DECISION ON ADMISSIBILITY AND MERITS
(delivered on 12 May 2000)

Cases nos. CH/98/875, CH/98/939 and CH/98/951

Radovan ŽIVKOVIĆ, Ilija SARIĆ and Dobrivoje JOVANOVIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 4 April 2000 with the following members present:

Mr. Andrew GROTRIAN, Acting President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Želimir JUKA
Mr. Miodrag PAJIĆ

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

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

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

I. INTRODUCTION

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

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

3. On 9 March 2000 the plenary Chamber has adopted a first decision on the admissibility and merits of three applications concerning the issue of the pensions paid by the Pension and Disability Insurance Fund of Bosnia and Herzegovina (the "PIO BiH") to JNA pensioners (cases nos. CH/98/706, 740 and 776, *Šećerbegović, Biočić and Oroz,* decision delivered on 7 April 2000). In deciding the present cases the Chamber has relied on its findings in that decision.

II. PROCEEDINGS BEFORE THE CHAMBER

4. The applications were introduced between 17 August and 15 September 1998 and registered on the date of their submission. Mr. Jovanović is represented by Mr. Ismet Mehić, a lawyer practising in Sarajevo, while the other two applicants are not represented by lawyers.

5. The applications were transmitted to the respondent Party for its observations on the admissibility and merits of the cases on 15 July 1999.
6. Observations from the respondent Party were received on 15 September 1999 and transmitted to the applicants on 12 October 1999. Only Mr. Jovanović replied to the respondent Party's observations.
7. The Chamber deliberated on the cases on 4 April 2000, decided to formally join the applications and adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

A. The facts of the individual cases

1. Case no. CH/98/875 Radovan Živković

8. The applicant, born in 1938, is a citizen of Bosnia and Herzegovina living in Sarajevo. He is a retired JNA officer. Since April 1992, due to the hostilities in Bosnia and Herzegovina, the applicant has not received any payments on account of his pension from the JNA Pension Fund. Since an unspecified date, probably between April 1992 and January 1993, he has been receiving an amount equivalent to 50 percent of his original pension from the PIO BiH in Sarajevo, as subsequently adjusted in accordance with the applicable Federation legislation. The applicant has not indicated the current amount of his pension. He has submitted a letter by the PIO BIH, by which the addressee (a JNA pensioner) is informed that the PIO BiH cannot issue a procedural decision determining the amount of the addressee's pension until "that problem is solved by law". The copy of the letter submitted to the Chamber does not contain the name of the addressee, nor any other data identifying him.

2. Case no. CH/98/939 Ilija Sarić

9. The applicant, born in 1927, is a citizen of Bosnia and Herzegovina living in Sarajevo. As of 1 January 1981 the applicant retired from active service in the JNA with the rank of an ensign of first class. In February 1992 he ceased receiving payments on account of his pension from the JNA Pension Fund. Since an unspecified date (probably between June 1992 and January 1993) he has been receiving from the PIO BiH an amount equivalent to 50 percent of his original pension, as determined on the basis of the slip of the last payment from the JNA Pension Fund and as subsequently adjusted in accordance with the applicable Federation legislation. The applicant did not receive any decision concerning this payment. As of June 1998 the applicant received a monthly pension of KM 245,50. Mr. Sarić has submitted to the Chamber a copy of the same letter submitted by Mr. Živković (see paragraph 8 above).

3. Case no. CH/98/951 Dobrivoje Jovanović

10. The applicant, born in 1935, is a citizen of Bosnia and Herzegovina living in Sarajevo. As of 1 January 1986 he retired as a JNA officer. In March 1992 he ceased receiving payments on account of his pension from the JNA Pension Fund. Since September 1992 he has been receiving from the PIO BiH an amount equivalent to 50 percent of his original pension, although during the war the amount paid was sometimes lower and sometimes the cash payment was substituted by payment in kind, such as flour or a food parcel. The pay cheque generally bore a note saying "50 percent of the Army pension". On 25 September 1997 the applicant addressed the PIO BiH and asked for explanations concerning the reduction in the payments he received. By letter of 2 October 1997 the PIO BiH replied, informing him that he was receiving 50 percent of his original JNA pension, as determined on the basis of the slip of the last payment from the JNA Pension Fund and as subsequently adjusted, in accordance with the applicable legislation enacted since 1992 (see paragraphs 17-24 below). After that, the cheque no longer indicated "50 percent of the Army pension". In September 1998 the applicant was receiving a monthly pension of KM 230.

B. Relevant domestic legislation

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

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

(i) *Civilian pensions*

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

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

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

ii. *Military pensions*

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

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

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

(b) Legislation of the Republic of Bosnia and Herzegovina

17. The SFRY Law on Pensions and Disability Insurance of Insured Military Personnel was taken over on 11 April 1992 as a law of the Republic of Bosnia and Herzegovina by the Decree with force of law on the Adoption and the Application of Federal Laws applicable in Bosnia and Herzegovina as Republic Laws (Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RBiH" – no. 2/92).

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

> "(1) The Fund decides on the right to pension and disability insurance of the military insurees who are citizens of the Republic of Bosnia and Herzegovina and who reside within the territory of the Republic of Bosnia and Herzegovina.
>
> (2) The pensions of military insurees are paid in the amount of 50 percent of the pension as determined in accordance with the Law on Pensions and Disability Insurance of Insured Military Personnel and are adjusted to the amount and in the way established by the Law on Fundamental Rights of Pension and Disability Insurance and the Law on Pension and Disability Insurance.
>
> (3) The pensions of military insurees are paid in the amount and in the way determined in paragraph 2 of this Article, starting with April 1992."

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

> "Article 5 is amended as follows:
>
> 'Pensions of Insured Military Personnel of the former JNA who are citizens of the Republic and who reside within the territory of the Republic (hereinafter "Insured Military Personnel") will be paid 50 percent of the pension established under the Law on Pensions and Disability Insurance of Insured Military Personnel.
>
> Where the pension of Insured Military Personnel established under the Law on Pensions and Disability Insurance of Insured Military Personnel is lower than the guaranteed pension established under the Law on Pensions and Disability Insurance (hereinafter "guaranteed pension"), pensions will be paid in the amount established under the Law on Pensions and Disability Insurance of Insured Military Personnel.

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

(c) Legislation of the Federation of Bosnia and Herzegovina

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

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

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

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

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

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

> "If the pension of the military insured of former JNA, determined in accordance with the military insured rules, is below the minimum guaranteed pension determined in the Article 72 of this law, the pension will be paid in the amount defined in accordance with the military insured rules.
>
> If the pension determined in accordance to the military insured rules amounts to more than the minimum pension guaranteed by this law, but is below the guaranteed minimum pension after application of paragraph 1 of Article 139 of this law, the pension will be paid in the amount of guaranteed minimum pension determined by this law."

24. Article 141 provides:

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

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

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

2. The Law on Administrative Proceedings

27. According to Article 68 of the SRBiH Law on Pension and Invalidity Insurance (see paragraph 12 above), rights from the pension and invalidity insurance are to be exercised, unless otherwise provided, in accordance with the Law on Administrative Proceedings. This provision was taken over into Article 7 of the Federation Law on Pension and Invalidity Insurance.

28. Under Article 221 paragraph 1 of the Law on Administrative Proceedings (OG FBiH no. 2/98), parties enjoy a right to appeal against decisions of first-instance administrative organs, unless otherwise provided.

3. The Law on Administrative Disputes

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

C. General factual background concerning the Bosnian pension system

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

31. During the war, the Pension and Disability Insurance Fund of the Republic of Bosnia and Herzegovina split into three separate funds, headquartered in Sarajevo, West Mostar and Pale, each fund becoming exclusively competent for the pensioners living within its region. The 1998 Federation Law on Pension and Disability Insurance provides for the continued existence of two pension funds within the Federation on a transitional basis (Article 6 of the Law). Unless otherwise specified, the Chamber has in the following disregarded the separate existence of two funds within the Federation, as it is not relevant to its decision and as it was ignored by the Parties in their submissions. All three applicants receive payments from the fund headquartered in Sarajevo, and the Chamber shall refer to it as the Pension and Disability Insurance Fund of Bosnia and Herzegovina ("PIO BiH").

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

33. According to the respondent Party, the JNA Pension Fund continues to pay pensions to the JNA pensioners living in the Republika Srpska. These pensions are allegedly lower than the pensions the JNA pensioners living in the Federation receive from the PIO BiH. According to the Federation, as of February 1999, 1,466 JNA pensioners were receiving pension payments from the PIO BiH. The average monthly pension of the JNA pensioners, i.e. the average benefit paid to JNA pensioners in accordance with Article 139 of the Federation Law on Pension and Disability Insurance, amounts to about KM 298. This is about 80 percent higher than the average of the pensions paid to all other categories of pensioners, which amounts to KM 164. The maximum monthly pension paid by the PIO BiH amounts to KM 613.

34. The Federation finally submits that the PIO BiH is in great financial difficulties, as the ratio between active workers contributing to it and beneficiaries of pensions is only of 1.3 to 1.

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

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

36. According to information provided by Mr. Jovanović, which was not disputed by the Federation, pensioners of the Army of the Federation who retired with a military rank comparable to his, receive a pension amounting to at least KM 510. The Chamber notes that this figure is compatible with information provided by the Federation in the *Šećeregović, Biočić and Oroz* case, according to which the average pension of the pensioners of the Army of the Federation was, in February 2000, KM 573.

IV. COMPLAINTS

37. The applicants allege a violation of their right to receive the full pension in accordance with the procedural decisions on their retirement. Messrs. Sarić and Jovanović also complain that they are being discriminated against in the enjoyment of that right, in comparison to all other pensioners in the Federation according to Mr. Sarić, in comparison to the retired officers of the Army of the Federation according to Mr. Jovanović. The latter applicant furthermore complains that his right to a fair hearing before a court for the determination of his right to receive the full pension is being violated, and that, as a consequence, he has no remedy against this violation.

V. SUBMISSIONS OF THE PARTIES

A. The Federation of Bosnia and Herzegovina

1. As to admissibility

38. The Federation asks the Chamber to declare the applications inadmissible on the ground that the applicants have not exhausted the available domestic remedies. It argues that the applicants should have appealed against the letter by the PIO BiH refusing to issue a procedural decision determining the amount of their pension. If no favourable decision had been obtained in the administrative appeals proceedings, they could have initiated court proceedings under the Law on Administrative Disputes.

39. The Federation also argues that the applications are inadmissible on the ground that they are outside the Chamber's competence *ratione temporis*. It submits that Article 139 of the Federation Law on Pension and Disability Insurance of 31 July 1998 is only a confirmation and continuation of the regulation adopted by the Republic of Bosnia and Herzegovina with the 1992 Decree and the 1994 Law. Therefore, it is argued that the relevant action by the authorities was taken with the 1992 Decree and the 1994 Law. Consequently, as the Agreement cannot be applied retroactively, the Chamber has no competence to examine the matter.

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

41. Finally, the Federation submits that, since Article 139 of the 1998 Law on Pension and Disability Insurance merely constitutes a continuation of the provisions adopted by the Republic of

Bosnia and Herzegovina, the State of Bosnia and Herzegovina, who is the legal successor of the Republic, should be called to act as a respondent Party in the present cases as well.

2. As to the merits

42. With regard to the merits of the complaints, the Federation submits that the applicants never paid contributions to the PIO BiH. Therefore, they are not entitled to receive a pension from the PIO BiH on the basis of the contributions made as active members of the JNA and do not have a claim against the PIO BiH or against the Federation that constitutes a possession within the meaning of Article 1 of Protocol No. 1 to the Convention.

43. The Federation argues that the provision contained in Article 5 of the 1992 Decree was adopted in order to provide the JNA pensioners living within the territory then controlled by the Army of the Republic of Bosnia and Herzegovina, who had ceased to receive pension payments from Belgrade, with some kind of pension. It is also submitted that the Federation government decided to give continuity to this solution in order to strike a balance between, on the one hand, the need to ensure the social security of the JNA pensioners who live on its territory and are citizens of Bosnia and Herzegovina, and, on the other hand, the need not to overburden the PIO BiH, which already faces great difficulties to ensure the pensions of its insurees (see paragraph 34 above). The Federation states that this is the only possible solution until the succession negotiations, including succession to the assets of the JNA Pension Fund, are concluded.

44. As to the complaint of discrimination, the Federation argues that as the applicants do not have a claim against the PIO BiH or against the Federation that constitutes a possession within the meaning of Article 1 of Protocol No. 1 to the Convention, there can be no discrimination in the enjoyment of that provision. It also submits that the payment to the JNA pensioners who reside in the Federation of only 50 percent of their original pension is fully justified in the light of the above considerations. Namely, that these pensioners contributed to the JNA Pension Fund, and not to the PIO BiH, that the PIO BiH is in serious financial difficulties and can hardly pay the full pensions to its insurees, and, finally, that notwithstanding the 50 percent reduction the average pension of a JNA pensioner is still 80 percent higher than the average pension paid by the PIO BiH. The Federation concludes that there is no discrimination against the applicants.

B. The applicants

45. Messrs. Živković and Sarić have not made any submissions, except for the above stated complaints. The following are the submissions by Mr. Jovanović.

1. As to admissibility

46. As to the issue of domestic remedies, the applicant recalls that the violation of his rights is provided for by the 1992 Decree and the 1998 Federation Law on Pension and Disability Insurance. He therefore concludes that it would be "illusory and an unnecessary waste of time" to initiate court proceedings with a view to being recognised his full pension as established by the SFRY Law on Pensions and Disability Insurance of the Insured Military Personnel. He submits that the same applies to the protection of his rights in administrative proceedings.

47. Regarding the six-months time-limit, the applicant submits that there is a continuity between the 1992 Decree, the 1994 Law and the 1998 Federation Law. He states that the application of these three laws constitutes a continuous and ongoing violation of his rights which renders inapplicable the time-limit in Article VIII(2)(a) referred to by the Federation.

2. As to the merits

48. The applicant confirms his complaints. He rejects the Federation's argument that as a JNA pensioner, who paid his contributions to the JNA Pension Fund in Belgrade, he does not enjoy a right to a pension paid by the PIO BiH. The applicant submits that this argument is contradicted by the fact that he is a citizen of Bosnia and Herzegovina, that the Federation assertedly admits in its observations that it is "withholding" the JNA pensions until the succession to the assets of the JNA

Pension Fund is solved, and that from 1992 to 1997 his pension cheque bore a note saying "50 percent of the Army pension" (see paragraph 10 above).

49. The applicant finally states that the letter received from the PIO BiH (see paragraph 10) above meant that he "had no right to any court proceedings to prove the violations of [his] rights, as the respondent Party sealed the whole thing up by the above-mentioned discriminatory law".

VI. OPINION OF THE CHAMBER

A. Admissibility

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

1. Competence *ratione personae*

51. The Federation submits, on the basis of the argument outlined above (paragraph 41), that the State of Bosnia and Herzegovina should be joined to the proceedings as respondent Party. The Chamber notes that in the *Šećerbegović, Biočić and Oroz* case, in which the State was a respondent Party, it found that it had no competence *ratione personae* to continue consideration of the applications insofar as they were directed against Bosnia and Herzegovina (paragraphs 68-71 of the *Šećerbegović, Biočić and Oroz* decision). It reached this conclusion on the grounds that pensions are not among the matters falling into the State's competence under the Constitution of Bosnia and Herzegovina, that "the State of Bosnia and Herzegovina has not taken any legislative or administrative action affecting the applicants, nor have institutions of the Republic of Bosnia and Herzegovina done so since the entry into force of the Agreement" and that therefore "no responsibility for the matters complained of can attach to Bosnia and Herzegovina" (paragraph 71).

52. As the cases presently before the Chamber do not reveal any difference in this respect to the *Šećerbegović, Biočić and Oroz* case, the Chamber concludes that it would not have any competence *ratione personae* with regard to the State of Bosnia and Herzegovina. The Federation's request stands therefore rejected.

2. Competence *ratione temporis*

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

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

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

55. The respondent Party asks the Chamber to declare the application inadmissible under Article VIII(2)(a) of the Agreement. It argues that the applicants should have appealed in accordance with the Law on Administrative Proceedings against the refusal of the PIO BiH to issue a procedural decision determining the amount of their pension. If no favourable decision had been obtained in the administrative appeals proceedings, they could have initiated court proceedings under the Law on Administrative Disputes.

56. The question arises whether the administrative and court proceedings invoked by the Federation constitute a remedy which the applicants could be reasonably expected to pursue. The Chamber notes that there is no dispute as to the full amounts of the applicants' JNA pensions, and, therefore, no issue left to be determined under the Law on Administrative Proceedings. Assuming that the applicants had initiated proceedings before the courts seeking payment of their JNA pensions in the full original amount, it can be reasonably expected that the court would have applied Article 139 of the Law on Pension and Disability Insurance. Furthermore, the Chamber notes that the respondent Party has not submitted a single case among the 1,466 affected by Article 139 of the 1998 Law of a JNA pensioner who would have availed himself successfully of the remedies indicated by it. The Chamber therefore concludes that there was no domestic remedy the applicants could be required to pursue for the purposes of Article VIII(2)(a) of the Agreement.

57. The respondent Party finally submits that the applications are inadmissible because the applicants did not lodge them within six months of the entry into force of the Decree of 18 September 1992, which, according to the Federation, was the relevant final decision in the cases.

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

4. Conclusion as to admissibility

59. The Chamber concludes that the applications are admissible.

B. Merits

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

61. Under Article II of the Agreement, the Chamber has competence to consider (a) alleged or apparent violations of human rights as provided in the Convention and its Protocols and (b) alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the international agreements listed in the Appendix (including the Convention).

62. The Chamber shall first consider the complaints raised under Article II(2)(a) of the Agreement and Article 1 of Protocol No. 1 to the Convention, as well as Articles 6 and 13 of the Convention. It shall secondly consider the complaints of discrimination under Article II(2)(b) of the Agreement and Article 9 of the ICESCR, protecting the right to social security.

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

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

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

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

65. The applicants argue that they are entitled to receive from the PIO BiH the full amount of their JNA pension.

66. The Chamber notes that the language both of Article 5 of the 1992 Decree, as amended by Article 2 of the 1994 Law, and of Article 139 of the 1998 Law might be interpreted in the sense that the Republic of Bosnia and Herzegovina first, and then the Federation, took over the obligation of the JNA Pension Fund to pay the applicants' JNA pensions and then decided to pay only 50 percent of the amount due. The amended Article 5 of the 1992 Decree (see paragraph 18 above) provided:

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

Article 139 of the 1998 Law (see paragraph 22 above) reads:

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

67. The Chamber notes, however, that the applicants have not paid any contributions to the PIO BiH in Sarajevo, nor to any other pension fund in the Republic of Bosnia and Herzegovina or in the Federation. They had no legal relation to the PIO BiH before the issuing of the 1992 Decree with Force of Law on Pension and Disability Insurance During the State of War or Immediate Threat of War.

68. The Chamber recalls that the Federation submits that the decision to pay JNA pensioners a pension in the amount of 50 percent of the pension they were entitled to under the Law on Pensions and Disability Insurance of Insured Military Personnel was taken in order to ensure that these persons living in the territory controlled by the Army of the Republic of Bosnia and Herzegovina, who at the outbreak of the war had ceased to receive their pension payments, had the means to survive. The Federation further submits that the same *ratio* underlies Article 139 of the 1998 Law in relation to the citizens of Bosnia and Herzegovina living in the territory of the Federation. It also stresses that the assets of the Belgrade JNA Pension Fund are among the subjects of the succession negotiations.

69. The Chamber concludes that the applicants have no claims against the PIO BiH or against the Federation beyond those attributed to them by the 1992 Decree and 1998 Law, which could be regarded as a possession under Article 1 of Protocol No. 1 to the Convention. The applicants' claim towards the JNA Pension Fund, which is not at issue before the Chamber, appears to remain

untouched by the mentioned legislation. Accordingly, the Chamber concludes that the applications do not reveal any interference with the applicants' possessions by the Federation and, accordingly, no violation of Article 1 of Protocol No. 1 to the Convention.

2. Article 6 of the Convention

70. Mr. Jovanović complains that, because the payment of only 50 percent of his full JNA pension is provided by law, he does not have access to a court for the determination of his right to receive the full pension in a fair hearing. On this ground he claims a violation of Article 6 paragraph 1 of the Convention, which – insofar as relevant – reads:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

71. The Chamber recalls that for Article 6 of the Convention to apply, the right at issue must be a "civil right" within the meaning of Article 6 paragraph 1. In the present case, however, for the reason set forth below, the Chamber need not determine whether the claim to receive from the PIO BiH or the Federation the full JNA pension concerns a "civil right".

72. The Chamber notes that Mr. Jovanović has not taken any steps in order to initiate court proceedings. Also, he has not claimed that he was barred, in fact or in law, from initiating such proceedings in order to complain of the alleged curtailment of his pension payments, once he had completed the proceedings before the competent administrative authorities. He rather complains that such court proceedings would not have offered any reasonable prospect of success, as the court would have applied exactly the legislation allegedly violating his rights.

73. In examining the admissibility of the applications under Article VIII(2)(a) of the Agreement, the Chamber has substantially agreed with this evaluation (see paragraph 56 above). With regard to the merits of the applicant's complaint, however, the Chamber does not find that this situation reveals a violation of the applicants' right to access to a court and to a fair trial before such court protected by Article 6. Indeed, while Mr. Jovanović's grievance is that his right to a full pension is not recognised by the Federation legislation, Article 6 extends only to disputes over (civil) "rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law (see Eur. Court H. R., *James and Others v. the United Kingdom* judgment of 21 February 1986, Series A no. 98, p.46, paragraph 81). Moreover, Article 6 does not require that there be a domestic court with competence to invalidate or override domestic law (see *James and Others*, paragraph 81).

74. To sum up, the fact that the applicants did not have a reasonable prospect to be recognised the right to receive the full JNA pension by a domestic court, because this right is not recognised by domestic law, does not disclose a violation of Article 6 of the Convention. There has accordingly been no violation of that provision.

3. Article 13 of the Convention

75. Mr. Jovanović states that he does not have any remedy before national authorities against the violation of his right to receive his full pension, which he considers a violation of his right to his possessions protected by Article 1 of Protocol No. 1 to the Convention. Although the applicant has made this complaint with reference only to Article 6 of the Convention, the Chamber has considered it also under Article 13, which provides:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

76. The Chamber notes that in the present cases the source of the grievance is the legislation itself. Requiring an effective remedy would be tantamount to requesting judicial or other review of legislation. In the *James and Others* judgment referred to above the European Court of Human Rights has held that "Article 13 does not go as far as to guarantee a remedy allowing a Contracting State's

laws as such to be challenged before a national authority on the ground of being contrary to the Convention" (paragraph 85). Accordingly, the applications do not reveal a violation of Article 13 of the Convention.

4. Discrimination in the enjoyment of the right to social security guaranteed by Article 9 of the ICESCR

77. Mr. Sarić complains that the JNA pensioners are the only category of pensioners who suffers a 50 percent reduction of the pension payments. Mr. Jovanović complains that his pension has been reduced while those of the pensioners of the Army of the Federation are being paid in the full amount.

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

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

79. In order to determine whether the applicants have been discriminated against, the Chamber must first determine whether the applicants were treated differently from others in the same or a 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).

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

81. The situation is different in relation to the former JNA members who retired after having served in the Army of the Republic of Bosnia and Herzegovina or the Army of the Federation, in particular those who retired before 30 July 1998 (see paragraphs 25 and 26 above). The latter category apparently receives the full pension as established under the Federation Law on Pension and Disability Insurance and full credit is given for the time served in the JNA, both for the purpose of the determination of the entitlement and of the amount of the pension to which they are entitled. The Chamber notes that the mechanism by which this category's entitlement to pension is calculated is not completely clear. The fact, however, that the average pension of the pensioners of the Army of the Republic of Bosnia and Herzegovina and of the Army of the Federation amounts to KM 573.50 (as of February 2000), whereas the average pension of the JNA pensioners is KM 298 (as of February 1999), the maximum pension obtainable being KM 613, leaves no doubt as to the favourable treatment of these pensioners.

82. These statistical data show that the veterans of the war in Bosnia and Herzegovina are put in a position of considerable economic advantage in comparison to the entire remaining population of the Federation, and not only as compared to members of the JNA who retired before 1992 and did not join the Army of the Republic of Bosnia and Herzegovina, the HVO or the Army of the Federation.

Furthermore, the former JNA members who joined these armed forces served either the government of the Republic of Bosnia and Herzegovina or of the Federation and thereby established a legal relationship to one or both of these governments. The Chamber notes that the privileged treatment of veterans is a feature that is not peculiar to the society of the post-war Federation of Bosnia and Herzegovina.

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

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

VIII. CONCLUSIONS

85. For the above reasons, the Chamber decides,

1. unanimously, to declare the applications admissible;

2. unanimously, 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. unanimously, that there has been no violation of the applicants' right to have their civil rights determined in a fair hearing before an independent and impartial tribunal under Article 6 of the European Convention on Human Rights;

4. unanimously, that there has been no violation of the applicants' right to an effective remedy before a national authority against violations of their rights protected by the Convention under Article 13 of the European Convention on Human Rights;

5. unanimously, that the applicants have not been discriminated against in the enjoyment of their right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Andrew GROTRIAN
Acting President of the First Panel