DECISION ON ADMISSIBLITY AND MERITS

(delivered on 9 May 2003)

Case no. CH/02/9434

Sabira JUSIĆ-KESEROVIĆ, Maid KESEROVIĆ and Mumo KESEROVIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 5 May 2003 with the following members present:

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

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Antonia DE MEO, 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 to 58 and 66 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The applicants are citizens of Bosnia and Herzegovina of Bosniak origin residing in Velika Kladuša in the Federation of Bosnia and Herzegovina. The applicants are the wife and children of Fikret Keserović, a former member of the National Defence of the Autonomous Province of Western Bosnia (hereinafter the "National Defence") who was killed on 6 April 1995 in Velika Kladuša. The applicants complain that members of the National Defence and families of fallen fighters of the National Defence are denied the right to financial and health compensation which is enjoyed by former members of the Army of Bosnia and Herzegovina (hereinafter the "BiH Army") and also the Croatian Defence Council (hereinafter the "HVO").

2. The application raises issues of discrimination in the enjoyment of the rights protected under Article 9 of the International Covenant on Economic, Social and Cultural Rights (the right to social security), Article 26 of the International Covenant on Civil and Political Rights (the right to equal protection before the law) and Articles 26 (the right of every child to social security) and 27 (the right of every child to a standard of living) of the UN Convention on the Rights of the Child.

II. FACTS

3. In Autumn 1993, Fikret Abdić, a former member of the Bosnia and Herzegovina Presidency, proclaimed the "Autonomous Province of Western Bosnia" in the area of North West Bosnia with its seat in Velika Kladuša. On 26 July 1995 he proclaimed that territory as the "Republic of Western Bosnia". The National Defence was the armed force of the newly formed Province and later of the Republic and whose members, mostly former military personnel of the BiH Army, joined Fikret Abdić. Following the proclamation of the autonomy, the BiH Army and the National Defence came into conflict. In August 1995 the BiH Army occupied the territory of the proclaimed "Republic of Western Bosnia".

4. Mr. Keserović, the late husband of the first applicant, and father of the second and third applicants, was a member of the BiH Army until October 1993, whereupon he joined the National Defence. On 6 April 1995 he was killed whilst serving as a member of the National Defence.

5. The applicants allege that the respondent Party treats the National Defence as a paramilitary formation. Therefore, its members and families of fallen fighters are denied the right to pension and social security benefits, which is enjoyed by former members of the BiH Army, the HVO and the Republika Srpska Army.

6. The applicants submitted to the Chamber the Federation Ombudsman's Report for the year 2000, in which it is stated that in Velika Kladuša and the Cazin Municipalities, there is a large number of members of the National Defence; the families of the fallen fighters and disabled veterans are referred to in this Report as "the out-law citizens". The Report further states that, through the Ombudsman's assistance, the respondent Party recognised years of military service to the members of the National Defence for the period when they were members of the BiH Army and many of them have received social welfare. The Report further points out, as a particularly serious fact, that members of the National Defence who were killed, have left behind approximately 800 children, which should be taken into consideration. The Report concludes that the competent departments of these municipalities are also of the opinion that the problem concerning the members of the National Defence and their families must be resolved in some equitable way.

7. The applicants also submitted to the Chamber the request of the "Association of Citizens - Realisation and Protection of Disabled Veterans' Rights 92/95" from Velika Kladuša of 11 June 2002, which has been submitted to the Government of the Federation of Bosnia and Herzegovina, the Assembly of the Federation of Bosnia and Herzegovina, the Ombudsman of the Federation and the Office of the High Representative, seeking that the future law regulating disabled veterans' rights and the rights of the fallen fighters' families should also include members of the National Defence. In this request, it is pointed out that members of this Association have examined the draft of the new Law on Basic Rights of Disabled Veterans and Fallen Fighters' Families and noted

that members of the National Defence have not been included, as they continue to be considered members of paramilitary formations who operated during the armed conflict.

8. In their reply to the Association of 27 November 2001, the President and the Vice President of the Federation of Bosnia and Herzegovina stated the opinion that the victims of the war and members of the National Defence are equal before the law and have the right, without discrimination, to be equally protected by the law.

III. PROCEEDINGS BEFORE THE CHAMBER

9. The application was submitted to the Chamber on 6 March 2002 and registered on the same day.

10. On 18 April 2002 the Chamber sent a letter to the first applicant Sebira Jusić-Keserović requesting her to state whether she intended to pursue her application exclusively on her own behalf or on her and her children's behalf. On 30 April 2002 the first applicant Sebira Jusić-Keserović stated that she had submitted the application to the Chamber on her own and her children's behalf.

11. On 23 May 2002 the Chamber transmitted the application to the respondent Party for its observations on the admissibility and merits under Article 9 of the International Covenant on Economic, Social and Cultural Rights, Article 26 of the International Covenant on Civil and Political Rights and Articles 26 and 27 of the UN Convention on the Rights of the Child in relation to Article II(2)(b) of the Agreement. On 24 July 2002 the respondent Party submitted its written observations. On 19 August 2002 the applicant submitted her statement in reply to the respondent Party's written observations.

12. The Chamber deliberated on the admissibility and merits of the case on 12 April 2002, 6 September 2002, 11 January 2003, 3 April 2003 and 5 May 2003. On the latter date the Chamber adopted the present decision.

IV. RELEVANT DOMESTIC LAW

A. The Constitution of Bosnia and Herzegovina

13. The Constitution of Bosnia and Herzegovina (hereinafter the "Constitution"), contained in Annex 4 to the General Framework Agreement, entered into force upon the signature of the General Framework Agreement on 14 December 1995. Article III of the Constitution sets forth the relations and responsibilities between Bosnia and Herzegovina and the Entities, including the Federation of Bosnia and Herzegovina. After specifying certain responsibilities concerning primarily international and financial matters, but not military matters and social security, Article III, Section 3(a) states:

> "All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities."

14. Annex II to the Constitution provides for transitional arrangements, including the continuation of laws. Under Article 2 of Annex II, it provides as follows:

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

B. Provisions concerning the armed forces

15. The Law on Armed Forces of the Republic of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina, nos. 4/92, 7/92, 9/92, 12/92, 19/92, 17/93, 27/93), entered into force on 20 May 1992 and provides under Article 2 paragraph 1, that the Armed Forces

of the Republic of Bosnia and Herzegovina shall be the BiH Army. Under paragraph 2 it is provided that the units of the HVO are an integral part of the BiH Army and so are other armed formations that place themselves under the "unique command" of the BiH Army. Under Article 2 paragraph 4, that was amended and entered into force on 5 August 1993, it is stated that, as an exception from the provisions of paragraph 1 of this Article, the self-organised armed formations or those organised illegal military units under various names that were forged in order to join the forces of resistance against the occupation of the Republic of Bosnia and Herzegovina shall also be considered members of the Armed Forces.

16. The Washington Agreement between representatives of the Bosnian Government, Croatian Government and a Bosnian-Croat delegate, signed on 1 March 1994, contains a Framework Agreement establishing the Federation in the Republic of Bosnia and Herzegovina. Part VI of the Washington Agreement concerning military matters provides, insofar as is relevant, as follows:

> "Both sides agree to the establishment of a unified military command of the military of the Federation.
>
> "The sides will develop comprehensive transitional arrangements to that end in the context of a military agreement. In the transitional period:
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> – current command structures will remain in place;
>
> – forces of the sides will disengage from one another immediately, with the aim of withdrawing to a safe distance to be specified in the military agreement; and
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> – all foreign armed forces, except those present with the agreement of the Republic of Bosnia and Herzegovina or the authorisation of the UN Security Council, will leave the territory of the Federation."

17. The Law on Defence of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina no. 15/96), under Section IV on the Armed Forces of the Federation, provides, insofar as is relevant, as follows:

> Article 36
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> "The armed forces of the Federation are a form of organising and preparing of all citizens for defence.
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> "The armed forces of the Federation may, under the conditions stipulated by this Law, perform also certain tasks in extraordinary circumstances, in cases of natural disasters and other disasters.
>
> "A member of the armed forces of the Federation is each citizen who, on an organised basis and in accordance with undertaken international obligations, by arms or in another way, takes part in resistance against an enemy."
>
> Article 37
>
> "The armed forces of the Federation consist of the Army of the Federation and, in the course of a war, the Police (the active and reserve forces) in the territory of the Federation, which, in accordance with this Law, place itself under the command of the Army of the Federation.
>
> "The Army of the Federation is composed of the armed forces of the Army of BiH and the Croatian Defence Council conclusively on the level of corps and military region, and it is constituted of a peacetime and war task force.
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> "The peacetime task force is constituted of persons serving in the Army of the Federation, soldiers who do their military service and the professional task force.
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> "The war task force of the Army of the Federation, in addition to the persons under paragraph 3 of this Article, also consists of persons deployed into the war units formed on territorial and production principles, with tasks and formation established by special regulations, issued by the officials under paragraph 22.
>
> "…"

Article 223

"The integration of the Army of the Federation, carried out in accordance with this Law, shall be implemented on the basis of the plans and programs made by the Ministry of Defence and it shall be approved by the officials under paragraph 22 within the following time limits and after this Law enters into force:

"…

"united organisation of the Army of the Federation shall be created within six months in compliance with the Vienna Agreement dated May 1994;

"…"

C. Provisions concerning social security

18. The Law on Special Financial Support of Disabled Veterans and Families of Fallen Fighters (Official Gazette of the Republic of Bosnia and Herzegovina, nos. 33/95 and 37/95) under Article 1 provides that military persons, members of the Police who perform their duty, members of the HVO serving in the BiH Army, and members of the other armed forces, which were self-organised into forces of resistance against the aggression on Bosnia and Herzegovina during the period from 30 April 1991 until 15 April 1992, are entitled to the right to special financial support.

19. The Law on Pension and Disability Insurance (Official Gazette of the Federation of Bosnia and Herzegovina, nos. 29/98 and 32/01) provides under Article 60 that the spouse and children can obtain family pension if they were supported by the insuree up until the moment of his/her death.

20. The Law on Fundamental Social Protection, Protection of Civil Victims of the War and Protection of Families with Children of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina, no. 36/99) establishes a general social security net for individuals and families with insufficient income to maintain themselves.

V. COMPLAINTS

21. The applicants complain that their right to social security and pension benefits have been violated by the respondent Party. They state that by having established certain rights for members of the BiH Army, the HVO and the Republika Srpska Army, and at the same time failing to recognise those rights for the members of the National Defence, the respondent Party has discriminated against the children and other members of their families. The applicants request the Chamber to order the respondent Party to provide them with the same rights as secured for other families of deceased members of the BiH Army, the HVO and the Republika Srpska Army.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

22. The respondent Party raises an objection *ratione personae* in relation to the applicants, since the case was registered in their name, but in essence, the initiator of the application is the "Association of Citizens for the Protection of the Rights of Invalids 92/95". The respondent Party alleges that all initiatives came from this Association and not from the applicants.

23. The respondent Party further alleges that the applicants did nothing to protect their rights under the Law on Fundamental Social Protection, Protection of Civil Victims of the War and Protection of Families with Children of the Federation of Bosnia and Herzegovina, and that the applicants applied only to the Chamber. The respondent Party further alleges that a change in the Law is requested by this application. However, at the same time neither the applicants nor anybody who would benefit from the change in Law have started any initiative to amend the law. It is pointed out that the Law on

Fundamental Rights of Disabled Veterans and Fallen Fighters is in the parliamentary procedure. Therefore, in this respect, the application is premature.

24. As to the merits of the application, the respondent Party points out that the National Defence was a paramilitary formation formed as a product of unlawful rebellion against legal authority. That is the reason why the applicants cannot achieve their rights within the field of protection for fallen fighters or disabled veterans, since the achievement of these rights requires membership in the BiH Army or the HVO, or to fall within one of the exceptional categories referred to under the Law on Armed Forces of the Republic of Bosnia and Herzegovina and the Law on Special Financial Support of Disabled Veterans and Families of Fallen Fighters. The respondent Party is of the opinion that the applicant and her children have the same legal rights as all residents of the Federation of Bosnia and Herzegovina and Una-Sana Canton, so Article 9 of the International Convenient on Economic, Social and Cultural Rights and Article 26 of the International Covenant on Civil and Political Rights have not been violated.

25. As to the achievement of the right to health protection, the respondent Party points out that the applicant Sebira Jusić-Keserović is employed and that the children have the right to social protection under the working relation of their parent; that is to say the first applicant.

26. In relation to the alleged violation of Articles 26 and 27 of the UN Convention on the Rights of the Child, the respondent Party points out that, if the first applicant considers that her income is insufficient for material security for her children, then she could have requested welfare support under the Law on Fundamental Social Protection, Protection of Civil Victims of the War and Protection of Families with Children, such as a welfare bonus for her children or tuition fees and scholarships for students. The respondent Party states that the law regulates "child protection" and in the present case the UN Convention on the Rights of the Child has not been violated.

B. The applicants

27. The first applicant Sebira Jusić-Keserović repeats that under the laws in force, families of victims of the conflict between the Republika Srpska Army, the HVO and the BiH Army may achieve all rights, regardless of confrontation amongst themselves, while those rights are denied only to members of the National Defence. The applicant therefore questions whether all citizens are equal before the law. The applicant repeats that the Federation Ombudsman in the year 2000 issued a report in which the problems of the protection of human rights of families of members of the National Defence were highlighted. However, the respondent Party has not done anything in order to prevent continued violations.

28. The first applicant Sebira Jusić-Keserović further alleges that she is a citizen excluded from the protection of the law because she was employed until 1994 by the Municipal organs of the Administration in Velika Kladuša, when allegedly, "liberators" of Velika Kladuša forbade her to work. She started to work again in December 1999, at which time she and her children achieved the right to health insurance. She further stated that at the end of 1999 she started to receive a family pension on the basis of the previous employment of her deceased husband. The applicants complain in this respect that during the period from 1995-1999 they received no pension and social security payments of any kind.

VII. OPINION OF THE CHAMBER

A. Admissibility

29. In accordance with Article VIII(1) of the Agreement, "the Chamber shall receive by referral from the Ombudsman on behalf of an applicant, or directly from any Party or person, non-governmental organisation, or group of individuals claiming to be the victim of a violation by any Party or acting on behalf of alleged victims who are deceased or missing, for resolution or decision applications concerning alleged or apparent violations of human rights within the scope of paragraph 2 of Article II." Further, in accordance with Article VIII(2) of the Agreement, "the Chamber shall decide which applications to accept.... In so doing, the Chamber shall take into account the following criteria:

(a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted .... (c) The Chamber shall also dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded, or an abuse of the right of petition."

30. The respondent Party objects to the admissibility of the application on three grounds. Firstly, the respondent Party considers the application inadmissible *ratione personae* as the applicants cannot claim to be victims of a violation, as required by Article VIII(1) of the Agreement, and submits that the application should have been submitted by the "Association of Citizens for the Protection of the Rights of Invalids 92/95" as the true initiator of the application. Secondly, the respondent Party submits that the applicants have done nothing to protect their rights under the Law on Fundamental Social Protection, Protection of Victim of Civil Population and Protection of Families with Children, and that the applicants applied only to the Chamber, thus failing to exhaust domestic remedies available to them. Thirdly, the respondent Party submits that the applicants seek a change in the law. However, the respondent Party points out that the Law on Fundamental Rights of Disabled Veterans and Fallen Fighters is in the parliamentary procedure; therefore, in this respect, the application is premature.

1. Standing of the applicants

31. The Chamber recalls that under Article VIII(1) it shall "...receive by referral from the Ombudsman on behalf of an applicant, or directly from any Party or person, non-governmental organization, or group of individuals claiming to be the victim of a violation by any Party or acting on behalf of alleged victims who are deceased or missing, for resolution or decision applications concerning alleged or apparent violations of human rights within the scope of paragraph 2 of Article VIII." In this respect, whether the application is initiated or supported by the "Association of Citizens for the Protection of the Rights of Invalids 92/95" is irrelevant. The applicants in the present case are directly affected by the difference in treatment they complain of. Therefore, they are "victims" within the meaning of Article VIII(1) of the Agreement. Accordingly, the Chamber will not declare the application inadmissible on this ground.

2. Non-exhaustion of domestic remedies

32. The respondent Party submits that the applicants could have submitted a request for protection in accordance with the Law on Fundamental Social Protection, Protection of Civil Victims of the War and Protection of Families with Children. However, the Chamber notes that the applicants complain that they cannot obtain the social security benefits enjoyed by the families of fallen fighters of the BiH Army and the HVO and that this difference in treatment is discriminatory. Accordingly, the remedy indicated by the respondent Party does not address the complaints of the applicants and the Chamber will not declare the application inadmissible on the ground raised by the respondent Party.

33. Insofar as the applicants' complaints concern their inability to receive ordinary social security and pension benefits for the period of 1995 to 1999, the Chamber notes that the applicants are entitled to such benefits and thereby they may have been deprived of such rights for the period mentioned. However, it cannot be seen from the case file that the applicants raised this complaint before the courts or any other domestic body prior to submitting their application to the Chamber. Accordingly, the Chamber finds that the applicants have not, as required by Article VIII(2)(a) of the Agreement, exhausted the effective domestic remedies in this respect. The Chamber therefore decides to declare the application inadmissible in respect to the complaints concerning the applicants' alleged inability to receive ordinary social security and pension benefits for the period of 1995 to 1999.

34. The final ground relied on by the respondent Party implies that a law from which the applicants would be likely to gain benefit remains in the parliamentary procedure. The application according to the respondent Party is therefore premature. The Chamber notes that whether or not a draft law that might address the applicants' complaints is being considered by the Federation Legislature, this cannot preclude the Chamber from considering an alleged violation of human rights that has been ongoing for a period of seven years. Accordingly, the Chamber will not declare the application inadmissible as premature.

3. Conclusion as to admissibility

35. The Chamber finds that no other ground for declaring the application inadmissible has been established. Accordingly, the Chamber declares the application admissible in relation to discrimination in the enjoyment of the rights protected under Article 9 (the right to social security) of the International Covenant on Economic, Social and Cultural Rights, Article 26 of the International Covenant on Civil and Political Rights (the right to equal protection before the law) and Articles 26 (the right of every child to social security) and 27 (the right of every child to a standard of living) of the UN Convention on the Rights of the Child. The Chamber finds that the remainder of the application, as stated in paragraph 33 above, is inadmissible.

B. Merits

36. Under Article XI of the Agreement the Chamber must next address the question of whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement. Under Article I of the Agreement the Parties are obliged to "secure to all persons within their jurisdicition the highest level of internationally recognised human rights and fundamental freedoms".

37. The Chamber has repeatedly held that the prohibition of discrimination, stipulated in Article I(14) of the Agreement, is a central objective of the General Framework Agreement to which the Chamber must attach particular importance. Article II(2)(b) of the Agreement affords the Chamber jurisdiction to consider alleged or apparent discrimination on a wide range of grounds in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to the Agreement, amongst others the International Covenant on Economic, Social and Cultural Rights (see *Zahirović,* case no. CH/97/67, decision on admissibility and merits, delivered on 8 July 1999, Decisions January-July 1999, paragraph 114 with further references).

38. The Chamber notes that the applicants complain that they are discriminated against in the enjoyment of certain pension and social security rights. They complain that the respondent Party discriminates against them by denying them the right to financial benefits and health care, which is enjoyed by former members of the BiH Army, HVO and the Republika Srpska Army and which is more favourable than the general social security scheme under the Law on Fundamental Social Protection, Protection of Civil Victims of the War and Protection of Families with Children of the Federation of Bosnia and Herzegovina.

39. The Chamber will examine this complaint as an allegation of discrimination in the enjoyment of Article 9 of the International Covenant on Economic, Social and Cultural Rights, Article 26 of the International Covenant on Civil and Political Rights and Articles 26 and 27 of the UN Convention on the Rights of the Child.

40. Article 9 of the International Covenant on Economic, Social and Cultural Rights reads:

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

41. Article 26 of the International Covenant on Civil and Political Rights reads:

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

42. Article 26 of the UN Convention on the Rights of the Child reads:

> "(1) States Parties shall recognize for every child the right to benefit from social security, including social insurance and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
>
> "(2) The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child."

43. Article 27 of the UN Convention on the Rights of the Child reads:

> "(1) States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
>
> "(2) The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
>
> "(3) States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
>
> "(4) States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements."

44. In order to determine whether the applicants have been discriminated against, the Chamber must first determine whether the applicants are treated differently from others in the same or a relevantly similar situation. Any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised (see e.g. case no. CH/97/67 *Zahirović,* decision on admissibility and merits delivered on 8 July 1999, Decisions January-June 1999, paragraph 120; case no. CH/97/50 *Rajić,* decision on admissibility and merits delivered on 7 April 2000, Decisions January – June 2000, paragraph 53 and case nos. CH/98/706, CH/98/470 and CH/98/776, *Šečerbegović, Biočić and Oroz*, decision on admissibility and merits delivered on 7 April 2000, Decisions January – June 2000, paragraph 93).

45. In the present case the applicants' late husband and father was a member of the BiH Army until October 1993, when he left the BiH Army and joined the National Defence. He was killed on 6 April 1995 in Velika Kladuša as a member of the National Defence. After his death, his family, the applicants, did not receive any kind of financial support from the respondent Party. The first applicant commenced work in December 1999 and thereafter, she and her children, also at the end of 1999, commenced to receive family pension in accordance with Article 60 of the Law on Pension and Disability Insurance of the Federation of Bosnia and Herzegovina.

46. The Chamber notes that the applicants, as family members of a fallen fighter to the 1992-1995 armed conflict in Bosnia and Herzegovina, share significant similarities with the spouses and children of fallen fighters of the BiH Army and the HVO: they seek special social security benefits as a result of losing, in connection with the armed conflict, their head of household and thereby losing their primary means of support and maintenance. The respondent Party points out, however, that the National Defence was a paramilitary formation formed as a product of unlawful rebellion against legal authority and therefore former members and their families are not entitled to rights that have been linked to membership of the BiH Army and the HVO. It is therefore not disputed by the respondent Party, that the applicants are treated less favourably than members of the BiH Army and the HVO and their families in relation to pension and social security rights. The respondent Party submits, however, that the differential treatment is justified in the public interest.

1. Aim and effect of the measure

47. The respondent Party submits that the exclusion of members of the National Defence and the families of its fallen fighters is in accordance with domestic law (see paragraphs 15 to 20 above). In this respect, the respondent Party notes that the National Defence was a paramilitary organisation formed by Fikret Abdić and, in fact, fought against the BiH Army during the armed conflict of 1992-1995. Under Article 2 of the Law on Armed Forces of the Republic of Bosnia and Herzegovina it is stated that the armed forces of the Republic of Bosnia and Herzegovina shall be the BiH Army (paragraph 1) and the HVO (paragraph 2). It is further stated that all other armed formations that place themselves under the unified command of the BiH Army shall also be considered an integral part of the armed forces of the Republic of Bosnia and Herzegovina. Under Article 2 paragraph 4 it is further stated that the self-organised armed formations or those illegally organised military units under various names that were forged in order to join the forces of resistance against the occupation of the Republic of Bosnia and Herzegovina in the period of 30 April 1991 to 15 April 1992, shall also be considered members of the Armed Forces (see paragraph 15 above).

48. The Chamber notes that the Washington Agreement, signed on 1 March 1994, established the Federation of Bosnia and Herzegovina, and formed a unified military command of the armed forces of the BiH Army and the HVO. Additionally, it was agreed that all foreign armed forces, except those present with the agreement of the Republic of Bosnia and Herzegovina or the authorisation of the UN Security Council, will leave the territory of the Federation of Bosnia and Herzegovina. In this respect it is noted that the National Defence, as a paramilitary formation, was not included in the Washington Agreement and as such remained on the territory of the Federation of Bosnia and Herzegovina as an illegal armed force.

49. The respondent Party has not explicitly stated which public interest it understands to underlie the difference in treatment between the members of its regular armed forces and their families on the one hand, and the members of the National Defence and their families on the other hand. However, it is implicit in the Federation's submissions that it considers that states and other organised communities have a legitimate interest in rewarding those who put their life and limb (as well as their families' economic security) at risk by taking part in the military defence of that community against aggression. This includes providing special social security benefits to veterans and to the families of fallen soldiers. The Chamber considers that, in pursuing this public interest, it is within the respondent Party's margin of appreciation not to grant individuals who take part in an armed rebellion against the legitimate government of the community, and thereby support the aggression from outside, benefits as a reward for their efforts during the war on the same basis as to members of the legitimate armed forces. In this respect, the public interest is served by excluding the rights of individuals that formed an illegal paramilitary force that fought against the armed forces of the Federation of Bosnia and Herzegovina. That this is the purpose of the Law on Special Financial Support of Disabled Veterans and Families of Fallen Fighters is underscored also by the inclusion among the beneficiaries of that Law of "members of the other armed forces, which were self-organised into forces of resistance against the aggression on Bosnia and Herzegovina during the period from 30 April 1991 until 15 April 1992" (see paragraphs 15 and 18 above).

50. The Chamber accepts this aim of the difference in treatment, implicitly set forth in the submissions of the respondent Party, as a legitimate one. As the Chamber has noted in the so-called "JNA pensioners cases" (see the above-mentioned *Šečerbegović, Biočić and Oroz* decision paragraph 97) "privileged treatment of veterans is a feature that is not peculiar to the society of the post-war Federation of Bosnia and Herzegovina". In the same case, the Chamber observed, as an example of such privileged treatment of veterans in the former Socialist Federal Republic of Yugoslavia, that members of the JNA received double credit for the years served as soldiers during the Second World War for the purposes of their entitlement to a pension (*ibid.*).

2. Proportionality

51. Having established that the differential treatment pursues a legitimate aim, the Chamber will now examine, in accordance with the approach outlined above, whether there is a reasonable relationship of proportionality between the means employed and the aim pursued. The Chamber notes that the applicants enjoy entitlement to the same legal rights as all non-military residents of the

Federation of Bosnia and Herzegovina and Una-Sana Canton and have full recognition regarding ordinary pension and social security benefits. The Chamber further notes that the applicants' father and husband has been fully credited for the period he remained in the BiH Army. Accordingly, the Chamber is of the opinion that the applicants have not been placed at a disproportionate and excessive disadvantage in the enjoyment of the right to social security. In other words, the difference in treatment between the two comparative groups, families of fallen soldiers of the HVO and the BiH Army and other "forces of resistance against the aggression on Bosnia and Herzegovina" on the one hand, and families of fallen soldiers of the National Defence on the other hand, is proportional and does not disclose a violation of the rights as pleaded by the applicants.

3. Conclusion as to merits

52. In summary, the Chamber finds that the means employed by the respondent Party pursue a legitimate aim, and that a reasonable relationship of proportionality between the means employed and the aim sought to be realised has been established.

53. Accordingly, the Chamber finds that the applicants have not been discriminated against in the enjoyment of pension and social rights.

VIII. CONCLUSION

54. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible in relation to the complaint of discrimination in the enjoyment of the rights protected under Article 9 of the International Covenant on Economic, Social and Cultural Rights, Article 26 of the International Covenant on Civil and Political Rights, and Articles 26 and 27 of the UN Convention on the Rights of the Child;

2. by 11 votes to 1, to declare the application inadmissible insofar as the applicants complain that they have not received any social security and pension benefits for the period of 1995 to 1999; and

3. by 11 votes to 1, that the Federation of Bosnia and Herzegovina has not discriminated against the applicants in the enjoyment of the rights protected under Article 9 of the International Covenant on Economic, Social and Cultural Rights, Article 26 of the International Covenant on Civil and Political Rights, and Articles 26 and 27 of the UN Convention on the Rights of the Child.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

Annex Dissenting Opinion of Mr. Manfred Nowak

ANNEX

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

DISSENTING OPINION OF MR. MANFRED NOWAK

In principle, I can agree that it is legitimate for a country to grant special social benefits to war veterans and families of fallen soldiers who fought in the regular army against a foreign army or irregular combatants. But in Bosnia and Herzegovina, the situation during the armed conflicts between 1992 and 1995 was somewhat more complicated. In fact, the BiH Army tried to defend the country against a number of armed forces which, at the time of the war, were all considered as "aggressors", amongst them the armed forces of the Bosnian Serbs (the "RS Army"), of the Bosnian Croats ("HVO") and of Fikret Abdić (the "National Defence"). While the families of fallen soldiers of the RS Army receive special social benefits from the Republika Srpska, and the families of fallen HVO soldiers from the Federation, the families of fallen National Defence soldiers do not receive similar benefits.

In my opinion, this differential treatment is difficult to justify, and the time has come for the authorities of Bosnia and Herzegovina to recognise that a civil war was going on in this country with many victims on all sides. For the children of the so-called fallen fighters, one should not continue to uphold a legal distinction between the children of the "good" soldiers and the children of the "bad" soldiers. They all lost their fathers who supported them and are, therefore, in equal need of social security benefits. To maintain distinctions on the basis of the legitimacy of the armed forces their fathers were fighting in seems unreasonable in light of the recent history of this country and the need to build a sustainable peace based on justice, human rights and reconciliation. As the Ombudsman of the Federation rightly criticised already in its report for the year 2000, the right to equality of these "out-law citizens", including approximately 800 children, should have been resolved years ago (see paragraph 6 of the decision).

For these reasons, I respectfully disagree with the majority and conclude that the applicants have been discriminated against in the enjoyment of their right to social security.

(signed)
Manfred Nowak