



DECISION ON ADMISSIBILITY AND MERITS

(delivered on 10 January 2003)

Cases no. CH/02/8923, CH/02/8924, and CH/02/9364

Đoko KLIČKOVIĆ, Anka PAŠALIĆ and Duško KARANOVIĆ

against

**BOSNIA AND HERZEGOVINA, THE FEDERATION OF BOSNIA AND HERZEGOVINA,
and
THE REPUBLIKA SRPSKA**

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 6 January 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. Giovanni GRASSO
Mr. Miodrag PAJIĆ
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, 57 and 58 of the Chamber’s Rules of Procedure:

I. INTRODUCTION

1. All three applicants are retired persons of Serb origin who lived in Sarajevo before the armed conflict and had been retired and receiving pensions from the Social Fund of Pension and Disability Insurance of Bosnia and Herzegovina (hereinafter the "SRBiH Fund"). During the war they resided in the territory of the Republika Srpska and received pensions from the Republika Srpska. In 2000 and 2001, they were reinstated into possession of their apartments in Sarajevo, where they have continued to live on their Republika Srpska pensions. They complain of disparities in pension amounts between the Entities.¹ The applications raise issues under Article 1 of Protocol No. 1 to the Convention and issues related to discrimination in the enjoyment of the rights guaranteed by Article 9 of the International Covenant on Economic, Social and Cultural Rights.

II. PROCEEDINGS BEFORE THE CHAMBER

2. On 18 February 2002, the Chamber received the applications in case nos. CH/02/8923 (Kličković) and CH/02/8924 (Pašalić), both filed against the Federation of Bosnia and Herzegovina. On 28 February 2002, the Chamber received the application in case no. CH/02/9364 (Karanović) against the Federation of Bosnia and Herzegovina and the Republika Srpska. All applications were registered on the day of their receipt.

3. On 30 April 2002, the Chamber transmitted these three cases to Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republika Srpska as respondent Parties for their observations on admissibility and merits under Articles 8 and 13 of the Convention, Article 1 of Protocol No. 1, and Article 2 of Protocol No. 4 to the Convention, as well as discrimination in the enjoyment of the rights protected under Article 9 of the International Covenant on Economic, Social and Cultural Rights.

4. On 1 July 2002, the Chamber received individual written observations from the Federation of Bosnia and Herzegovina. For cases CH/02/8923 (Kličković) and CH/02/8924 (Pašalić), the Federation's written observations were combined. No observations were received from the other two respondent Parties.

5. On 4 July 2002, the Chamber transmitted the Federation's written observations to each of the applicants. The Chamber received a joint response from the applicants in cases no. CH/02/8923 (Kličković) and CH/02/8924 (Pašalić) on 19 July 2002. The Chamber transmitted the observations of the applicants in cases no. CH/02/8923 and CH/02/8924 to the Federation on 22 July 2002.

6. On 29 July 2002, the Federation of Bosnia and Herzegovina submitted additional written observations. On 7 August 2002, the Chamber transmitted the Federation's additional observations to each of the applicants.

7. The Chamber deliberated on the admissibility and merits of the applications on 9 April 2002, 6 September 2002, 10 and 12 October 2002, 7, 8 and 9 November 2002, 6 December 2002, and 6 January 2003. On the latter date, it decided to join the applications and adopted the present decision.

III. FACTS

A. Facts relating to the pension system

8. In the former Socialist Federal Republic of Yugoslavia (hereinafter "SFRY"), civilian pensions were administered by the six Socialist Republics under their own respective laws and institutions. In addition, the state-level Law on Basic Rights of Pension and Disability Insurance (OG SFRY no.

¹ The applicants earlier complained of their lack of access to insured health care. As discussed in paragraphs 21, 25, 29, 55, and 58 below, however, this problem appears to have been resolved.

23/82, 77/82, 75/85, 8/87, 65/87, 87/89, 54/90, and 84/90) granted equal minimum rights to every SFRY citizen and regulated the rights of persons who moved from one Republic to another.

9. Following changes brought about by the armed conflict, pensions in Bosnia and Herzegovina came to be administered by three separate funds: the Social Fund of Pension and Disability Insurance of Bosnia and Herzegovina (hereinafter the "Sarajevo Fund"), the Bureau of Pension and Disability Insurance Mostar (hereinafter the "Mostar Fund"), and the Public Fund of Pension and Disability Insurance of Republika Srpska (hereinafter the "RS Fund"). The Sarajevo Fund and Mostar Fund subsequently merged, following a November 2000 decision by the High Representative,² into the Federation PDI Institute (hereinafter the "Federation Fund"), which has been operational since 1 January 2002. Presently there is one pension fund in the Federation and one in the Republika Srpska, and all legislation directly concerning pension systems is made at the Entity level.

10. The basic calculation schemes for determining rights to pension and disability insurance are different in each entity. One result of this has been significantly lower pensions in the Republika Srpska. In March 2002, the average pension in the Federation was 190 KM, and the average pension in the Republika Srpska was 120 KM. The minimum pension payment prescribed by law in the Federation of Bosnia and Herzegovina is 140 KM, while the minimum pension in the Republika Srpska is 80 KM.³

11. The system of pension insurance in Bosnia and Herzegovina, as inherited from the former SFRY, has been based on the "pay/go" principle that salary contributions from current workers support the current pensioners. Thus, money that comes into the system as contributions is immediately paid out as pensions, rather than becoming interest-generating capital from which the interest is paid out as pensions. When the current workers retire, salary contributions from the future generation of workers will finance the current workers' pensions. Therefore, the pension system as a whole has had the character of a general social insurance system. This is also the case with the current Federation and RS Funds.

12. On 27 March 2000, the Mostar Fund, Sarajevo Fund, and RS Fund entered into the Agreement on Mutual Rights and Obligations in Execution of Pension and Disability Insurance (hereinafter the "Pension Agreement") (OG RS, no. 15/00, 5 June 2000; OG FBiH, no 24/00, 30 June 2000), under which they agreed that the Fund that had made payments to pensioners before the Agreement came into force would continue to pay those pensions regardless of the pensioners' place of temporary or permanent residence. The Pension Agreement entered into force on 18 May 2000. The enabling legislation for the Pension Agreement is listed in the preamble as Article 205, paragraph 2 of the Republika Srpska Law on Pension and Disability Insurance (OG RS nos. 27/93, 14/94, and 10/95) and Article 82, paragraph 4 of the Federation Law on Pension and Disability Insurance (OG FBiH no. 29/98).

13. The RS Fund, with the authorisation of the Republika Srpska government,⁴ unilaterally terminated the Pension Agreement in March 2002 (OG RS, no. 10/02, 4 March 2002). According to a June 2002 report⁵ by the United Nations High Commissioner for Refugees (hereinafter "UNHCR"), despite its withdrawal from the Agreement, the RS Fund has continued to pay those pensioners already recognised as its beneficiaries. For its part, the Federation Fund has declared that it will continue to follow the Agreement and pay its beneficiaries now living in the Republika Srpska.⁶

14. According to the June 2002 UNHCR report, the absence of harmonised legislation between the two Entities and the lack of state-level legislation regulating pension and other social benefits

² High Representative's *Decision Imposing the Federation Law on Pension and Disability Insurance Organisation*, 12 November 2000 (OG FBiH no. 49/00, 27 November 2000).

³ Office of the High Representative, *Economic Newsletter*, Vol. 5, No. 1, March 2002.

⁴ Under Article 34, paragraph 2 of the law on Government of Republika Srpska (OG RS nos. 3/97 and 3/98), the Government of Republika Srpska at its session on 13 February 2002 adopted a decision granting consent to cancellation of the Agreement.

⁵ *Update: Pension and Disability Insurance Within and Between Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia in the Context of the Return of Refugees and Displaced Persons*, United Nations High Commissioner for Refugees, June 2002, at 6 (hereinafter "UNHCR Report").

⁶ *Id.* at 7 n.24.

causes problems for displaced pensioners and returnees. Specifically, these problems arise from the different pension calculation schemes and different pension amounts in each Entity.⁷

15. As a practical matter, a person who retired in Sarajevo and held a pension there before the armed conflict, but later began receiving pension payments from the RS Fund after displacement to the Republika Srpska, would continue, after returning to Sarajevo, to receive the lower pension payment from the RS Fund. Such a returnee, while receiving the smaller RS Fund pension, would also face a higher cost of living in Sarajevo than in Republika Srpska. Moreover, such a returnee would receive a pension much lower than a person who had made similar pension contributions during their working life but remained in the Federation throughout the armed conflict.

16. Under various inter-state pension benefits agreements, some civil pensioners from the Federation of Bosnia and Herzegovina who moved to other countries during the armed conflict continue to enjoy their full pension rights from the Federation Fund. For example, under the Agreement on Social Insurance Between Bosnia and Herzegovina and the Republic of Croatia (OG BiH Supplement on International Agreements, No. 6/01, 11 October 2001), the responsible domestic insurer is obligated to pay full rights to a pension beneficiary, even if that person is residing in the other contracting state. According to UNHCR, no major problems are reported with regard to refugees from Bosnia and Herzegovina receiving their full pensions in Croatia.⁸ As of June 2002, similar agreements had been signed and implemented between Bosnia and Herzegovina and Austria and Turkey, while other such agreements were in the works.⁹ According to OHR, users of pensions from Bosnia and Herzegovina were receiving pensions in 23 countries (mostly in Croatia and Germany) in June 2002.¹⁰

B. Facts relating to health care

17. In addition to the problem of disparate pension amounts, pensioners living in one Entity but receiving payments from the other Entity's pension fund reported being unable to realise secondary social benefits related to their pension, the most important of these benefits being health care. Until recently, health insurance for pensioners within Bosnia and Herzegovina was geographically fixed to the Entity of their pension registration. If a person moved from one Entity to the other, their health insurance did not move with them. Thus, insured treatment would only be provided where the person was registered, and they would incur personal liability for the full costs of treatment at other locations. Under this scheme, elderly pensioner returnees, a category of persons with relatively high health care needs, were required to travel to the other Entity to receive health care or otherwise pay the full cost of health care services.

18. On 5 December 2001, health care officials of the Federation, Republika Srpska, and the Brčko District entered into the Agreement on the Manner and Procedure of Using Health Care Services of Insurees in the Territory of Bosnia and Herzegovina Outside the Territory of the Entity, Including Brčko District, in Which they are not Insured (hereinafter "Health Care Agreement") (OG BiH no. 30/2001; OG FBiH no. 8/2002; OG RS no. 9/2002) to secure access to health care for returnees. Under this Agreement, effective 1 January 2002, persons who return or have returned from one Entity to the other, including pensioners, are entitled, under certain conditions, to insured health care services pursuant to legislation in their place of return. The pension fund to which the returnee is attached is required to certify a form in order for the pensioner to be registered for insured health care in the place of return.

19. Under the Health Care Agreement, a Special Commission for co-ordination and monitoring was established. This Commission issued instructions concerning registration of beneficiaries, issuance of health care documents, and other relevant procedures.

⁷ *Id.* at 7.

⁸ UNHCR Report at 14-15.

⁹ Office of the High Representative, Human Rights and Rule of Law, *Access to Pensions: An Overview of the Current Situation in Bosnia and Herzegovina*, June 2002, at 2-3.

¹⁰ *Id.* at 3.

20. According to UNHCR, implementation of this agreement was problematic, and it was not fully implemented until May 2002. This was primarily due to the fact that the RS Fund was not providing the required certification for pensioners returning to the Federation, which prevented those returnees from registering for and receiving insured health care in the Federation.¹¹

21. According to a report of the Human Rights and Rule of Law Sarajevo Field Office of the Office of the High Representative (hereinafter "OHR"), however, procedural problems with the Health Care Agreement were nearly non-existent in May and June 2002, and complaints from the main returnee association in Sarajevo Canton have ceased to exist. The report indicates that in late May, the RS Fund began to verify the required documents, and the major obstacle to implementation was removed. Thus, the Serb returnees observed in the study had no trouble accessing medical facilities in Sarajevo Canton. The report generally concludes that, after a six-month delay, the Health Care Agreement has come into effect throughout Bosnia and Herzegovina and there are no major legal or procedural obstacles to health care access.¹²

C. Facts of the individual cases

1. Case no. CH/02/8923, Đoko Kličković against the Federation of Bosnia and Herzegovina

22. The applicant retired in Sarajevo in 1982. In May 1992 he stopped receiving his pension from the SRBiH Fund when he left Sarajevo. In 1996, he began receiving his pension from the RS Fund.

23. The applicant returned to his pre-war apartment at Trampina no. 6 in Sarajevo in 2001. On 25 September 2001, he addressed the Sarajevo Fund, requesting the Fund to pay his future pension. The applicant alleges that he received a reply stating that he could not receive his pension from the Federation of Bosnia and Herzegovina because he had already realised that right in the Republika Srpska. The Pension Agreement between the pension funds was cited.¹³

24. The applicant alleges that by not receiving his pension from the Federation he has been damaged because his pension, if received from the Federation Fund, would be 500 KM, but his pension from the RS Fund is only 250 KM.

25. The applicant reports that, despite earlier difficulties, he now has access to insured health care in the Federation.

26. The applicant believes the Pension Agreement directly endangers his private and family life and his choice of place of residence. He asserts that it has not been possible for him to stay in his apartment despite the fact that it was returned to his possession.

27. The applicant submitted a compensation claim for damages in the amount of the difference between pensions which he would receive if he were a user of the Federation Fund and the pension he receives from the RS Fund. The applicant also submitted a compensation claim for non-pecuniary damages in the amount of 2000 KM for pain and maltreatment.

2. Case no. CH/02/8934, Anka Pašalić against the Federation of Bosnia and Herzegovina

28. This applicant resides with Đoko Kličković (the applicant in case no. CH/02/8923) at Trampina no. 6 in Sarajevo, and her case presents similar facts. The applicant lived in Sarajevo before the armed conflict, and she retired in 1981. She stopped receiving her pension from the SRBiH Fund in May 1992, when she left, and she later began receiving a pension from the RS Fund in 1996. Upon her return into her apartment in Sarajevo in 2001, she requested that the Sarajevo

¹¹ UNHCR Report at 8; see also Office of the High Representative, Human Rights and Rule of Law, Sarajevo Field Office, *Report on Health Care Survey*, June 2002, at 3, 4 (hereinafter "OHR Health Care Survey").

¹² OHR Health Care Survey at 1, 4, 5, 7; see also paragraphs 25, 29, and 55 below.

¹³ Mr. Kličković and Ms. Pašalić state that they applied to the Federation Fund orally on several occasions and that they later sent a request by registered mail. They state, however, that they lost the registered mail receipt.

Fund pay her pre-war pension, but she received an oral reply stating that she could not receive her pension from the Federation of Bosnia and Herzegovina because she had already realised that right in the Republika Srpska. She did not receive a written decision. The applicant alleges that she currently receives 190 KM from the RS Fund, and that she would receive 350 KM if her pension was paid by the Federation Fund.

29. The applicant reports that, despite earlier difficulties, she now has access to insured health care in the Federation.

30. The applicant submitted a compensation claim for the difference in pension payments between the entities and for 2000 KM in non-pecuniary damages.

3. Case no. CH/02/9364, Duško Karanović against the Federation of Bosnia and Herzegovina and the Republika Srpska

31. The applicant retired and realised his right to a pension from the SRBiH Fund on 2 March 1987. He received his last pension payment from that Fund in April 1992, when he left Sarajevo. From April 1992 until April 1998 he received his pension from the RS Fund. He then went to Serbia, where he received his pension from a Pension Fund in Serbia until 30 September 2000. This payment from the pension fund in Serbia had the character of charity, however, and not of a real pension.

32. The applicant regained possession of his apartment in Sarajevo on 22 September 2000, and he resides there now. On 24 January 2001, he submitted a request to receive his pension from the Federation of Bosnia and Herzegovina. The Sarajevo Fund or Federation Fund did not deliver a procedural decision on his request, but instead sent a letter to the RS Fund on 6 February 2001, transmitting the applicant's request and asking the RS Fund to take over his pension payments in accordance with the Pension Agreement.

33. On an unspecified date, the applicant initiated a civil proceeding before the Municipal Court II in Sarajevo against the Sarajevo Fund. On 25 January 2001, the Court issued a procedural decision declaring itself incompetent to decide the matter and rejecting the complaint. According to the Court, rights regarding pension funds are to be determined in administrative proceedings (pursuant to Article 7 of the Law on Pensions and Disability Insurance of the Federation of Bosnia and Herzegovina). There is no information indicating that the applicant appealed against this procedural decision.

34. On an unspecified date, the applicant appealed to the Human Rights Ombudsman of Bosnia and Herzegovina. On 16 January 2002, the Ombudsman sent a letter to the applicant, citing the Article 2 of the Pension Agreement and informing the applicant that, according to that Agreement, he could not obtain his pension in the Federation and that his case before the Ombudsman was closed.

35. The applicant alleges that the Entities have no legal basis for enacting the Pension Agreement because the bases for that Agreement (Article 82 paragraph 4, and Article 205 paragraph 2) only regulate the determination of years of service and not the determination of the right to payment of pension. The applicant believes the Agreement is therefore unconstitutional and illegal and that his rights have been violated. He has not submitted a compensation claim.

IV. RELEVANT LEGAL PROVISIONS

36. Under Article III(3)(a) of the Constitution of Bosnia and Herzegovina, all governmental functions and powers not expressly assigned in the Constitution shall be those of the Entities. The Constitution does not address pension systems, therefore all relevant governing legislation is made at the Entity level. In the Federation, the main relevant legislation is the Law on Pension and Disability Insurance (OG FBiH no. 29/98, 23 July 1998), as amended by the High Representative's Decision Amending the Federation Law on Pension and Disability Insurance (OG FBiH no. 49/00, 27 November 2000) and the High Representative's Decision Imposing the Federation Law on

Pension and Disability Insurance Organisation (OG FBiH no. 49/00, 27 November 2000). Relevant legislation in the Republika Srpska is the Law on Pension and Disability Insurance (OG RS no. 32/00, 40/00, 37/01, 22 September 2000).

37. Article 146 of the Federation Law on Pension and Disability Insurance provides as follows:

“Citizens of Bosnia and Herzegovina who are the beneficiaries of the rights to pension and disability insurance shall continue using these acquired rights with the insurance carrier on the territory of the Federation.

“The pensioners who acquired their pension in the republics of the former SFRY and who are citizens of the Federation with their place of residence within the territory of the Federation, are to be paid pension advances, if their pensions are not being disbursed by the insurance holder where the right to pension had been acquired.”

38. Article 82, paragraph 4 of the Federation Law on Pension and Disability Insurance (OG FBiH 29/98, 49/00, 32/01) provides as follows:

“Years of service counted for pension of different insurers of pension and disability insurance both in the Federation of Bosnia and Herzegovina and in the Republika Srpska shall be recognised in accordance with the Agreement reached between the mentioned subjects.”

39. Section 210 of the Republika Srpska Law on Pension and Disability Insurance, which was in place at the time the Pension Agreement took effect, provided as follows:

“The insurance seniority which the insurees and other persons – citizens of the Republika Srpska acquired in the other republics of the former Socialist Federal Republic of Yugoslavia until the day they became independent states, is equalised in terms of rights stemming from the pension and disability insurance with the pension seniority acquired in the Republika Srpska.

“As for the recognition of the pension seniority that insurees acquire in the independent states referred to in paragraph 1 of this Article, there shall also be applied the principle of reciprocity or the provisions of the conventions which the Republic concludes with those states.

“A citizen of the Republic without the insuree status in terms of this law, may exercise his rights related to pension and disability insurance if his pension seniority acquired in the republics of the former Socialist Federal Republic of Yugoslavia until the day they became independent states meets the requirements for exercising rights under this law and if his last employment, i.e. insurance, was within the territory of the Republika Srpska. The pension seniority acquired in the republics of the former SFRY until the day they became independent states also includes the insurance seniority acquired by displaced persons in the Republic of Srpska Krajina.

“As an exception to paragraph 3 of this Article, the displaced persons from the territory of the Republic of Croatia and the part of the former Bosnia and Herzegovina which belongs to the Federation of Bosnia and Herzegovina, may exercise their rights stemming from pension and disability insurance as stipulated by this law also in case their last employment, i.e. insurance, was within the territory of the Republic of Croatia, the Republic of Srpska Krajina and the Federation of Bosnia and Herzegovina.

“The right referred to in paragraph 1 of this Article is established by a provisional procedural decision, which shall be applicable until the Republic resolves its relations with the states that came into being through the dissolution of the former SFRY.”

40. The Agreement on Mutual Rights and Obligations in Execution of Pension and Disability Insurance (the “Pension Agreement”) provides, in Article 2:

“The Insurer who was paying the pension to the pension beneficiary on the date this Agreement came into force shall continue paying the pension regardless of the pension beneficiary’s place of temporary or permanent residence.

“For a pension beneficiary whose pension was being paid from April 1992 but stopped before the entry into force of this Agreement, the pension shall be paid by the insurer who paid the pension last.”

The enabling legislation for the Pension Agreement is listed in the preamble as Article 205, paragraph 2 of the Republika Srpska Law on Pension and Disability Insurance (OG RS nos. 27/93, 14/94, and 10/95) and Article 82, paragraph 4 of the Federation Law on Pension and Disability Insurance (OG FBiH no. 29/98).

V. COMPLAINTS

41. The applicants claim that their rights under Articles 8 and 13 of the Convention, Article 1 of Protocol No. 1 to the Convention, and Article 2 of Protocol No. 4 (the right to liberty of movement and to choose one's residence) have been violated. They further complain that the parties to the Pension Agreement intended a discriminatory effect when they decided upon this practice of payment of pensions. The applicants also appear to complain that they have 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 (hereinafter "ICESCR").

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Parties

1. The Federation of Bosnia and Herzegovina

a. Cases no CH/02/8923 (Kličković) and CH/02/8924 (Pašalić)

42. The Federation of Bosnia and Herzegovina asserts that the applications in cases no CH/02/8923 (Kličković) and CH/02/8924 (Pašalić) contain no statements as to how the Federation has violated the applicants' rights. Therefore, the Federation argues, the Chamber should decline to examine the applications under Chamber Rule 46, paragraph 4.

43. The Federation asserts that the applications should be declared inadmissible under Article VIII(2)(a) of the Agreement for failure to exhaust domestic remedies. According to the Federation, the applicants' claims for pension payments from the Federation Fund have not been registered with the relevant organs and the applicants have not initiated administrative or judicial proceedings before the relevant competent bodies.

44. The Federation asserts that the Chamber should dismiss the applications under Article VIII(2)(c) of the Agreement as being manifestly ill-founded. In this regard the Federation relies on Article 2 of the Pension Agreement, under which the applicants have no right to a pension from the Federation Fund because they were pensioners in the RS Fund when the Pension Agreement went into force.

45. With regard to the alleged violation of Article 8, the Federation claims that it is not responsible for any interference because the applicants obtained their pensions in the Republika Srpska and returned to Sarajevo on their own initiative. Further, the applicants should have known about the Pension Agreement when they decided to return to the Federation.

46. With regard to the alleged violation of Article 13, the Federation asserts that effective remedies exist, but the applicants have failed to pursue them.

47. With regard to Article 1 of Protocol No. 1 to the Convention, the Federation concedes that the applicants have property rights in their pensions. It was the applicants' own actions, however, and not the Federation's, that have placed them in their current situation. Based on Article 2 of the Pension Agreement, the Federation asserts that it has not violated the applicants' property rights.

48. The Federation further asserts that it has not violated Article 2 of Protocol No. 4 to the Convention because the applicants chose to move to the Federation to reclaim their apartment in Sarajevo.

49. The Federation further asserts that it has not discriminated against the applicants with regard to their rights under Article 9 of the ICESCR. According to the Federation, the applicants are treated the same as other citizens of Bosnia and Herzegovina who lived in the Republika Srpska and now live in the Federation of Bosnia and Herzegovina and want to receive pensions from the Federation Fund.

50. With regard to the applicants' compensation claims, the Federation asserts that it has no obligation to pay, that the amounts are unacceptable, and that the applicants have provided no factual basis for their compensation claims.

b. Case no CH/02/9364 (Karanović)

51. The Federation of Bosnia and Herzegovina argues that the application in case no. CH/99/9364 (Karanović) is inadmissible because it is identical to the applicant's submission to the Human Rights Ombudsman of Bosnia and Herzegovina, who closed the case. According to the Federation, the applicant presents no new evidence, and Annex 6 does not give the Chamber the right to re-examine cases the Ombudsman has already considered. The Federation further asserts that the application should be rejected under Article VIII(2)(c) of the Agreement under the doctrine of *lis alibi pendens* or under Article VIII(3)(b) as *res judicata*.

2. The Republika Srpska and Bosnia and Herzegovina

52. The Republika Srpska and Bosnia and Herzegovina have not submitted any written observations in these cases.

B. The applicants in cases no. CH/02/8923 (Kličković) and CH/02/8924 (Pašalić)

53. The applicants in cases no. CH/02/8923 (Kličković) and CH/02/8924 (Pašalić) dispute that their applications are inadmissible. They state that there are no effective domestic remedies available to them. They believe that the domestic courts are politically controlled and would not respect their rights to a fair trial.

54. With regard to Article 8 of the Convention, the applicants assert that it is impossible for them to enjoy their right to privacy and family life. They complain that the respondent Parties have regulated this matter only through an inter-Entity agreement and not by passing legislation. They believe the Pension Agreement violates Article 8.

55. With regard to Article 1 of Protocol No. 1 to the Convention, the applicants assert that the Pension Agreement violates this Article. They receive much lower pensions than if they would receive them from the Federation Fund.

56. With regard to Article 2 of Protocol No. 4 to the Convention, the applicants assert that, because they do not receive their pensions where they live, they are deprived of the right to choose where to live.

57. With regard to Article 9 of the ICESCR, the applicants assert that the Federation has an obligation to protect its citizens, and, by entering into the Pension Agreement, the Federation did not do that, but instead allowed discrimination against non-Bosniak citizens.

58. The applicants in cases no. CH/02/8923 (Kličković) and CH/02/8924 (Pašalić) reported on 15 August 2002, in response to the Federation's observations regarding health care, that they now have health insurance. Beginning in September 2001 through the beginning of 2002 they experienced difficulties, but they now have access to health care in the Federation. With regard to their pensions, their problem remains. They state that they have been in Sarajevo since September 2001 and would like to remain.

C. The applicant in case no. CH/02/9364 (Karanović)

59. The Chamber received no written observations from Duško Karanović (case no. CH/02/9364) in reply to the observations of the Federation.

VII. OPINION OF THE CHAMBER

A. Matters resolved while the cases were pending

60. Under Article VIII(3)(b) of the Agreement, the Chamber may decide to reject or strike out an application, or a portion thereof, on the ground that the matter has been resolved.

61. Two of the applicants complained of violations related to their inability to access insured health care in the place where they live. The Chamber considers that the situation regarding access to health care has been resolved while the case was pending, and the applicants have stated that they no longer have problems in this regard (see paragraphs 21, 25, 29, and 55 above). The Chamber therefore finds that it is no longer necessary to consider these claims and strikes them out pursuant to Article VIII(3)(b) on the ground that the matter has been resolved.

B. Admissibility

62. Before examining the merits of the applications, the Chamber shall decide whether to accept them, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. Under Article VIII(2)(a), the Chamber shall consider whether effective remedies exist and, if so, whether the applicants have demonstrated that they have been exhausted. According to Article VIII(2)(b), it shall not address any application that is substantially the same as a matter that has already been submitted to another procedure of international investigation or settlement. Under Article VIII(2)(c), the Chamber shall dismiss any application that it considers incompatible with the Agreement.

1. Ratione personae

a. Responsibility of Bosnia and Herzegovina

63. The Chamber will consider whether and to what extent the regulation of matters relevant to the present applications falls within the responsibility of each respondent Party. With regard to Bosnia and Herzegovina, the Chamber notes that none of the present applicants named Bosnia and Herzegovina as a respondent Party. The Chamber recalls, however, that it has consistently held that it is not restricted by an applicant's choice of respondent Party, and that it will examine applications in regard to a respondent Party designated by the Chamber itself. The Chamber transmitted these cases to Bosnia and Herzegovina and will consider Bosnia and Herzegovina as a respondent Party.

64. The Chamber notes that Bosnia and Herzegovina has submitted no observations whatsoever regarding these cases, and thus has raised no objections to admissibility. The Chamber further notes that Bosnia and Herzegovina is the likely successor to the rights and obligations of the former SRBiH fund, including obligations toward the present applicants. Moreover, because the present cases raise important issues of state-level concern, the Chamber finds the applications admissible against Bosnia and Herzegovina.

b. The Republika Srpska

65. The Chamber notes that the Republika Srpska has submitted no observations whatsoever regarding these cases, and thus has raised no objections to admissibility.

66. Whatever the current status of the Pension Agreement, the Chamber considers that, as a party to the Pension Agreement, the Republika Srpska may bear some responsibility for the position of the present applicants. The Chamber therefore finds the applications admissible against the Republika Srpska.

2. Requirement to exhaust effective domestic remedies

67. The Federation of Bosnia and Herzegovina asserts that the applications are inadmissible for non-exhaustion of effective domestic remedies.

68. It appears that the applicants would have no chance of success in an administrative proceeding because the governing Pension Agreement is in fact applied. All three applicants have addressed the relevant pension fund in the Federation but have not received any written procedural decision against which they could appeal. In the absence of a written procedural decision, the applicants' only apparent remedy could be an appeal to the Supreme Court based on the silence of the administrative body. The respondent Party fails to demonstrate, however, that an action of this sort could provide an effective remedy.

69. The applicant in case no. CH/02/9364 (Karanović) initiated a civil proceeding before the Municipal Court II in Sarajevo, which rejected his complaint by declaring itself incompetent because it is a purely administrative matter.¹⁴ Thus, it also appears that the applicants cannot obtain an effective remedy by directly addressing the domestic courts.

70. Under the circumstances, the Chamber considers that the domestic courts are likely to apply the Pension Agreement, and there are no domestic remedies that the applicants should be required to exhaust for purposes of Article VIII(2)(a) of the Agreement.

3. *Res judicata* and *lis alibi pendens*

71. The Federation argues that the application in case no. CH/99/9364 (Karanović) is inadmissible under Article VIII(2)(b) because it is identical to the applicant's submission to the Human Rights Ombudsman of Bosnia and Herzegovina, who closed the case. According to the Federation, the applicant presents no new evidence, and Annex 6 does not give the Chamber the right to re-examine cases that the Human Rights Ombudsman of Bosnia and Herzegovina has already considered. The Federation further asserts that the application should be rejected under Article VIII(2)(d) of the Agreement under the doctrine of *lis alibi pendens*.

72. The Chamber recalls its earlier jurisprudence relating to Article VIII(2)(b) and (d) of the Agreement (see, e.g., case no. CH/98/1066, *Kovačević*, decision on review of 12 October 2001, paragraphs 37-44). Under Article VIII(2)(b), the Chamber is prevented from addressing an application which is substantially the same as a matter which has already been examined by the Chamber itself or which has already been submitted to another procedure of international investigation or settlement. Since the Ombudsman cannot be considered "another procedure of international investigation or settlement", this provision does not apply to the Ombudsman.

73. Article VIII(2)(d) authorises the Chamber to reject or defer consideration if the application concerns a matter currently pending before any other international human rights body or any other Commission established by the Annexes to the General Framework Agreement. Since the Ombudsman is neither another "international human rights body" nor another Commission established by the Dayton Peace Agreement, this provision does not apply to the Ombudsman either.

74. In conclusion, neither Article VIII(2)(b) nor Article VIII(2)(d) apply to divest the Chamber of its power to consider Mr. Karanović's application, regardless of his petition to the Human Rights Ombudsman of Bosnia and Herzegovina.

4. Manifestly ill-founded

75. The Federation asserts that the applications should be declared inadmissible under Article VIII(2)(c) of the Agreement as being manifestly ill-founded. The Federation argues that the applicants have no right to a pension from the Federation Fund because they were pensioners in the RS Fund when the Pension Agreement went into force.

¹⁴ There is no information indicating whether the applicant appealed from this decision.

76. The Chamber considers that the present applications raise legitimate issues regarding the Pension Agreement that are compatible with the Agreement and within the Chamber's competence. Accordingly, the Chamber rejects the suggestion that they must be dismissed as manifestly ill-founded pursuant to Article VIII(2)(c).

5. Conclusion

77. As no other ground for declaring the cases inadmissible has been established, the Chamber declares the applications admissible in all respects against Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republika Srpska.

C. Merits

78. Under Article XI of the Agreement, the Chamber will next address the question of whether the facts established disclose any breaches by the respondent Party of its obligations under the Agreement. Under Article 1 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 its Protocols.

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

(a) General considerations

79. The applicants complain that their property rights under Article 1 of Protocol No. 1 to the Convention have been violated. This provision reads as follows:

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

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

(b) Whether the respondent Parties have interfered with the applicants' property rights

80. The system of pension insurance in Bosnia and Herzegovina, as inherited from the former SFRY, has been based on the "pay/go" principle that salary contributions from current workers support the current pensioners. Thus, when the current workers retire, salary contributions from the future generation of workers will finance the current workers' pensions. Therefore, the pension system as a whole has had the character of a general social insurance system. This is also the case with the current Federation and RS Funds.

81. The Chamber has previously held that contributions to an old age pension fund may give rise to a property right in a portion of such a fund, but that there is no right to receive social welfare benefits in a certain amount (case no. CH/99/1554, *Pezer*, decision on admissibility of 7 June 2000, paragraph 5, Decisions January-June 2000). Given the nature of the Socialist Republic of Bosnia and Herzegovina pension system and its successor funds, the same analysis applies to the present cases, and the applicants do not have a right to receive a particular amount of pension payment.

82. The Chamber therefore finds, on the basis of the evidence presented to it, that the fact that the applicants receive smaller pensions than persons paid by the Federation Fund does not interfere with their rights under Article 1 of Protocol No. 1 to the Convention.

(c) Conclusion

83. Accordingly, the Chamber concludes that there has been no violation by Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, or the Republika Srpska of the applicants' rights to peaceful enjoyment of their possessions under Article 1 of Protocol No. 1 to the Convention.

2. Discrimination in the enjoyment of the right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights

84. The complaints concern the applicants' rights to social security and therefore fall within the scope of the rights protected by Article 9 of the International Covenant on Economic, Social and Cultural Rights. Pursuant to Article II(2)(b), the Chamber can consider alleged violations of such rights only in conjunction with discrimination "on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status". The applicants allege discrimination, and the Chamber has therefore considered their applications in light of 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."

85. In order to determine whether the applicants have been discriminated against in the enjoyment of social security rights, 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).

86. In accordance with the approach outlined above, the Chamber has considered whether other categories of pensioners constitute "others in the same or relevantly similar situations". The situation of the current applicants (and presumably others in the Federation who were displaced to the Republika Srpska during the armed conflict) can be compared to those of SRBiH pensioners who matured their pension rights before the conflict broke out in 1992 and remained in the Federation. Both sets of pensioners paid their contributions into the SRBiH Fund during their working lives and thereby acquired rights to a pension from that fund in accordance with the provisions of the SRBiH Law on Pension and Disability Insurance, which was in effect when they retired. Under current practice, the pension of a former Federation pensioner who is now paid by the RS Fund because he or she was displaced to the Republika Srpska during the armed conflict is significantly lower than the average pension of a similarly situated SRBiH Pensioner who remained in the Federation. This is true for each of the present applicants, who would receive greater pensions if they were paid by the Federation Fund.

87. This disparity leaves no doubt that persons who were internally displaced during the armed conflict are, upon their return, treated differently. Each of the present applicants left Sarajevo in 1992 at the outset of the armed conflict. These applicants now receive smaller pensions simply because they left the Federation for a period of time, not on their own free will, to live in the Republika Srpska. Those who remained enjoy greater pension rights than those who left, even though they may have been identically situated before the armed conflict.

88. Indeed, it appears that the present applicants (and others who were internally displaced and have returned to the Federation) are in a worse position than Federation pensioners who moved to other countries during the armed conflict. Many Federation pensioners who moved to other countries during the armed conflict continue to enjoy full pension rights from the Federation Fund (see paragraph 16 above).

89. Moreover, the prospect of returning to live in the Federation (where the cost of living is higher than in the Republika Srpska) on a smaller RS Fund pension presents a significant obstacle to the return of displaced persons. The present applicants attest to these difficulties, and the Federation, in its observations, admits that they should have been aware of them (see paragraph 45 above).

One of the important objectives of the settlement of the conflict in Bosnia and Herzegovina was to facilitate the return of displaced persons (see generally the General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 7). The Chamber considers that displaced person status is a status relevant for the purposes of Article II(2)(b) and further finds that the current situation regarding displaced persons' pensions is inimical to the goals of Annex 7. The only reason put forward for the different treatment is the Pension Agreement, which, by its terms, makes displaced person status the basis for different treatment. But displaced person status cannot serve as a justification for disparate treatment, especially where, as here, it carries with it a connotation of discrimination on ethnic grounds. Under the circumstances, the Chamber concludes that the different, poorer treatment of the applicants with regard to their pension payments has no objective justification.

90. In light of these considerations, the Chamber concludes that the applicants have been treated differently and have therefore been discriminated against in their enjoyment of the right to social security, as guaranteed by Article 9 of the ICESCR.

(a) Alleged violation by the Federation of Bosnia and Herzegovina

91. Having regard to the above, the Chamber concludes that, as a result of the Pension Agreement, the applicants, as internally displaced persons who returned to the Federation, have been discriminated against in the enjoyment of their right to social security in comparison to similarly situated persons who remained in the Federation. This constitutes discrimination in the enjoyment of the rights protected by Article 9 of the ICESCR for which the Federation of Bosnia and Herzegovina, as a party to the Pension Agreement, is responsible.

(b) Alleged violation by Bosnia and Herzegovina

92. Having regard to the above, the Chamber considers that, because Bosnia and Herzegovina is not a party to the pension agreement and because all legislation directly concerning pension systems is made at the entity level, Bosnia and Herzegovina is not responsible for the discrimination against the applicants with regard to their pension rights.

(c) Alleged violation by the Republika Srpska

93. Having regard to the above, the Chamber considers that the Republika Srpska, though a party to the Pension Agreement, cannot be held directly responsible for the comparatively lower pensions received by the applicants. The Pension Agreement does not necessarily compel the existing pension disparity, nor does it prevent the Federation from placing returnee pensioners on equal footing with those who remained in the Federation. As such, the Republika Srpska is not responsible for the discrimination against the applicants with regard to their pension rights.

3. Other claims

94. Having regard to the violations found above, the Chamber finds that it is not necessary to separately examine the applications under Articles 8 and 13 of the Convention, or under Article 2 of Protocol No. 4 to the Convention.

VIII. REMEDIES

95. Under Article XI(1)(b) of the Agreement, the Chamber must next address the question of what steps shall be taken by the respondent Parties to remedy the breaches of their obligations under the Agreement. In this respect, the Chamber may consider issuing orders to cease and desist, awarding monetary relief (for pecuniary and non-pecuniary damages), and prescribing provisional measures.

96. The applicants Kličković and Pašalić claim compensation for the difference between the amount they would receive from the Federation Fund and the amount they receive from the RS Fund. They each additionally seek 2000 KM for non-pecuniary damages. The applicant Karanović has not submitted a compensation claim.

97. The Federation asserts that it has no obligation to pay the applicants' compensation claims, that the amounts are unacceptable, and that the applicants have provided no factual basis for their compensation claims.

98. The Chamber finds it appropriate to order the Federation of Bosnia and Herzegovina to take all necessary legislative and administrative actions by 10 July 2003 to ensure that the applicants are no longer discriminated against in their enjoyment of pension rights guaranteed by Article 9 of the International Covenant on Economic, Social and Cultural Rights, particularly in comparison to those pensioners who remained in the Federation during the armed conflict.

99. The Chamber further orders the Federation of Bosnia and Herzegovina to compensate each applicant for the difference between the pension that he or she would be due under the Pension Agreement between the pension funds and the amount the applicant would have received from the Federation Fund, from the date of his or her application to the Human Rights Chamber until the date of the Federation's compliance with the remedy ordered in paragraph 98.

IX. CONCLUSIONS

100. For the above reasons, the Chamber decides,

1. unanimously, to declare the applications admissible in their entirety against Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republika Srpska;

2. by 9 votes to 3, 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;

3. by 10 votes to 2, that the Federation of Bosnia and Herzegovina has discriminated against the applicants in the enjoyment of their right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

4. by 11 votes to 1, that Bosnia and Herzegovina has not discriminated against the applicants in the enjoyment of their right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights;

5. by 10 votes to 2, that the Republika Srpska has not discriminated against the applicants in the enjoyment of their right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights;

6. unanimously, that it is not necessary to separately examine the applications under Articles 8 and 13 of the Convention, or under Article 2 of Protocol no. 4 to the Convention;

7. by 10 votes to 2, to order the Federation of Bosnia and Herzegovina to take all necessary legislative and administrative actions, by 10 July 2003, to ensure that the applicants are no longer discriminated against in their enjoyment of pension rights guaranteed by Article 9 of the International Covenant on Economic, Social and Cultural Rights, particularly in comparison to those pensioners who remained in the Federation during the armed conflict;

8. by 10 votes to 2, to order the Federation of Bosnia and Herzegovina to compensate each applicant for the difference between the pension that he or she would be due under the Pension Agreement between the pension funds and the amount the applicant would have received from the Federation Fund, from the date of his or her application to the Human Rights Chamber until the date of the Federation's compliance with the remedy ordered in conclusion no. 7 above;

CH/02/8923 *et al.*

9. unanimously, to order the Federation of Bosnia and Herzegovina to report to the Chamber by 10 August 2003 on the steps taken to comply with the above orders.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

Annex Dissenting opinion of Mr. Hasan Balić

ANNEX

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

DISSENTING OPINION OF MR. HASAN BALIĆ

I do not agree with the conclusion of the Chamber's decision in cases CH/02/8923, CH/02/8924, and CH/02/9364, establishing the breach of the Agreement by the Federation of Bosnia and Herzegovina for the following reasons:

In order for the respondent Party to be responsible, it is necessary to establish its responsibility on the grounds of a violation or a contract. No such responsibility exists in the current case. The applicants left Sarajevo of their own accord and went to live in the Republika Srpska. Their motivation for doing that is not important in this case. Now, they decided to return to Sarajevo in the Federation of Bosnia and Herzegovina. It is their right, and nobody is contesting it. The respondent Party cannot be held responsible on any grounds for the fact that they had left for the Republika Srpska and had their pensions regulated there. The Fund of the Republika Srpska "is guilty" of paying pensions that are smaller than the ones paid to the beneficiaries who remained within the Federation of Bosnia and Herzegovina and had their pension related rights regulated there.

(signed)
Hasan Balić