of competencies and

responsibilities between them. Thus, for example, the Constitution of Bosnia and Herzegovina lists some very important fundamental principles, the observance of which in any circumstances should be guaranteed by the State of Bosnia and Herzegovina as such. If they are not observed in practice for whatever reasons (e.g. not taking appropriate steps, maintaining laws and tolerating practices which contradict them), the State should always be held responsible. Among these fundamental principles one can point out the following:

- the principle of the “respect for human dignity, liberty and equality” (the preamble);
- the constitutional recognition of the fact that “Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law” (paragraph 2 of Article I);
- the principle that “Bosnia and Herzegovina and both entities shall ensure the highest level of internationally recognised human rights and fundamental freedoms” (paragraph 1 of Article II);
- the principle of non-discrimination (paragraph 4 of Article II).

These principles constitute the democratic foundation of Bosnia and Herzegovina and the interpretation of other provisions of the Constitution in a way which would allow the departure from them or would relieve the State from the responsibility for their observance would undermine the foundation itself.

The involvement of State responsibility in the cases under consideration is supported also by other provisions of the Constitution. According to paragraph 1(e) of Article III, the institutions of the State are responsible for “the international obligations of Bosnia and Herzegovina”. These obligations include also those that bind the State under different international human rights instruments. It is evident that in case of non-conformity between domestic and international standards, the State and its institutions are obliged to act in order to conform to the standards of the international human rights instruments. Notwithstanding the fact that social security matters are not mentioned among the responsibilities of State institutions, in the cases under consideration the State should have taken steps to live up to its obligations under the accepted international human rights instruments. This obligation of the State to act has been confirmed also by paragraph 2 of Annex II to the Constitution. According to this paragraph, the State, following the entry into force of the Constitution, should have taken steps to abolish those legislative provisions which violate the provisions of the Constitution (for example those former laws which involved discrimination). Former laws and regulations could remain in effect to the extent not inconsistent with the constitutional provisions. In other words, there is a clear omission on the part of the State to bring its legislative practice in harmony with the accepted international standards. Hence it is wrong to conclude that the Chamber has no competence *ratione personae* in so far as the complaints are directed against the State.

### **As to the merits**

I am not in a position to share the opinion of the majority that there has been no violation of the applicants’ right to peaceful enjoyment of their possessions (under Article 1 of Protocol No. 1 to the European Convention on Human Rights) and that there has been no discrimination whatsoever against the applicants. Rather, I think that the Ombudsperson, in her Special Report, has arrived at a proper conclusion: the applicants were deprived of their possessions in a discriminatory manner, in violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1 to the Convention.

There are no doubts whatsoever that the subject-matter of the applicants’ complaint – the right to a pension based on individual contributions to the relevant social security system – falls within the ambit of Article 1 of Protocol No. 1. The Chamber has not questioned this fact (see paragraph 82). However, the majority unfortunately arrived at the conclusion that it was not necessary for the Chamber to deal with the complaints from the point of Article 1 of Protocol No. 1 (see paragraph 89). In support of this approach it has relied on different arguments which, according to my opinion, may be questioned for different reasons.

Firstly, the majority has taken note and endorsed without any reservation the arguments of the Federation of Bosnia and Herzegovina that military pensioners of the former JNA, following the

disintegration of Yugoslavia, have, in fact, lost their right to a pension within the social security system of the newly emerging states and that they are receiving some payment in the form of “humanitarian assistance” (see paragraph 86). This is unacceptable from the point of the protection of acquired rights. The principle of respect for acquired rights is part of generally accepted international law, and the entitlement based on those rights cannot be extinguished *per se* by any transfer of sovereignty. The new circumstances created by the transfer of sovereignty may justify a certain margin of appreciation for the states involved as to how these rights will be protected, but an outright denial of their recognition would run counter to the norms of generally accepted international law.

Secondly, some of the arguments relied upon leave open essential points and create the impression that the relevant laws are interpreted against their wording. Both the 1992 Decree and the 1998 Law of the Federation clearly recognise that military insured persons of the former JNA residing within the territory of the Republic or the Federation were and are receiving pensions (and not “humanitarian assistance”). Moreover, the Pension Fund of the Federation has issued letters in which it admits that military members of the JNA had been taken over by the BiH Fund, and that they are entitled to receive from that fund 50 percent of their previous pension (see paragraphs 84 and 85). In other words, at the level of laws at least, neither the former Republic of Bosnia and Herzegovina nor the Federation has dared to adopt a solution which would totally deny the respect for acquired rights. It is not quite clear from the reasoning of the majority what do the applicants finally receive from the social security system. In paragraph 89 it is stated that they receive payments from the PIO BiH (one of the Pension Funds within the Federation). However, in paragraph 98 it is admitted that they still receive pensions. But how can they receive pensions if, according to the majority’s opinion, they “have not paid any contributions to the PIO BiH” and “had no legal relation to the PIO before the issuing of the 1992 Decree”? (see paragraph 88).

Thirdly, in paragraph 88 the majority points out that the “competent authorities of the Federation do not have access to the employment records of the former JNA employees, so that they would not be in a position to determine the entitlement of these pensioners and the amount to which they are entitled”. It is true that there are no official channels for this type of correspondence between Bosnia and Herzegovina and Yugoslavia. But the Federation pension authorities are in practice in a position to establish both the entitlement and the amount. They are requiring from the JNA pensioners to produce documentation from the military pension fund in Belgrade for the months of February and March 1992 (see the Federation Ombudsmen report on the human rights situation for 1988, p. 41). Without this information there would be no possibility for the 50 percent reduction. It is evident that it is not possible to establish the half of something if there is no information on the full amount.

The examination of the complaints and the decision reached by the Chamber from the point of the principle of equality and non-discrimination raises even more serious doubts. My misgivings are not caused solely by the fact of the 50 percent reduction of the pensions of those involved (although one has to admit that it is a substantial reduction, which can be considered itself as a real threat to the substance of the right to use the benefits of the social security system based on individual contributions). It is evident to everybody that the social security system of the former SFRY has fallen apart and that there are no real possibilities for its full reactivation in the light of present day reality. To be more specific, I do not think that the applicants are entitled to a pension of an amount received by them before the adoption of the laws establishing the 50 percent reduction. What is embarrassing is the manner in which it was done. The relevant laws contained no reasons as to the reduction of the pensions of this particular group of persons, no legal remedy has been provided for those concerned, and no reduction was applied to any other category of pensioners. Furthermore, in practice, there is an unjustified differential treatment even within the group of military pensioners, who are former JNA members. Some receive reduced pensions and some receive full pensions. For the latter group, full credit is given also for the time served in the JNA (see paragraph 96).

Apart from this I would like to add that, in my opinion, the general state of the present social security system in Bosnia and Herzegovina has not received sufficient attention in the decision. Many of the documents used by the Chamber have indicated that the pension system is full of serious defects. Thus, the OSCE Report pointed out that “the current pension system remains poorly

supported, non-transparent, and full of loopholes allowing for arbitrary and discriminatory internal polices” (see p. 2). The Federation Ombudsmen also pointed to the problem of discrimination and arbitrary treatment of many pensioners (see pp. 40-41 of the report). For example, it should have been a warning signal for the Chamber that the elements of ethnicity are still present in the social security system, which is totally unacceptable. As it is known, there is no unified social security in the country, as Sarajevo, West Mostar and Pale maintain their own funds, which are competent for the pensioners living within the relevant ethnically determined regions. The State of Bosnia and Herzegovina is clearly responsible for tolerating the presence of elements of ethnicity in the domain of social security within its territory, even if it has no expressly established competence for social security matters.

Considering the complaints from the point of the responsibility of the Federation, one can hardly understand the real motives of the inclusion into the 1998 Law on Social Security of the provision on the 50 percent reduction. The applicants themselves were not involved in any kind of actions against the independent Bosnia and Herzegovina. Further, the number of such pensioners is relatively small (1,500 persons). Hence it is difficult to argue that the respect of their acquired rights would put an excessive burden on the social security system. Thus, the general interest cannot serve as a basis for their differential treatment. In any event, even if the situation was different, this interest may under no circumstances be invoked as a means of denying arbitrarily an acquired right protected under international law. Justice cannot be done to those in majority by doing injustice to others.

Finally, I think that this decision might adversely influence the process of voluntary return of displaced persons and refugees. The right to return is one of the most important rights secured by the General Framework Agreement. In a post-war situation the easiest way of impeding this process is the deprivation or substantial reduction of the social security entitlement of those who are considering the possibility of returning to their homes. Without legal security, due respect for the acquired rights and eradication of all possible discriminatory elements from the social security system, one cannot anticipate a speedy return of displaced persons.

(signed)  
Viktor Masenko-Mavi