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SEVENTH ITEM ON THE AGENDA

Report of the Director-General

Second supplementary report: Report of the Committee set up to examine the representation alleging non-observance by Croatia of the Maintenance of Migrants' Pension Rights Convention, 1935 (No. 48), made under article 24 of the ILO Constitution by the Association of Trade Unions of Pensioners of Serbia (USPS)

Contents

	<i>Page</i>
I. Introduction	1
II. Examination of the representation	1
A. The complainant's allegations	1
B. The Government's response	4
III. The Committee's conclusions	12
IV. The Committee's recommendations	17

I. Introduction

1. By a communication dated 25 November 2014, the Association of Trade Unions of Pensioners of Serbia (USPS) made a representation to the International Labour Office (ILO) under article 24 of the ILO Constitution alleging non-observance by Croatia of the Maintenance of Migrants' Pension Rights Convention, 1935 (No. 48), ratified by Croatia in 1991 and currently in force for that country.
2. The following provisions of the ILO Constitution relate to representations:

Article 24

Representations of non-observance of Conventions

1. In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit.

Article 25

Publication of representation

1. If no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it.

3. In accordance with articles 1 and 2(1) of the Standing Orders concerning the procedure for the examination of representations, as revised by the Governing Body at its 291st Session (November 2004), the Director-General acknowledged receipt of the representation, informed the Government of Croatia, and brought the matter before the Officers of the Governing Body.
4. At its 326th Session (March 2016), the Governing Body decided that the representation was receivable and set up a tripartite committee for its examination composed of Mr Diego Cano Soler (Government member, Spain), Mr Kris de Meester (Employer member, Belgium) and Mr Plamen Dimitrov (Worker member, Bulgaria).
5. The Government of Croatia submitted its written observations in a communication dated 30 December 2016.
6. The Committee met on 13 March and 9 June 2017 to examine the representation and to adopt its report.

II. Examination of the representation

A. The complainant's allegations

7. According to the complainant organization, in the 1990s, a large number of Croatian pensioners, mostly of Serbian nationality, were denied their right to old-age pensions.

During the 1990s, these persons lived in occupied parts of the Croatian territory”¹ or in other parts of Croatia and were, due to pressure and threats, forced to leave their homes and flee to Serbia, Montenegro, Bosnia and Herzegovina or elsewhere. The payment of their pensions was suspended unilaterally by the Croatian pension fund invoking the interruption of money transfer due to the then ongoing war in the former Yugoslavia.

8. At the end of the war, the Croatian Government acknowledged the right to accrued but unpaid pensions from the date payments were suspended until the right to receive pensions was again recognized. In July 1996, the Director of the former Croatian Pension and Disability Insurance Fund sent a circular letter to all district offices to the effect that all suspended pensions due to beneficiaries who resided in the former occupied area of the Republic of Croatia or were present there because of war, would be paid out based on the request. However, the Republic of Croatia never implemented this circular. In October 1996, the Central Service of the former Pension and Disability Insurance Fund sent another circular letter to all managers of district services stating that “instructions sent in July 1996 have to be suspended until further notice due to the lack of financial resources”. According to this circular, “all pending procedures were to be interrupted, without any decision being made”. The complainant organization states that, soon after the adoption of the second circular, the Croatian Government reconsidered its acknowledgment of the right of beneficiaries to receive accrued but unpaid pensions by referring to the Statutory Instruments on statute of limitations which foresee the possibility to deny payment of benefits due to changes of circumstances by the beneficiaries of pensions. Therefore, in spite of the fact that the administrative and legal bodies had admitted that the payment of pensions was interrupted due to the ongoing war, in practice the Government applies a statutory instrument according to which the right to obtain payment of accrued but unpaid pensions becomes time-barred if the suspension is caused by the beneficiary. As a consequence, if a request for payment of an accrued but unpaid pension was submitted prior to 1 January 1999, the Croatian Pension Insurance Institute would only recognize the right to receive a pension for the period of the last three years. With respect to payment requests submitted after this date, the beneficiaries were granted pensions retroactively but only for the previous 12 months.
9. The complainant organization alleges that, according to the Pension and Disability Insurance Act, payment of accrued but unpaid pensions can be made subject to a statute of limitations only where the beneficiary has caused the suspension of payment. In the present case however, the payments were not suspended due to circumstances caused by the beneficiaries but by the war (force majeure) which generated the interruption of money transfers and payment of pensions. It is therefore considered unlawful to apply to the situations under review the statutory instrument concerning the statute of limitations for accrued but unpaid pensions. It is also denying the rights to payment of accrued but unpaid pensions is in direct contradiction with the following provisions of Convention No. 48, which are of particular importance as regards the obligation of payment of accrued but unpaid pensions:

Article 10

1. Persons who have been affiliated to an insurance institution of a Member and their dependents shall be entitled to the entirety of the benefits the right to which has been acquired in virtue of their insurance:

- (a) if they are resident in the territory of a Member, irrespective of their nationality;
- (b) if they are nationals of a Member, irrespective of their place of residence.

¹ An area of the Republic of Croatia which was under the UN administration in the period from 1991 to 1995, and part of the country – eastern Slavonia, Baranja and Western Srem – under the UN interim administration from 1996 until the end of peaceful reintegration into constitutional and legal systems of the Republic of Croatia on 15 January 1998.

2. Provided that any subsidy or supplement to or fraction of a pension which is payable out of public funds may be withheld from persons who are not nationals of a Member.

3. Provided also that, for a period of five years from the first coming into force of this Convention, a Member may reserve the payment of any subsidy or supplement to or fraction of a pension which is payable out of public funds to the nationals of Members with which it has concluded supplementary agreements to this effect.

Article 19

The provisions of this Convention may be derogated from by treaties between Members which do not affect the rights and duties of Members not parties to the treaty and which make definite provision for the maintenance of rights in course of acquisition and of acquired rights under conditions at least as favorable on the whole as those provided for in this Convention.

Article 21

1. Where, prior to the coming into force of this Convention, a pension has not been awarded or the payment of a pension has been suspended on account of the residence abroad of the person concerned, the pension shall be awarded or the payment of the pension resumed in pursuance of the Convention as from the date of the coming into force thereof for the Member concerned.

2. In applying this Convention account shall be taken of insurance periods prior to its coming into force if account would have been taken of such periods if this Convention had been in force during these periods.

3. At the request of the person concerned claims settled before the coming into force of this Convention shall, unless they have been settled by the payment of a lump sum, be reviewed. Review shall not involve the payment of arrears of, or the refund of, benefits for the period prior to the coming into force of the Convention for the Member concerned.

- 10.** The complainant organization alleges that by refusing to pay pension unpaid during four or more years to citizens of the Republic of Croatia who lived in the occupied parts of the Croatian territory as well as to beneficiaries who continued to live in parts of Croatia under the authority of the Croatian Government and who were, due to the pressure and threats, forced to leave their homes and flee to Serbia, Montenegro, Bosnia and Herzegovina or elsewhere, Croatia violated the commitments taken under ratified international treaties. According to the provisions of the Convention, the Republic of Croatia is obliged to pay all accrued but unpaid pensions, which it accepted at first by instructing payment arrears to be made. The USPS considers that Article 21 of the Convention concerning situations existing prior to its entry into force does in no way mean that this provision refers only to pension rights derived from the period before the Convention came into force. Therefore, "prior to the coming into force of this Convention" does not mean that a State is relieved from the payment of non-liquidated pensions after the entry into force of the Convention. Its goal is rather to resolve, at the time when the Convention was adopted, the issue of the pensions that were suspended or non-liquidated at the time.
- 11.** Article 19 of the Convention offers the possibility to Members to conclude bilateral agreements which do not affect the rights and duties of Members not parties to the treaty and which make provision for the maintenance of rights in course of acquisition and of acquired rights under conditions at least as favourable on the whole as those provided for in this Convention. The USPS argues that pensions are an acquired and inalienable right and that it is necessary to ensure equality between the above pensioners and Croatian pensioners by providing a mechanism for the payment of unpaid pensions due to non-fulfilment of legal requirements that are subject to the statute of limitations for payment of accrued but unpaid conditions and in respect of requirements according to which the pension user can use only one pension of his/her choice due to the interruption in money transfers during the war.

12. The USPS further states that the Croatian Pension Insurance Institute still resolutely refuses to pay accrued but unpaid pensions to the pensioners who lived in the occupied parts of Croatia arguing that these persons were receiving pensions from the so-called para-fund of the occupied territory. It is considered that there is no legal basis for the payment of pensions to pensioners by the so-called para-fund since, before the war and prior to the establishment of the so-called para-fund, the pensioners were not paying pension contributions into the so-called para-fund but they were regularly paying contributions into the Pension Insurance Fund of the Republic of Croatia during their working life.
13. According to the USPS, pensioners who turned to the Croatian Courts of Law were also deprived of the right to payment of accrued but unpaid pensions for the abovementioned reasons in violation of the Convention. Considering the fact that Croatian pensioners were not paying pension contributions into the so-called para-fund but into the Croatian Pension Insurance Fund before the war and the establishment of the so-called para-fund, it can be concluded that the financial support which they received from the so-called para-fund cannot be considered as pension. This has been confirmed by the report of the UN Special Rapporteur for human right in the former Yugoslavia stating that elderly people completely depend on humanitarian aid because they have not received pensions for five years. Instead of pensions, the pensioners were provided with supplemental security income by local Serbian authority, amounting US\$10 a month. That income was, on average, ten times lower than their real pensions, which Croatia refused to pay unjustifiably. It also did not express any wish to solve the problem with the support from the United Nations Protection Force (UNPROFOR) and pay the pensioners their pensions which they earned during their working life.
14. Croatia also abolished the so-called compensatory supplements for all pensioners residing outside of Croatia who have the lowest pensions but who acquired the right to pension based on International Social Security Agreements. By limiting this right to pensioners residing in Croatia, Croatia violated Article 10 of the Convention according to which they have the rights irrespective of their place of residence.
15. Finally, the USPS alleges that, by breaching the Convention, Croatia also violated its own Constitution, as the Convention, based on its legal force, is above the law. In accordance with article 141 of the Constitution “International treaties which have been concluded and ratified in accordance with the Constitution, published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law.”

B. The Government’s response

1. Procedural aspects

16. With regard to the procedural presumptions for the consideration of the representation, the Government of the Republic of Croatia would like to stress that the complainant is not an industrial association of workers within the meaning of article 24 of the Constitution of the International Labour Organization and article 2(2)(b) of the Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the Constitution of the International Labour Organization. The Association of Trade Unions of Pensioners of Serbia was founded in 2009, is registered with the Serbian Business Registers Agency and not in the Trade Union Registry of the Republic of Serbia, which is a fundamental prerequisite for obtaining trade union status in the Republic of Serbia. The Association of Trade Unions of Pensioners of Serbia is a civil society organization that only uses the term

“trade union” in its title. Thus, according to the regulations of the Republic of Serbia, this organization is not registered as a trade union, does not participate in collective bargaining, nor does it in any way participate in the protection of the interests of workers, including migrant workers. In this regard, the Republic of Croatia believes that conditions exist for the suspension of proceedings related to the representation lodged by the complainant.

17. The Government also stresses that the representation significantly relates to the attainment and exercise of pension insurance rights of persons who during the war resided in the occupied territories of the Republic of Croatia and who to this day have their place of residence there. Given that those in question are not persons who have changed their residence from one State to another within the meaning of Convention No. 48 but rather are governed by the relevant pension insurance regulations of the Republic of Croatia, Convention No. 48 is not the relevant mechanism for the acquisition and disbursement of their pensions. The Government believes that this presents additional grounds for the suspension of further proceedings.
18. However, given the Government’s desire to provide comprehensive and detailed information about all of the aspects of the problem of the payment of pensions on the occupied territory of the Republic of Croatia, as well as issues with the payment of pensions to people who have changed their residence from Croatia to other countries, including those established after the dissolution of the former Yugoslavia, the Government submits the observations below.

2. **Material aspects**

19. Before the breakup of the former Yugoslavia, the pension system of the State was organized on the principle of pay as you go and at the level of individual federal units. At the federal units’ level, there were separate providers (funds) for workers, farmers and self-employed persons. The pension insurance fund with which an insured person was last insured was responsible for the determination and payment of pensions. As necessary, insured individuals could request that their rights be realized by the fund with which they accrued the majority of their years of insurance coverage. The insurance provider who recognized the pension right took into account the years of insurance coverage and contributions paid to other insurance providers within the same or in other federal units. That insurance provider fully took over the obligation to pay pensions; however, it could request proportional compensation for the cost of the individual’s pension from other providers with which the individual accrued insurance coverage. At the federal (national) level there was only one pension insurance fund for the military and the federal budget secured funds for the payment of pensions for The Second World War veterans, which were paid out by the funds from federal units. By the 1980s, significant problems were developing in securing funds for the regular payment of pensions as a result of the ageing population and the economic crisis.
20. The democratic parliamentary elections held in 1990, the adoption of new constitutions, the ensuing referendums on independence in Croatia, Slovenia and Bosnia and Herzegovina, were followed by the aggression of the former federal army and federal entities (Serbia and Montenegro) that were opposed to these democratic developments against the territories of these independent, soon-to-be internationally recognized States. A part of the Croatian population, mostly of Serbian descent (nationality), joined in these war activities. The war of aggression and the occupation of large parts of Croatian territory resulted in the suspension of contribution collections and pension payments to the areas from which the aggression was emanating or which were under occupation. The devastations of war, the cost of caring for a large number of refugees and displaced persons, the interruption of economic relations and similar war-induced adversity especially threatened the viability and functioning of the pension system. However, at no time was the operation of the pension system interrupted, including the payment of pensions.

- 21.** The Government wishes to stress that the period in question was one in which Croatia was in a situation of grave insecurity arising from a conflict situation (war) resulting from a foreign intervention by another State. As the International Labour Organization has recognized in its report to the 105th Session of the International Labour Conference proposing the revision of the 1944 Recommendation on Employment (Transition from War to Peace), “recovery from such situations may take years and go through a number of stages”. In line with the new proposed Recommendation, in addition to protecting its internationally recognized borders and reintegrating its occupied territories, the Republic of Croatia sought to ensure the functioning of State institutions that provided for social protection, basic needs and law and order, compromised by the armed aggression against the State.
- 22.** Following the peaceful reintegration of the last part of its occupied territory in 1998, the Republic of Croatia has undertaken significant reforms of the pension system (raising the age of retirement, applying a scoring formula for calculating pensions, commencing the equalization of conditions for acquiring old-age and early retirement pensions for women and men, etc.), and in 2002, it introduced mandatory and voluntary pension insurance based on the principle of capital coverage.
- 23.** In considering the allegations, it is essential to legally and factually distinguish between two situations: (1) the collection of contributions, acquisition and determination of pension rights and pension payments in the occupied territories of the Republic of Croatia; and (2) the acquisition, determination and payment of pensions to people who have changed their residence from Croatia to that of other countries, including those established after the dissolution of the former Yugoslavia.
- (a) The collection of contributions and payment of pensions on the occupied territories of the Republic of Croatia
- 24.** The occupying authorities who controlled the occupied territories established their own funds (referred to as para-funds) which continued with the collection of contributions, determination of pensions and payment of pensions in these territories. Immediately upon the liberation and the peaceful integration of the occupied territories, the competent public pension funds of the Republic of Croatia continued with the payment of pensions and establishment of new pension rights based on accrued years of employment and contributions paid to the para-funds established in the occupied territories. As for the occupied territories, although these issues fall under the application of Convention No. 48 only in terms of those who during the war or after it emigrated from the Republic of Croatia, the Government stresses that the Republic of Croatia passed the Law on Convalidation² and later a Regulation³ which regulated the attainment and payment of pension rights based on accrued years of employment and contributions paid to the para-funds founded during the occupation. The insurance periods and paid contributions for which the required records existed were recognized by the competent pension insurance authorities of the Republic of Croatia. Convalidated decisions and other acts passed by the para-funds during the occupation were also recognized. With regard to the allegation that some individuals’ rights were not recognized, the Government stresses that the legislation of the Republic of Croatia that was in force at the time prevented the simultaneous acquisition of two or more pensions,

² Law on Convalidation (“Official Gazette” – *Official Gazette of the Republic of Croatia*, No. 104/97).

³ Regulation for the implementation of the Law on Convalidation in the area of labour, employment, pension and disability insurance, child benefit, social welfare and protection of military and war disabled civilians (“Official Gazette” – *Official Gazette of the Republic of Croatia*, No. 51/98).

and those legal regulations still apply.⁴ Similarly, as a consequence of the pay-as-you-go pension system, and due to the statute of limitations, the possibilities for the payment of unpaid pensions have always been limited (according to older legislation, a maximum of three years in arrears and currently a maximum of one year). Due to the application of these legal concepts, essential to the sustainability and stability of the pension system, some of the pensioners who remained in the occupied territories or left the Republic of Croatia were partially or entirely unsuccessful with their applications to the pension providers in the Republic of Croatia, which related to the payment of pensions during residence in the occupied territories of the Republic of Croatia or abroad. However, it should be noted that pursuant to the Constitution of the Republic of Croatia, they had legal recourse through the courts. Judicial proceedings were undertaken by some persons concerned, including proceedings before the Constitutional Court of the Republic of Croatia. The outcome of legal proceedings depended on the circumstances of each case. Given that the Republic of Croatia has been a member of the Council of Europe since 1996 and ratified the Convention on Human Rights and Fundamental Freedoms on 5 November 1997, a number of cases related to the acquisition and the payment of pensions was considered by the European Court of Human Rights.

25. The Government especially emphasizes the decision of the European Court of Human Rights in the case of *Cekic and others v. the Republic of Croatia* (ECHR, 15085/02) in which that Court declared the applicants' requests inadmissible. The applicants claimed, among other things: (1) a violation of their right to ownership because they were partially deprived of their pensions simply because they lived in the occupied territories of the Republic of Croatia or outside of the territory of the Republic of Croatia; (2) the loss of their pensions as a result of choosing to remain in the occupied territories of the Republic of Croatia; and that (3) they were expelled from the Republic of Croatia and subsequently prevented from returning for a prolonged period of time. In connection with these arguments, the European Court of Human Rights in the summary of the Court's ruling on the matter, emphasized among other things, the following:

The Court notes that in respect of the first, second and fifth applicants the domestic courts found it established that they had received a pension from the authorities which had controlled the occupied territories of Croatia where the applicants lived. They based their decisions to deny the applicant's claims for payment of a pension from the Croatian authorities on the provisions of the Pensions Act which stated that a person is entitled to only one pension. As already stated above, under the Court's assessment in respect of the alleged violation of Article 6 § I of the Convention, the proceedings which led to such decisions entirely complied with the fair trial requirement and showed no appearance of arbitrariness.

The Court recalls further that even though the rights stemming from the payment of contributions to the social insurance system, in particular the right to derive benefits from such a system - for instance in the form of a pension - can be asserted under Article 1 of Protocol No. 1, this provision cannot be interpreted as giving an individual a right to a pension of a particular amount.⁵

Thus, the Court concludes that during the very difficult period of time, involving the dissolution of the former Yugoslavia and the ensuing armed conflict, the applicants were not in fact deprived of their pensions. Furthermore, once the conflict was over and the applicants had returned to Croatia the payments of their pensions were resumed. In these circumstances the

⁴ Section. 134. No. 1 of the Pension and Disability Insurance Act ("Official Gazette" – *Official Gazette of the Republic of Croatia*, Nos 26/83, 48/83, 5/86, 42/87, 34/89, 57/89, 40 / 90, 9/91, 71/91, 26/93, 96/93, 29/94, 37/94, 44/94, 59/96, 20/97, 102/98).

⁵ *Müller v. Austria*, No. 5849/72, Commission decision of 1 October 1975, Decisions and Reports 3, p. 25; and *Domalewski v. Poland* (Dec.), No. 34610/97, ECHR 1999-V, pp. 582 and 583.

Court does not find that there has been any interference with their property rights which would run counter to Article 1 of Protocol No. 1 to the Convention.

...

The Court notes that the applicants were in a position different from persons who did not live in the occupied territories of Croatia and did not receive their pension from some other authorities. The distinction between these two groups is, therefore, not discriminatory, as there is an objective and reasonable justification to discontinue payments of the pension instalments to persons who had received a pension on some other basis. Consequently, this difference in treatment does not, in the Court's view, disclose any appearance of discrimination within the meaning of Article 14 of the Convention. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

In respect of the third and the fourth applicants, the Court notes that the domestic courts rejected their claims because they fell within the statutory limitation for the claims of such nature imposed by the Pensions Act. In other words, their claims were filed out of the prescribed time-limit and the domestic courts were thus prevented from examining the merits of their cases. The Court finds, therefore, that the third and the fourth applicants have not complied with the procedural rules governing the domestic proceedings.

...

As to the complaint that the applicants were prevented from entering Croatia, the Court notes that they were in fact able to enter Croatia and that all of them are now living in Croatia. The Court considers that in these circumstances this complaint is without substantiation.

(b) The preservation of the rights of those who have changed residence

- 26.** Although because of the war, though also independently of it, some individuals changed their place of residence, the Republic of Croatia ensured the protection of their rights during the process of acquiring pension rights, as well as the preservation of acquired rights regardless of any change of residence or citizenship. With regard to those who because of the war, or for any other reason moved to the territory of other States established after the dissolution of the former Yugoslavia, pensions continued to be paid by the pension funds of those States. After the interruption of the payment system for policy holders who changed their residence from the Republic of Croatia to other states of the former Yugoslavia or who already had their place of residence in those States, pension payments were temporarily taken over by those States.⁶ Similarly, for those who were entitled to pensions in one of the Republics of the former Yugoslavia, and who had permanent residence in the Republic of Croatia, the payment of pensions was temporarily assumed by the Republic of Croatia, first by way of a special regulation,⁷ followed by a special law.⁸

⁶ Thus, for example the Republic of Serbia adopted the Regulation of the Government of Serbia on the right to advance payment of pensions to beneficiaries with permanent residence in the territory of the Republic of Serbia who acquired the right to a pension in the other republics of the former Socialist Federal Republic of Yugoslavia (*Official Gazette of the Republic of Serbia*, Nos 76/92, 16/93, 42/93, 75/93, 98/93, 28/94, and the Regulation on amendments to this Regulation, *Official Gazette of the Republic of Serbia*, No. 1/95).

⁷ Regulation on payment of pensions to beneficiaries who acquired the right to a pension in the republics of the former Socialist Federal Republic of Yugoslavia ("Official Gazette" – *Official Gazette of the Republic of Croatia*, Nos 46/92 and 56/92).

⁸ The Law on the payment of pensions to beneficiaries who acquired the right to a pension in the republics of the former Socialist Federal Republic of Yugoslavia ("Official Gazette" – *Official Gazette of the Republic of Croatia*, No. 96/93).

27. In determining pension rights, the funds took into account the years of employment and paid contributions realized in the territories of all of the former federal units that made up the former Yugoslavia, not just the years of employment in their individual territory. Therefore, it is obvious that the complainant's allegation that those who left Croatia were not entitled to a pension, is not accurate. On the contrary, they were entitled to pensions in their States of residence that recognized pension rights pursuant to the legislation of those States based on the total years of employment on the entire territory of the former Yugoslavia, meaning all federal units. Moreover, those that fled the Republics of Serbia and Montenegro and Bosnia and Herzegovina to Croatia had the right to a pension in Croatia. It is therefore evident that all persons pursuant to the legislation of the States that emerged from the former Yugoslavia, in which they resided during the war until the entry into force of bilateral agreements, had the right to a pension based on the total years of employment accrued in all of the former Yugoslavia.
28. After the cessation of hostilities, the liberation and peaceful reintegration of the occupied territories of the Republic of Croatia, the question of acquiring and determining the amount and payment of pensions was regulated by bilateral international treaties that were signed and ratified as follows: (i) Social Security Agreement between the Republic of Croatia and the Republic of Slovenia of 28 April 1997; entered into force on 1 February 1998; (ii) Social Security Agreement between the Republic of Croatia and the Republic of Macedonia; entered into force on 1 November 1997; (iii) Social Security Agreement between the Republic of Croatia and Bosnia and Herzegovina; entered into force on 1 November 2001; (iv) Agreement between the Republic of Croatia and Bosnia and Herzegovina on cooperation in the field of victims of the war in Bosnia and Herzegovina who were members of the Croatian Defence Council and their families, entered into force on 1 July 2006; (v) Agreement between the Republic of Croatia and the Federal Republic of Yugoslavia on social security; entered into force on 1 May 2003 (currently applicable in relations with the Republic of Serbia); and (vi) Social Security Agreement between the Republic of Croatia and Montenegro; entered into force on 5 January 2014.
29. All these bilateral agreements guarantee the possibility of payments (exports) of pension benefits abroad. In addition, the Government especially emphasizes that article 39 of the Agreement between the Republic of Croatia and the Federal Republic of Yugoslavia (later Serbia and Montenegro) stipulates that, with respect to payments determined in the period from 8 October 1991 until the entry into force of the bilateral agreement (thus until 1 May 2003), each State will assume responsibility for the payment of pensions for the insurance periods realized in its territory (according to the *pro rata temporis* principle). Therefore, after the entry into force of this bilateral agreement, the competent Croatian pension insurance authorities obtained, from the competent pension insurance authorities of Serbia and Montenegro, floppy disks with information on policy holders who were, pursuant to the aforementioned regulations, paid their pensions by Serbia and Montenegro. A total of 4,458 pensioners were in question, to whom the payment of pensions continued in accordance with the new bilateral agreement. For those policy holders whose rights were recognized as of 8 October 1991 to the date of entry into force of the bilateral agreement, pensions were recalculated in accordance with the *pro rata temporis* principle, separating the insurance periods completed in different States, in order for the States that had previously received pension contributions to take on the financial burden of proportionate pension payments. The redetermination of pensions was implemented in accordance with the provisions of article 39 of the Agreement. If, under these provisions, the sum of a newly designated pension was larger, the policy holder was entitled to a larger re-established pension payment than that determined by the pension provider in the contracting State. If the sum was lower, the provisions of article 39(4), of the Agreement protected pension beneficiaries in such a way that the beneficiary was entitled to the difference between the previously determined pension amount (pensions determined by the regulations mentioned above) and the total pension amount according to the provisions of the bilateral agreement.

This agreement between the Republic of Croatia and the Federal Republic of Yugoslavia (now the Republic of Serbia) continues to be in force and as such all of its provisions and protections continue to apply. The Government wishes to stress that, with regard to the issues of recognition and payment of pensions to the abovementioned categories of persons, there are no unresolved applications for the payment of accrued but unpaid pensions before the competent bodies of the Croatian pension insurance provider.⁹

30. In terms of the social risks covered and the circle of insured persons, the Government points out that the bilateral agreements that the Republic of Croatia has entered into with the States of the former Yugoslavia as well as with other countries are more comprehensive and technically accurate, and regulate more favourably the issues that are the subject of Convention No. 48. As such, all of the aforementioned agreements ensure the realization and protection of the rights guaranteed by Convention No. 48. Given that the complainant's representation emphasizes problems with the acquisition and payment of pensions in some of the States of the former Yugoslavia, the Government stresses that it has concluded additional agreements on administrative cooperation and assistance with those States, and that this cooperation is unfolding at an acceptable level. By 30 September 2016, the Republic of Croatia has paid the following pensions:

- to the Republic of Bosnia and Herzegovina for 46,712 users;
- to the Republic of Montenegro for 1,738 users;
- to the Republic Macedonia for 1,636 users;
- to the Republic Serbia for 49,734 users;
- to the Republic Slovenia for 8,565 users.

31. Pursuant to the signed bilateral agreements, the State whose insurance provider recognized pension rights prior to 8 October 1991 (Independence Day of the Republic of Croatia), continues to pay pensions in full, regardless of whether the policy holder was for a period insured with a pension provider in another State of the former Yugoslavia. However, persons who were entitled to pensions before 8 October 1991 were given the right to apply, one year from the date of entry into force of the bilateral agreements, for their pension to be redetermined by the provider in the State in which they accrued the most years of employment. Due to these different options for realizing pension rights, the Government

⁹ It is important to note that relations with the Republic of Slovenia (another former State of the former Yugoslavia) regarding the acquisition and realization of pensions are determined by European Union regulations on the coordination of social security systems, given that the Republic of Croatia has been a member of the EU since 1 July 2013. The same provisions therefore apply to pension rights of the citizens of other EU Member States as well as of the European Economic Area. In addition, with regard to the social rights of migrants, the Republic of Croatia has also signed international agreements on social security with Australia, Canada, the Canadian province of Quebec, the Swiss Confederation and the Republic of Turkey.

In addition, issues relating to the acquisition and payment of pensions funded from the budget of the former Yugoslavia, and especially in relation to the issue of pensions of members of the former federal army, are regulated by the Agreement on Succession Issues concluded on 21 June 2001 and which entered into force on 2 June 2004 ("Official Gazette, International Agreements" – *Official Gazette of the Republic of Croatia*, No. 2/04 and 5/04).). According to Article 1 of Annex E; "Each state shall assume responsibility for and regularly pay legally approved pensions funded by that State in its former capacity as a constituent republic of the Socialist Federal Republic of Yugoslavia, regardless of nationality, citizenship, residence or domicile." There are no major problems in the application of this contractual provision.

notes that with regard to pensions that are paid by the Republic of Croatia to persons in the Republic of Serbia, 4,167 were recognized before 8 October 1991, and 45,567 as of 8 October 1991 (data as at 30 September 2016).

- 32.** In addition, it is incorrect, as the complainant alleges, that Croatia unreasonably abolished pension income supplements for persons who do not live in the Republic of Croatia thereby violating Article 10 of the Convention. According to all of the aforementioned bilateral agreements, pension payments to other States are guaranteed without any deductions except in the case of pension benefits that have a social function or are conditional upon a pensioner's income being below a certain means test, where such benefits are financed from the state budget. Thus, for example, article 5(3) of the Agreement on Social Security between the Republic of Croatia and the Federal Republic of Yugoslavia (currently applicable in relations with the Republic of Serbia) provides that the acquisition and payment of pensions is governed by the so-called "equalized territories", according to which it is forbidden to reduce an individual's rights as a result of payments made in case of residence in another State, except in the case of benefits based on residual ability to work, minimum pensions, protective supplements, as well as all other pension allowances determined by means-testing. Similar provisions exist in the Agreement on Social Security between the Republic of Croatia and Montenegro (article 5(3) and (4) of this Agreement), which prohibits reductions in payments to those in another country except for the minimum pensions, funeral expense allowance, residual ability to work allowance and other benefits that are conditional on a means test pursuant to Croatian legislation. Therefore, in accordance with bilateral agreements, payments to other contracting States are excluded only in the case of those benefits and supplements that are not realized on the basis of the contributions, but rather are meant to protect the social position of beneficiaries who have a residence in the Republic of Croatia. Therefore, it is clear that Croatia has acted in accordance with Articles 10 and 19 of Convention No. 48.
- 33.** As a member of the European Union which guarantees the realization of the fundamental right to freedom of movement and as a country with significant emigration, Croatia has a modern and quite developed system to protect the pension rights of those who, for whatever reason, change their residence. This is partially based on the European Union *acquis*, partially on bilateral social security agreements, and partially on the Constitution and relevant national laws. As a member of the Council of Europe and the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in accordance with its Constitution, the Republic of Croatia guarantees judicial protection of social rights as fundamental human rights. Based on the above, it is clear that the Republic of Croatia fully guarantees all rights provided for by the Convention to persons who change their residence by including years of employment during the acquisition of pensions and preserving already acquired rights to a pension regardless of nationality of the person and location of pension payments. As the Committee of Experts has noted in its observations relating to Convention No. 48, the provisions of the Convention are aimed at establishing a scheme for the maintenance of rights between Members of the ILO which are bound by this Convention. With this in mind, the Republic of Croatia has regulated relations with the countries that have ratified the Convention in relation to the acquisition and preservation of pension rights, including mutual administrative assistance in deciding such rights. Therefore, the Government believes that the representation of the Association of Trade Unions of Pensioners of Serbia is completely unfounded and hereby requests that the competent authorities of the International Labour Organization suspend any further action in this matter.

III. The Committee's conclusions

1. Receivability of the representation

34. The Committee recalls that the representation was declared receivable by the Governing Body at its 326th Session (March 2016) pursuant to the Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the Constitution of the International Labour Organization. The Standing Orders charge tripartite committees with the “examination of the representation as regards substance” with a view to presenting a report to the Governing Body describing the steps taken to examine the representation, formulate conclusions and recommendations as to the decisions to be taken by the Governing Body (article 6). The Committee is therefore not in a position to examine the arguments of the Government opposing the receivability of the representation and will, in the sections below, examine the merits of the representation as regards substance.

2. Examination of the merits of the representation

35. The allegations of the complainant organization relate to the unpaid pensions by the Croatian social security institutions to the following two categories of beneficiaries:

- (i) Croatian nationals who were in receipt of old-age pensions and transferred their residence from the occupied territories to Serbia or elsewhere between 1991 and 1998; and
- (ii) Croatian nationals in receipt of an old-age pension in 1991 who continued to reside in an occupied part of Croatia until it peacefully reintegrated the Republic of Croatia in 1998.

(a) Personal scope of the Convention

36. Prior to analysing whether the Convention may be invoked to support the payment of pension arrears in the case of the abovementioned categories of beneficiaries, the Committee needs to examine their different situations vis à vis the Convention.

37. The Committee notes that, pursuant to Article 10 of the Convention:

1. Persons who have been affiliated to an insurance institution of a Member and their dependants shall be entitled to the entirety of the benefits the right to which has been acquired in virtue of their insurance –

- (a) if they are resident in the territory of a Member, irrespective of their nationality;
- (b) if they are nationals of a Member, irrespective of their place of residence.

...

38. The Committee observes that the two groups of beneficiaries were persons who acquired their right to pension prior to the independence of the Republic of Croatia in 1991, that is, in the territory of the former Socialist Federal Republic of Yugoslavia. It notes that the Socialist Federal Republic of Yugoslavia ratified the Convention on 4 January 1946 and that the Republic of Croatia succeeded to the obligations under the Convention as of 8 October 1991.

39. The first group of beneficiaries migrated outside of Croatia during the occupation period and according to the allegation their pensions were not paid by Croatia in their new country of

residence. From the point of view of Article 10 of the Convention, these beneficiaries were “affiliated to an insurance institution of a Member”, and were both “nationals of a Member” and “resident in the territory of a Member”. The Committee therefore considers that the situation of these beneficiaries with respect to the question of the pensions due following their transfer of residence to another country is governed by Part III of the Convention related to the maintenance of acquired rights.

40. The second group of pensioners who resided in the occupied territories also had been “affiliated to an insurance institution of a Member”; they were “nationals of a Member” in which case the benefit needs to be granted irrespective of their place of residence, and they were also “resident in the territory of a Member”, in the sense of Article 10 of the Convention.¹⁰ The Committee observes that the conditions established by Article 10 of the Convention in order to be entitled to benefits protected under the Convention are fulfilled. Therefore, the Convention is also applicable to the acquired rights of pensioners who resided in the occupied territories.

(b) *Material scope of the Convention*

41. With regard to the material scope of the application of the Convention, the Committee will examine the cases in which the Convention authorizes the reduction or suspension of benefits (Article 12 of the Convention) and the cases in which the Convention authorizes bilateral agreements to derogate from its provisions (Article 19 of the Convention).

- (i) Possibility to reduce or suspend benefits authorized by the Convention

- (a) *Pension rights of pensioners who transferred their residence in Serbia or elsewhere*

42. With respect to the group of pensioners who left the occupied territories and re-established their residence in Serbia or elsewhere, the Committee notes that, according to the allegations, their pension payments were suspended on the part of the Croatian social security system. However, pursuant to Article 10 of the Convention, these beneficiaries should have been “entitled to the entirety of the benefits the right to which has been acquired in virtue of their insurance”. According to the information provided by the Government, in case of transfer of residence to a State of the former Yugoslavia, pensions which were already in payment were temporarily taken over by the new State of residence, which took into account the totality of contributions made in all the former federal units composing the former Yugoslavia. Where, in principle, pensions are to be exported in case of residence abroad, the Convention stipulates in its Articles 16 and 19 that:

Article 16

With the consent of the competent central authorities of the Members concerned, an insurance institution liable for benefit to a beneficiary resident in the territory of another Member may, on terms agreed between the two institutions, entrust the insurance institution of the place of residence of the beneficiary with the payment of such benefit on its behalf.

Article 19

The provisions of this Convention may be derogated from by treaties between Members which do not affect the rights and duties of Members not parties to the treaty and which make

¹⁰ In accordance with Article 1(2) of the Convention, “References to Members in Parts II, III, IV and V of this Convention shall be construed as including only Members of the International Labour Organisation bound by this Convention.”

definite provision for the maintenance of rights in course of acquisition and of acquired rights under conditions at least as favourable on the whole as those provided for in this Convention.

43. In this respect, the Committee notes that the temporary operational arrangement between the States comprising the former federal Yugoslavia aimed at maintaining social security rights by guaranteeing that the persons residing in these countries would receive their pensions from the social security institution of their place of residence regardless of their contributory record in that State during the period of the former Yugoslavia. This arrangement thus served to implement the provisions of Articles 16 and 19 of the Convention. As a party to this arrangement, Croatia did not breach its obligations under the Convention by not exporting the pensions of beneficiaries who transferred their residence to another State of former Yugoslavia, including fractions of their pensions payable out of public funds. The Committee considers that the arrangement between the States of the former Yugoslavia could have equally derogated to the provision of the Convention prohibiting withholding of benefits paid out of public funds in case of nationals of a Member.

(b) *Pensioners who resided in the occupied territories*

44. As regards the old-age benefits which stopped to be paid to pensioners while they resided in the occupied territories, the Committee notes the Government's statement, in reply to the allegations of the USPS, that "the war of aggression and the occupation of large parts of the Croatian territory resulted in the *suspension of contribution collections and pension payments to the areas from which the aggression was emanating or which were under occupation*".¹¹ The Government further stresses that, pursuant to section 134 of the Croatian Pension and Disability Insurance Act, the simultaneous acquisition of two or more pensions was prohibited, adding that "some of the pensioners who remained in the occupied territories or left the Republic of Croatia were partially or entirely unsuccessful with their applications to the pension providers in the Republic of Croatia, which related to the payment of pensions during residence in the occupied territories of the Republic of Croatia or abroad".

45. As regards the possibility to reduce or suspend pension rights, Article 12(1) of the Convention states that:

1. The provisions of the laws or regulations of a Member permitting the reduction or suspension of benefit if the person concerned has concurrent rights to other social insurance benefits or is in employment involving compulsory insurance may be applied to beneficiaries under this Convention in respect of benefits payable under an insurance scheme of another Member or in respect of employment in the territory of another Member.

46. The Committee notes that although this provision applies to cases in which benefits are suspended or reduced whenever a beneficiary receives a concurrent payment by the insurance scheme of *another* Member, its rationale could be applied *mutatis mutandis* to the payments made by the para-funds established in the occupied territories. The Committee therefore needs to determine whether the para-funds established in the occupied territories may be considered as "insurance institutions" within the meaning of Article 12(1). Should this be the case, the Convention would authorize Croatia to apply its national legislation permitting the reduction or suspension of benefits to the beneficiaries concerned as long as they received "concurrent" benefits. According to the information provided by the Government, the para-funds established by the occupying authorities were collecting contributions and serving benefits to the persons residing therein.¹² Following the end of the

¹¹ Emphasis added.

¹² "The occupying authorities who controlled the occupied territories established their own funds (hereinafter referred to as "para-funds") which continued with the collection of contributions, determination of pensions and payment of pensions in these territories."

conflict, Croatia passed “the Law on Convalidation and later a Regulation which regulated the attainment and payment of pension rights based on accrued years of employment and contributions paid to the para-funds founded during the occupation. *“The insurance periods and paid contributions for which the required records existed were recognized by the competent pension insurance authorities of the Republic of Croatia. Convalidated decisions and other acts passed by the para-funds during the occupation were also recognised.”*¹³

- 47.** Thus, the para-funds established in the occupied territories, albeit they were not insurance institutions of another Member, had the characteristics and were recognized by Croatia as “insurance institutions” both as regards rights in the course of acquisition and acquired rights.¹⁴ Therefore, the Committee considers that the suspension of pension payments to pensioners who didn’t migrate from the occupied territories, is not *per se* contrary to Article 12(1) of the Convention.
- 48.** Given that Article 12(1) of the Convention leaves it to the national legislation of each Member to establish the legal regime for the reduction or suspension of concurrent benefits, the Committee will pursue its examination of the matter by analysing the suspension in the light of the national legal framework.¹⁵
- 49.** The Committee notes in this respect that, according to section 134 of the Pension and Disability Insurance Act referred to by the Government in its observations (as applicable at the time of the events):
- (1) If the insured person or beneficiary of a pension is entitled to two or more pensions, only one of these pensions may be used – according to his own choice.
 - (2) The pension beneficiary referred to in paragraph 1 of this article shall later choose to use the second pension, if and when it becomes more favourable for him.
- 50.** The Committee observes that the purpose of section 134 of the Pension and Disability Insurance Act is to protect the best interest of pensioners in case of double entitlement by letting them choose which benefit they prefer receiving and even allowing beneficiaries to modify their choice in case the other benefit subsequently becomes more favourable. The Committee is therefore led to examine whether the beneficiaries who continued to reside in the occupied territories opted for the benefit paid by the para-funds. The complainant organization provided no documented data establishing the amounts paid by the para-funds

¹³ Emphasis added.

¹⁴ The Committee observes that the allegation of the complainant organization according to which there is no legal basis for the para-funds to pay old-age pensions to beneficiaries who paid contributions to the social security institution of Croatia throughout their careers is unfounded. The situation of persons who resided in the occupied territories can be assimilated from the point of view of maintenance of acquired rights to that of Croatian beneficiaries who transferred their residence in another State of the former Yugoslavia. As indicated by the Government, just like the para-funds, the social security institutions in these States also assumed the full financial responsibility for the beneficiaries which had re-established their residence in their territory although they had spent their contributing career in another entity of the former Yugoslavia.

¹⁵ The preparatory works of the Convention show that there was consensus that “the draft Convention should provide for the possibility of applying the reduction and suspension provisions of the national law of a Member, even in respect of benefit payable or employment held in the territory of any other Member participating in the scheme. ... The power thus granted to Members to apply the provisions of their own law in regard to the reduction or suspension of benefit would place no obstacle in the way of the observance of the rules laid down under the international scheme: these provisions must in no case affect rights arising under this scheme.”

created in the occupied territory but merely a reference to a report of the UN Special Rapporteur for human rights in the former Yugoslavia stating that these benefits were ten times lower than the pensions they were receiving prior to the conflict. Lacking relevant information pertaining to whether pensioners may be reasonably considered as having opted for the benefit served by the para-funds, the Committee is not in a position to conclude whether the Croatian social security institution acted in conformity with section 134 of the Pension and Disability Insurance Act.

(ii) The suspension of pensions and the possibility to derogate from the Convention by way of bilateral agreement

51. In this section, the Committee is examining whether Croatia and Serbia made use of Article 19 of the Convention allowing Members party to the Convention to derogate from it by way of bilateral agreement and providing for special rules applicable to the payment of pension to the occupied territories. Pursuant to this provision:

The provisions of this Convention may be derogated from by treaties between Members which do not affect the rights and duties of Members not parties to the treaty and which make definite provision for the maintenance of rights in course of acquisition and of acquired rights under conditions at least as favourable on the whole as those provided for in this Convention.

52. The Committee notes the conclusion in 2001 by Croatia and the Republic of Serbia of a bilateral social security agreement, Article 38(1) of which provides that: “this agreement does not stipulate the right to benefits for the period prior to its entry into force”.

53. The Committee notes that the agreement therefore does not apply to old-age pensions the right to which was acquired before 1991 and consequently does not permit to derogate from the Convention in respect of the pensions that were already in payment prior to 1991. As regards the non-payment to these pensioners of fractions of their pensions payable out of public funds, the Committee considers that in the absence of a derogation from the provision of the Convention prohibiting withholding of benefits paid out of public funds in case of nationals of a Member (Article 10(2)), the pensioners residing in the occupied territories should also have received any fractions of their pensions payable out of public funds.

(iii) Was the suspension of pension payments to the occupied territories a case of force majeure?

54. In the previous sections, the Committee considered the legal dimensions of the allegations raised by the representation vis à vis the relevant provisions of the Convention and the national legislation. It will now examine whether, since the suspension of pension payments to the occupied territories may be considered as having been due to an *external* event that was *unforeseeable* and *irresistible* rendering impossible the application of the national and international legal frameworks due to force majeure. The Committee notes in this respect that the payment of old-age benefits was suspended following a war of aggression and subsequent occupation of large parts of the national territory. The Government had therefore no choice but to suspend payments made towards the occupied territories.

55. In view of the above, the Committee considers that the situation of war and occupation constituted a case of force majeure which made it impossible for the Government of Croatia to continue the payment of pensions and put the pensioners residing in the occupied territories in a situation of legal vacuum from the point of view of the national legislation and the Convention as the national laws and international social security treaties applicable to Croatia could not de facto be applied to them. The Committee is therefore of the view that the suspension of the payment of pensions to the occupied territories by the social security institution of Croatia was due to force majeure and therefore does not constitute a breach of

Croatia's obligations under the Convention. At the same time, taking into account the objectives of the Convention, the Committee also considers that the acquired rights of each pensioner concerned, while they may be temporarily suspended or reduced due to force majeure, should not be lost completely and for all times due to the fact that these persons availed themselves of the unique source of income made available to them during the time they resided in an occupied territory.

* * *

56. Based on the above, the Committee considers that Croatia did not breach its obligation under the Convention in respect of pensioners who transferred their residence to another country of the former Yugoslavia who were covered by the temporary operational agreement between the States comprising the former Yugoslavia.
57. With regard to persons who resided in the occupied territories, the situation is extremely complex as the period during which they resided in the occupied territories varied for each beneficiary, certain pensioners were able to get judicial redress while others were not and many received payments from the para-funds. Moreover, as the facts date back to more than 25 years ago, it is uncertain how many persons who were already receiving pensions at that time, are still alive today and whether their individual situations present documented cases of denial of acquired pension rights. In these circumstances, the Committee stresses that compliance with the Convention could be assessed only on a case-by-case basis at the national level, identifying the pensioners concerned and the volume of their acquired rights. Therefore, considering that acquired rights are individual rights, and given the lack of documented evidence as regards the number and identity of the actual beneficiaries concerned, more than 25 years after their pensions were suspended, as well as the actual amounts of these pensions pursuant to the Croatian social security system, the Committee considers that it is not in a position to pronounce itself as regards the situation of every potential beneficiary concerned. In view of the above, the Committee recalls that for safeguarding the acquired rights in such complex situations, Part IV of the Convention specifically provides for mutual assistance of the Members concerned.

IV. The Committee's recommendations

58. *In light of the foregoing conclusions, the Committee recommends that the Governing Body close procedure.*

Geneva, 9 June 2017

(Signed) Mr Diego Cano Soler
Mr Kris de Meester
Mr Plamen Dimitrov