

THE ISSUE OF
PENSION AND DISABILITY FUND
OF KOSOVO IN THE
CONTEXT OF AN EVENTUAL
'GRAND FINALE' BETWEEN
KOSOVO AND SERBIA

October 2019

Supported by:



Norwegian Embassy



Mother Teresa Square, Entrance I · 59 A · No. 10
Prishtinë, 10000
Republic of Kosovo
T/F: +381 38 746 206
E-mail: ridea.institute@gmail.com
Website: www.rdiea-ks.org

BACKGROUND NOTE/STUDY

ON

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Author: Research Institute of Development and European Affairs (RIDEA)

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Abbreviations

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|---------------|--|
| ECHR | European Convention on Human Rights |
| EU | European Union |
| FPRY | Federal People's Republic of Yugoslavia |
| HRAP | Human Rights Advisory Panel |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICJ | International Court of Justice |
| IFUP | Independent Federation of the Union of Pensioners |
| KLA | Kosovo Liberation Army |
| KSAP | Socialist Autonomous Province of Kosovo |
| MLSW | Ministry of Labour and Social Welfare |
| NATO | North Atlantic Treaty Organisation |
| NBS | National Bank of Serbia |
| SCI | Self-managing Community of Interest |
| SCIPDI | Self-managing Community of Interest for Pension and Disability Insurance |
| SFRJ | Socialist Federal Republic of Yugoslavia |
| SORP | Statistical Office of the Republic of Serbia |
| SRSG | Special Representative of the Secretary General |
| UN | United Nations |
| UNMIK | United Nations Mission in Kosovo |
| WWII | World War II |

Introduction

1. In this background note, the aim is to estimate the potential debt to contributory pensioners¹ as a prerequisite for claiming compensation from the Republic of Serbia, which unlawfully abolished and suspended the payment of pension benefits to Albanian and Non-Serb² contributory pensioners in Kosovo.

2. The objectives of this background note include:
 - i) Critically review the historic facts about the political and social situation of ethnic-Albanians in Kosovo and the interethnic conflict between the ethnic-Albanian majority and Serbs in Kosovo;
 - ii) Critically review the legal and economic aspects of the process of the establishment, transformation, and abolishment of the Pension and Disability Insurance Fund of the former KSAP;
 - iii) Critically review the legal and economic aspects of the pension reform under the administration of UNMIK;
 - iv) Critically review the role of UNMIK, as a political trustee of the Kosovo population, in solving the issue of the Pension and Disability Insurance Fund of the former KSAP;
 - v) Critically review the activities undertaken so far by contributory pensioners to re-exercise their fundamental right to pension acquired through work compulsory contributions to the Pension and Disability Insurance Fund of the former KSAP; and
 - vi) Estimate the pecuniary and non-pecuniary losses resulting from the abolishment of the Pension and Disability Insurance Fund of the former KSAP and the unlawful suspension of payment of pension and disability benefits to Albanian and Non-Serb contributory pensioners.

¹Those who have acquired their fundamental right to pension and disability insurance as per applicable law of, inter alia, the former Socialist Federal Republic of Yugoslavia.

²Non-Serb contributory pensioners exclude Montenegrins, as the payment of their pension benefits was not suspended by Serbia.

History

3. Having background information about the history of political and economic developments in Kosovo is a prerequisite for building a more comprehensive and unbiased understanding of the current situation, and to develop realistic arguments about the right to War Reparations of Kosovo, specifically the right to reparations regarding the Pension and Disability Fund of the Former Socialist Autonomous Province of Kosovo (henceforth KSAP).

4. In the aftermath of Tito's death, Slobodan Milosevic striving to accomplish his political rise decided that the best strategy would be to attract the support of the Serb minority in Kosovo by reducing the power of the Kosovo government and causing a socio-economic and political crisis in Kosovo. The anti-bureaucratic revolution broke out characterised by cultural, political, and socio-economic oppression of the ethnic Albanian population. In 1989, Milosevic through Serbian federal authority revoked the legal status of Kosovo granted by the 1974 Yugoslav Constitution. In 1990, the National Assembly of Serbia passed two special laws, the Law on the Operations of Republican Institutions under Special Conditions and the Law on Work Relations under Special Conditions. The first law was used to overthrow the constitutional order of former Yugoslavia and to abolish the autonomy of Kosovo, while the second law, which was applicable in Kosovo only, served as the basis for introducing temporary measures. Through these measures, Kosovo-Albanian workers were requested to sign loyalty oaths to the newly established Serbian regime. Yet, in solidarity with the national cause of "aspiration for independence", the majority of Albanian workers refused to sign. In what followed, state-owned companies were put under the direct control of the Serbian government and Kosovar Albanians were removed from management positions. At the University of Prishtina, education in the Albanian language was abolished and Albanian teachers were also laid off. Albanian workers were sacked from government and the media positions, hospitals and other government-controlled

industries. As a result, out of a total of 164.000 Albanians who were employed in 1989, more than 130.000 were sacked by 1992 and were denied the right to any social or material compensation.³ In 1991, opposing the constitutional changes and the resulting Serbian repression, the Albanian political representatives declared the independence of Kosovo and adopted the Constitution of the Republic of Kosovo in 1992. Further, a referendum was organised, and although not internationally recognised but observed, whereby 98% favoured the independence of Kosovo. Following, ethnic Albanians established parallel political, legal, education, and economic institutions.

5. Due to the increased repression by the Serbian regime, ethnic Albanians established the Kosovo Liberation Army (KLA) in 1995 and the interethnic conflict escalated in 1998/1999. Upon Serbia's rejection to sign the peace agreement with KLA during the Peace Conference in Rambouillet in 1999, the NATO bombing campaign began. Months later, the NATO campaign was suspended and the Secretary-General of the United Nations issued the UN Security Council Resolution 1244 (henceforth Resolution 1244), which envisioned the independence of Kosovo. Based on Resolution 1244 and supplementing documents the UN Mission in Kosovo was established as a political trusteeship with its mission being to exercise sovereignty in the territory of Kosovo on behalf and for the benefit of the Kosovo population aiming at creating the preconditions for the eventual independence of the territory, self-government, and economic sufficiency.⁴
6. While still under UNMIK administration, Kosovo entered a new stage of governance by establishing its Provisional Institutions of Self-Government through the UNMIK Regulation 2001/9. This regulation provided the Constitutional Framework for establishing institutions such as the Assembly, President, Executive, and the judicial

³Fetahu, A. (2015), 'In Defense of the Rights of Pensioners'. Available at: <http://adilfetahu.com/wp-content/uploads/2016/01/ADIL-FETAHU-Ne-mbrojtje-te-te-drejtave-te-pensionisteve.pdf> [Accessed on: September 10, 2019].

⁴Perritt, H. (2004), 'Economic Sustainability and Final Status for Kosovo'. Available at: <https://www.law.upenn.edu/journals/jil/articles/volume25/issue1/Perritt25U.Pa.I.Int%27Econ.L.259%282004%29.pdf> [Accessed on: September 10, 2019].

system. In 2006, as envisioned in the Resolution 1244, Kosovo started international negotiations, led by the UN Special Envoy Martti Ahtisaari, on its final political status. A year after, a draft status settlement proposal was submitted to both Prishtina and Belgrade. The document served as the basis for a draft UN Security Council Resolution and envisaged supervised independence for Kosovo. As a result of Russia's opposing the draft resolution on the grounds that it adversely affects the principle of state sovereignty, the document was rewritten several times. Despite the efforts of the international community to ensure Russia's support for the resolution, Russia declared that it would not approve of any resolution on which either Prishtina or Belgrade disagrees.

7. In 2008, the Kosovo Parliament declared independence, currently recognised by 116 countries. The National Assembly of Serbia, which still considers Kosovo as part of its sovereign territory, declared that the Declaration of Independence by the Kosovo Assembly was illegal on the grounds that "it was not in coordination with the UN Charter, the Constitution of Serbia, the Helsinki Final Act, Resolution 1244 (including the previous resolutions) and the Badinter Commission." Seeking support for its stance, Serbia initiated a request from the International Court of Justice (ICJ) an advisory opinion on the legality of the unilateral declaration of independence of Kosovo. The ICJ ruled that "*the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently, the adoption of that declaration did not violate any applicable rule of international law*".⁵
8. Following the decision of the ICJ, the United Nations General Assembly passed a resolution jointly drafted by the EU and Serbia, containing a request for an EU-facilitated dialogue between Kosovo and Serbia which would "be a factor for peace, security, and stability in the region, and that dialogue would be to promote

⁵ International Court of Justice (2010), 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo. Available at: <https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf> [Accessed on: September 10, 2019].

cooperation, achieve progress on the path to the European Union and improve the lives of the people”.⁶ Accordingly, in 2013, Kosovo and Serbia agreed on the 2013 Brussels Deal. The negotiations at the moment are stalled, nonetheless, there has not been any serious progress so far.

The process of establishment, transformation, and the abolishment of the Pension and Disability Fund of the Former Autonomous Socialist Province of Kosovo

9. The Pension and Disability Fund in the Former Autonomous Socialist Province of Kosovo managed and operated by the Self-managing Community of Interest on Pension and Disability Insurance as an independent generation solidarity system, known as the Pay-As-You-Go pension system. The fund has provided income and health benefits based on work and compulsory contributions (through which the fundamental right to pension and disability insurance was acquired). The Fund has had an important impact on the socio-economic wellbeing of beneficiaries and was an important financial instrument against destitution in old age. Given this, the unlawful abolishment and misappropriation of the former KSAP pension and disability fund and the unlawful suspension of the payment of benefits by Serbia have prevented beneficiaries from peacefully enjoying their possessions. In what follows, the key historic and legal facts about the establishment, transformation and abolishment of the fund, the suspension of payment of benefits and the resulting the violation of the right to pension and disability insurance, as a fundamental human right, as well as the resulting damaging effects upon the socio-economic wellbeing of the contributory pensioners are highlighted dating back to the 1946 Constitution of the former Federal People’s Republic of Yugoslavia (FPRY).

⁶ United Nations General Assembly (2010), ‘Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law’. Available at: <http://www.unmikonline.org/Documents/GA64298.pdf> [Accessed on: September 10, 2019].

10.As per 1974 Constitution of SFRY, the basic right to social security was regulated based on Article 281 Section 3:

“The Federation shall through its agencies:

.. (3) regulate those basic rights of workers in associated labour which ensure their status, as laid down by the present Constitution, in self-management and socio-economic relations and the basic rights and obligations of organisations of associated labour, self-managing communities of interest, other self-managing organizations, and communities, and socio-political communities regarding socially-owned resources; regulate the basic rights of working people concerning their social security and solidarity; lay down principles concerning the status, rights and duties of the Social Attorney of Self-Management.”⁷

11.Further, following the decentralisation and transfer of power to governments of the federal units by the federal government granted by the 1974 Constitution of SFRY, the development and management of social security systems became the responsibility of the constituent units of SFRY.⁸ Accordingly, the republics and provinces were transferred the legal responsibility to develop and manage, among other political, social and economic organisations, their pension and disability systems through their self-managing communities of interest-based on the principles of reciprocity and solidarity, and past labour. The legal grounds for this were established based on Article 53 whereby *“in order to ensure their social security working people shall form self-managing communities of interest in the fields of pension and disability insurance and other forms of social security, in which they will pool resources for the purpose and determine, on the principles of reciprocity*

⁷ Assembly of the Socialist Federal Republic of Yugoslavia (1974), ‘The Constitution of the Socialist Federal Republic of Yugoslavia 1974’ p.225. Available at: <http://www.worldstatesmen.org/Yugoslavia-Constitution1974.pdf> [Accessed on: September 10, 2019].

⁸ Lukovic, S. (1998), ‘Social Protection in the Federal Republic of Yugoslavia’ p. 81-92.

solidarity, and past labour, their common and individual obligations towards these communities and the common and individual rights they will realize in them.”⁹

12.As per Article 163, the independent self-managing communities of interest for pension and disability of the respective republics and provinces of the SFRY became responsible for collecting compulsory social security contributions as well as for paying pension benefits and other benefits, such as healthcare, to existing contributory pensioners based on contributions. Other responsibilities included the regulation of such benefits for non-contributory pensioner, based on the principles of reciprocity and solidarity: *“The right of workers to social security shall be ensured through obligatory insurance based on the principles of reciprocity and solidarity and past labour, in self-managing communities of interest, on the basis of contributions collected from workers’ personal incomes and contributions collected from income of organizations of associated labour, or contributions collected on resources of other organizations or communities in which they work. On the basis of this insurance the workers shall have, in conformity with statute, the right to health care and other benefits in the case of illness, childbirth benefits, benefits in the case of diminution or loss of working capacity, unemployment and old age, and other social security benefits, and for their dependents – the right to health care, survivors’ pensions, and other social security benefits. Social security benefits for working people and citizens who are not covered by the compulsory social insurance scheme shall be regulated by statute on the principles of reciprocity and solidarity.”¹⁰*

13.Based on the provisions of the 1974 Constitution, to complement the legal framework regulating the fundamental right to social security, in 1982 SFRY passed the federal Law on Basic Rights to Pension and Disability Insurance, in which only the basic elements of social security were regulated, while other issues became the

⁹ Assembly of the Socialist Federal Republic of Yugoslavia (1974), ‘The Constitution of the Socialist Federal Republic of Yugoslavia 1974’ p.111. Available at: <http://www.worldstatesmen.org/Yugoslavia-Constitution1974.pdf> [Accessed on: September 10, 2019].

¹⁰ Assembly of the Socialist Federal Republic of Yugoslavia (1974), ‘The Constitution of the Socialist Federal Republic of Yugoslavia 1974’ p.174. Available at: <http://www.worldstatesmen.org/Yugoslavia-Constitution1974.pdf> [Accessed on: September 10, 2019].

responsibility of the federal units.¹¹ Based on the 1974 Constitution and the 1982 Law, each republic and province developed its law in the field of pension and disability insurance and, established their independent pension and disability insurance funds. Pursuant to these individual laws, the funds, as legal entities, were established as independent self-managing communities of interest for the territory of the federal unit based on the principles of reciprocity and solidarity, and past labour, and were administered and managed through their statutes.¹²

14. Based on the 1974 Constitution, the 1982 SFRY Law on the Fundamental Right to Pension and Disability Insurance, and the 1983 Law on Pension and Disability Insurance of KSAP, the right to social security, including the right to pension and disability benefits, is a fundamental human right, which is earned (acquired) based on work and compulsory contributions from income (Article 281 Section 3, 1974 Constitution of SFRY; Article 3, Article 8, Article 108 of 1983 Law of KSAP).¹³ So, the right to pension was regulated as a fundamental human right and as such it (i) could not be transferred to another person (Article 5, Law on the Principles of Pension and Disability Insurance 1982) and (ii) could not be repealed, except for claims on unpaid amounts and unpaid claims (Article 5, SFRY Law on the Principles of Pension and Disability Insurance 1982; Article 9, KSAP Law 1983). As per the existing Serbian Law No. 73/2018 on Pension and Disability Insurance, the right to pension and disability insurance is also defined and regulated as a personal right which is not alienable and cannot become obsolete.¹⁴ The Serbian law envisages that the right to pension and disability insurance is a personal right which cannot be

¹¹ Kálin, W., Koser, K., Solomon, A., and Williams, R. C (2010), 'Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges No. 41'. Available at: https://www.brookings.edu/wp-content/uploads/2016/06/0119_internal_displacement_complete.pdf [Accessed on: September 10, 2019].

¹²In later constitutions, Yugoslavia enriched the social insurance and security system by extending insurance rights to other categories, such as families of workers, independent crafts persons, and others.

¹³The eligibility criteria included retirement age and number of years of service, or both. Workers could, under certain conditions, retire prior to reaching retirement age. The pension benefit was calculated based on the average of the individual's ten best working years.

¹⁴ Assembly of Serbia (2018), 'Law No. 73/2018 on Pension and Disability Insurance'. Available at: <http://pio.rs/images/dokumenta/Zakoni/2018/Zakon%20o%20PIO%20-2018.pdf> [Accessed on: September 10, 2019].

transferred to other persons and it shall not be limited, “with the exception of the right to claim the accrued pension and disability insurance benefits.”¹⁵ The legal interpretation provided by the European Court of Human Rights (ECHR) in the legal case *Grudic v. Serbia*¹⁶ serves as additional sound evidence in support of the pension right being a personal right. In the legal assessments, the ECHR considers that “existing pension entitlements constitute (d) a possession within the meaning of Article 1 of Protocol No. 1 to the Convention.” Further evidence in the form of legal interpretation of the right to pension and disability insurance is provided by the Human Rights Advisory Panel in the legal case *Krasniqi against UNMIK*¹⁷ whereby the Panel explains that “it has been established that accrued pension rights are considered property rights and that any reduction or discontinuance of a pension may, therefore, constitute an interference with the peaceful enjoyment of possession protected by Article 1 of Protocol 1 to the European Court of Human Rights”.

15. According to the 1974 Constitution and the 1982 SFRY Law on Basic Rights of Pension and Disability Insurance, the former KSAP had the right to take over legal responsibilities in the field of social security within the territory of the province. The former KSAP exercised its right to develop and manage its independent social security system granted by the 1974 Constitution of the SFRY.¹⁸ In its 1974 Constitution, KSAP provided the legal grounds for establishing Self-Managing Communities of Interest, among others, also in the field of pension and disability insurance.¹⁹ Subsequently, in 1976, the Assembly of the former KSAP passed the

¹⁵Assembly of Serbia (2018), ‘Law No. 73/2018 on Pension and Disability Insurance – Article 6’. Available at: <http://pio.rs/images/dokumenta/Zakoni/2018/Zakon%20o%20PIO%20-2018.pdf> [Accessed on: September 10, 2019].

¹⁶European Court of Human Rights (2012), ‘*Grudic v. Serbia*. Judgment Strasbourg.’ Available at: http://www.zastupnik.gov.rs/uploads/cr/presude/u-odnosu-na-rs/grudic-protiv-srbije-p.-br.-31925-08/Grudic_p_3192508_eng.pdf [Accessed on: September 10, 2019].

¹⁷The Human Rights Advisory Panel (2016), ‘*Krasniqi against UNMIK*’. Available at: http://www.unmikonline.org/hrap/Eng/Cases%20Eng/08_10%20Krasniqi%20FINAL%2017may16.pdf [Accessed on: September 10, 2019].

¹⁸Assembly of the Socialist Federal Republic of Yugoslavia (1974), ‘The Constitution of of the Socialist Federal Republic of Yugoslavia 1974 – Articles 53, 163, 281’. Available at: <http://www.worldstatesmen.org/Yugoslavia-Constitution1974.pdf> [Accessed on: September 10, 2019].

¹⁹Socialist Autonomous Province of Kosovo (1974), ‘The Consitution of the Socialist Autonomous Province of Kosovo – Articles 50, 51, 52’

Law on the Self-managing Community of Interest for Pension and Disability Insurance (henceforth the Law on SCIPDI). According to this law, the Self-managing Community of Interest (henceforth SCI) was established as a legal entity by the workers based on a self-managing agreement, *“aiming at ensuring their own social security, workers establish the self-managing communities of interest for pension and disability...”* (Article 1 of the 1976 Law on SCIPDI). Further, the Law envisaged that the SCI for Pension and Disability Insurance is established by and for the workers in the territory of the former Socialist Autonomous Province of Kosovo (Article 5 Law on SCIPDI, p. 444). As per Article 8, the SCIPDI, inter alia, *“approves and implements its development plan, regulates the methods and procedures for realizing the right to pension and disability insurance, establishes the conditions for the use of and implementation of the pension and disability insurance, undertakes measure to prevent disability caused at work in line with the contemporary scientific achievements, works on the improvement of the protection against disability, secures the means for pension and disability insurance, performs other duties in the common interest in the field of pension and disability insurance as set in the self-managing agreement on its establishment and in the statute.”* Further, it is governed by its Assembly, which *“consists of delegates of the workers from the basic organisations of work ...”* (Article 10 Law on SCIPDI) and its Assembly approves the statute of the SCI (Article 180, 1983 KSAP Law on Pension and Disability Insurance). So, the SCI for Pension and Disability of the former KSAP, as per law, was established as an independent legal entity to manage and administer Pension and Disability Insurance in the territory of the former KSAP (Article 3 and Article 5, Law on SCIPDI). Put differently, the SCI for Pension and Disability Insurance was established by workers and working people as an independent Pension and Disability Fund to ensure their social and material security in the territory of former KSAP. As such, it has not had

any legal connections or obligations to the independent SCI for Pension and Disability Insurance of the Republic of Serbia.²⁰

16. In 1983, the Assembly of KSAP passed the Law on Pension and Disability Insurance (1983 KSAP Law on PDI) through which it “*regulated in detail the fundamental rights to pension and disability insurance in accordance with the SFRY Law on Fundamental Rights to Pension and Disability Insurance (Official Gazette of SFRY, No. 23/82 and 77/82) and regulated other fundamental rights to pension and disability insurance.*” (Article 1, 1983 KSAP Law on PDI). According to this law, workers and the working people ensured themselves social and material security through work and compulsory contributions to the Self-Managing Community of Interest on Pension and Disability Insurance established for the territory of KSAP (Article 3, Article 5, Article 8, Article 108, 1983 Law of KSAP). So, in the KSAP Self-Managing Community of Interest, that means in the Pension and Disability Fund, workers and the working people “*regulated their common and individual rights to pension and disability insurance and the common obligations they realised within it, in accordance with the self-management agreement, social agreement and the law*” (Article 5, 1983 Law of KSAP). Accordingly, in Former KSAP the right to pension and disability insurance was a fundamental right acquired through work and compulsory contributions of the workers from their income. As outlined in Article 11 of the same law, these fundamental rights to pension and disability of the insured included: (i) the right to the old-age pension, (ii) the right to disability pension, (iii) the right to family pension. The same Article envisaged that the SCIPDI may apply additional rights to pension and disability insurance. Other rights to pension and disability envisaged by this law (in addition to the fundamental rights determined by the SFRY Law on Fundamental Rights to Pension and Disability Insurance), included: (i) the right to pre-retirement old age pension, (ii) the right to partial pension, (iii) the right to

²⁰In 1977, the Assembly of the former KSAP passed the Law on Amending and Supplementing the 1972 and 1974 Law on Pension and Disability Insurance. Inter alia, this Law provided that the term “provincial community for pension and disability” be replaced with the term “self-managing community of interest for pension and disability insurance”. Additional Laws Amending and Supplementing the Law on Pension and Disability Insurance were passed by the Assembly of the KSAP in 1979 and 1980.

care/ nursery and cure, and (iv) the right to professional rehabilitation of children with special needs. The obligations, criteria and measures to determine the amount of financial means, as well as the methods and plan for the collection of contributions for pension and disability insurance were regulated by the self-management agreement (Article 186, 1983 Law of KSAP). In Article 190, the law also envisaged that the amount of contributions had to be sufficient to cover the obligations of the SCIPDI, create a reserve and an adequate level of current assets (cash and cash equivalents). It has to be noted, though, that the definition of basic rights and eligibility criteria, such as retirement age, preretirement age, and years of service, remained the legal responsibility of the federal government.

17. Following the overthrowing of the constitutional order of former SFRY by the Republic of Serbia through the Law on the Operations of Republic Institutions under Specific Conditions (and by the new Constitution of the Republic of Serbia), Serbia violently abolished Kosovo's status as an Autonomous Socialist Province as per the 1990 Law on the Suspension of Operations of the Assembly of KSAP and the Executive Committee of the KSAP, and the Milosevic regime imposed direct rule by Serbia on Kosovo.²¹ Through this Law, Serbia revoked the legal and legitimate competencies and authorisations of Kosovo institutions. The Assembly of the Republic of Serbia took over the rights and responsibilities of the KSAP Assembly, while the Executive Committee of the Serbian Assembly took over the rights and duties of the Executive Committee of the KSAP Assembly. As per law, functionaries of the KSAP Assembly, members of its Executive Committee, and functionaries who were leading the administrative organisations of the province, administrative organisations and professional services, the secretary of the Executive Committee of the KSAP Assembly and his deputy were fired.²² Further, the Assembly of Serbia passed Law no. 30/90 on Work Relations under Special Conditions, which was

²¹ Fetahu, A. (2015), 'In Defense of the Rights of Pensioners'. Available at: <http://adilfetahu.com/wp-content/uploads/2016/01/ADIL-FETAHU-Ne-mbrojtje-te-te-drejtave-te-pensionisteve.pdf> [Accessed on: September 10, 2019].

²² Official Gazette of KSAP (1990), 'Law on the Suspension of Operations of the Assembly of KSAP and the Executive Committee of the KSAP' no.27, p.988.

applicable in Kosovo only. Based on this law the Serbian regime introduced violent temporary measures in Kosovo and passed 367 administrative orders on the implementation of temporary measures, out of which 237 related to economic enterprises, 101 related to education, cultural and health institutions, 20 related to agricultural cooperative, and 9 related to the media.²³ As a result, all ethnic Albanians holding managerial positions were sacked and replaced with Serbian or Montenegrin workers changing thus the ethnic structure of the management in economic enterprises. Albanian as the language of instruction at the University of Prishtina was no longer legal, Albanian teachers were laid off, and new Serbian curricula were introduced. Moreover, the temporary measures envisaged that Albanian workers sign loyalty oaths to the newly established direct Serbian regime. This was refused by the majority of Albanians working in government institutions, social institutions, and economic enterprises. Due to the implementation of the temporary measures and following the refusal to sign the loyalty oath, approximately 130.000 Albanian workers were unlawfully sacked. As a result, they unlawfully were denied their fundamental rights to social and material compensation, including social security in the form of unemployment benefits as well as pension and disability benefits which they had acquired through work and compulsory contributions as per the applicable law.²⁴

18. Following the implementation of the violent temporary measures in Kosovo, the Self-managing Communities of Interest were rescinded. Further, in 1992, the Assembly of Serbia passed the new Law on Pension and Disability Insurance which abolished the Pension and Disability Fund whereby the 1983 KSAP Law on Pension and Disability Insurance and other provisions issued under that law were repelled (Article 248). As per this 1992 Law, Serbia abolished (rescinded) the SCIPDI of former KSAP (Article 242 Section 6) and integrated the same with the Serbian SCIPDI. Consequently, all properties, inventory, assets, rights, and obligations of

²³ Fetahu, A. (2015), 'In Defense of the Rights of Pensioners'. Available at: <http://adilfetahu.com/wp-content/uploads/2016/01/ADIL-FETAHU-Ne-mbrojtje-te-te-drejtave-te-pensionisteve.pdf> [Accessed on: September 10, 2019].

²⁴ Ibid.

Kosovo SCIPDI were seized (Article 243 Section). Through this unlawful, arbitrary and unjust undertaking, Serbia misappropriated the Pension and Disability Fund of Kosovo citizens. But pursuant to the law Serbia took over all accruing LEGAL OBLIGATIONS of the SCIPDI of former KSAP, including and not limited to the payment of pension and disability benefits.

19. During the period 1992-1998, Serbia respected, but there are disputes and disagreement as to whether in full, its legal obligations relating to the Pension and Disability Fund. Upon the escalation of the war in 1998, Serbia unlawfully and arbitrarily stopped paying pension and disability benefits to Albanian and Non-Serb contributory pensioners living in Drenice, Malisheve, Drenas, and several other areas. Further, upon the 1999 NATO bombing campaign and the establishment of the UNMIK as per Resolution 1244, Serbia denied the acquired right to pension and disability benefits to Kosovo Albanian and Non-Serb contributory pensioners by suspending the payment of pension and disability benefits.

The Pension Reform upon the Establishment of UNMIK

20. During UNMIK administration, a new pension system was established based on UNMIK Regulation No 2001/35 and became operational in 2002.²⁵ According to UNMIK Regulation No. 2001/35, UNMIK Regulation No. 2005/20, Law no. 03/L-084 on Amending UNMIK Regulation No. 2005/20 Amending UNMIK Regulation No. 2001/35 on Kosovo Pensions Trust, Law No. 04/L-101 on Pension Funds of Kosovo, Law No. 04/L-168 on Amending and Supplementing Law No. 04/L-101, and Law No. 05/L-116 on Amending and Supplementing Law No. 04/L-101, and Law No. 04/L-131 on Pension Schemes Financed by the State, mandatory pensions comprise two forms of Pension: Basic Pensions and Individual Savings Pensions. The regulation

²⁵ Gubbels, et al. (2007), 'The Kosovo pension reform: Achievements and lessons. World Bank Social Protection Discussion'. Available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.504.7425&rep=rep1&type=pdf> [Accessed on: September 10, 2019].

also envisioned two types of non-mandatory pensions: Supplementary Employer Pension and Supplementary Individual Pension.

- 21.** The mandatory Basic Pension, referred to as Pillar I, consists of an old age basic pension and a disability pension funded by the Kosovo budget, rather than through an earmarked wage tax.²⁶ The former is paid to all residents of Kosovo who have reached retirement age (namely 65 years of age and older), while the disability pension was narrowly defined considering only total and permanent disability as an eligibility criterion. The scheme is based on the principle of universal coverage and the same rate of benefit is paid to each beneficiary, ignoring any type of categorisation. Consequently, the scheme completely disregards the pension contributions paid to the previous pension fund by some of the pensioners and the years of experience, which implies a discriminatory treatment of the “contributory pensioners” and those with work experience.
- 22.** According to the Administrative Instruction No. 11/2007 of the Kosovo government for Execution of Decision of Government No. 13/277, only in 2007, the Kosovo government decided in favour of the categorisation of pension beneficiaries by honouring the right to pension of the contributory pensioners of the previous system. In doing so, it established the right to basic pension increase by a total of 35 euros per month for all retirees, “who could provide evidence that they had been paying contributions within the former-Yugoslavia system for 15 years.” Similar to the previous regulations and laws on the pension system, this government decision was again characterised by discriminatory treatment. The new decision discriminates against those who have contributed to the former pension system for less than 15 years²⁷, as they are treated equally with those who have had no work experience at all prior to 1999. So, their less than 15 years of contributions were deemed irrelevant according to the new scheme.

²⁶ Ibid.

²⁷ A large share of these contributory pensioners were forcefully laid off during the extraordinary measures imposed by the direct Serbian regime.

23. Pillar I was administered and managed by Kosovo Pension Administration, as an administrative unit, under the supervision of the Ministry of Labour and Social Welfare. The Ministry of Finance was responsible for defining the monthly benefits based on the cost of the food basket in Kosovo. The same would then be approved by the Kosovo government, conditional on fiscal limitations and following the principle of fiscal sustainability. The basic pension benefit was the same as the disability pension benefit. The basic pension and disability benefits were linked to the cost of the food basket aimed at reflecting the standard for basic food needs, that is, the economic situation, rather than a political decision.²⁸ The Group for Legal and Political Studies, referring to an article in Koha Ditore Daily on the adequacy of the pension benefits, show that the benefits are insufficient to cover basic food needs, even if medical and housing expenses are covered, leaving “pensioners in a miserable state of poverty”.²⁹ Consequently, such a program is considered social assistance rather than a pension scheme. Even after the 2007 decision, which grants the right to an extra 35 euros pension benefit to contributory pensioners proving that they have contributed to the previous fund for at least 15 years, the pension benefits were inadequate to maintain an adequate standard of living.

24. According to Gubbels et al.³⁰, the extent to which pension liabilities related to the old system are accounted for when establishing a new system is an important and sensitive issue relating to pension reforms worldwide. In the case of Kosovo, Pillar I of the new pension system provided universal coverage in the sense that it covered

²⁸ Gubbels, et al. (2007), ‘The Kosovo pension reform: Achievements and lessons. World Bank Social Protection Discussion’. Available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.504.7425&rep=rep1&type=pdf> [Accessed on: September 10, 2019].

²⁹ GLPS (2012), ‘Pension System in Kosovo: Review of Current State, Main Challenges and Gaps’ p. 15. Available at: <http://www.legalpoliticalstudies.org/wp-content/uploads/2012/12/Pension-System-in-Kosovo.pdf> [Accessed on: September 10, 2019].

³⁰ Gubbels, et al. (2007), ‘The Kosovo pension reform: Achievements and lessons. World Bank Social Protection Discussion’. Available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.504.7425&rep=rep1&type=pdf> [Accessed on: September 10, 2019].

all former contributory-pensioners as well as all residents of Kosovo aged 65 years and older. Although it provides pension benefits to contributory pensioners who have earned the right to a pension through contributions to the previous pension fund as per former-Yugoslav legal framework, the new pension system, through Pillar I, does not recognise any liabilities from the previous pension system. So, the pension reform was based on the principle that the establishment of a new pension system is a separate political issue from that of the suspension and of liabilities of the old pension system. In this regard, it was considered that liabilities deriving from the old system and honouring the earned right to pension benefits of Kosovar contributory-pensioners were the responsibility of the Belgrade-based pension fund and that this political issue be dealt with separately from the reform process. UNMIK did not assume the liabilities of the previous pension system which was centralised in Belgrade and the solution to this problem was deferred to the potential future dialogue between Kosovo and Serbia. Yet, the pension reform did not envisage legal implications regarding the diminishing or altering of the liabilities of the old system which are the responsibility of Belgrade-based pension fund.

UNMIK as a Political Trustee and the Former KSAP Pension and Disability Fund

25. Following the NATO intervention in Kosovo in 1999, the Secretary-General of the United Nations issued the Resolution 1244 and subsequent implementing documents, based on which the UN Mission in Kosovo (henceforth UNMIK) was established as a political trusteeship, while the independence of Kosovo was envisioned as a possibility.³¹ According to the definition provided by Perritt,³² a political trusteeship is a state or group of states that administer a territory on behalf

³¹ Perritt, H. (2004), 'Economic Sustainability and Final Status for Kosovo'. Available at: <https://www.law.upenn.edu/journals/jil/articles/volume25/issue1/Perritt25U.Pa.I.Int%27Econ.L.259%282004%29.pdf> [Accessed on: September 10, 2019].

³² Perritt, H. (2003), 'Structures and Standards for Political Trusteeship'. Available at: <http://www.kentlaw.edu/perritt/courses/seminar/ucla-jilfa-published-wl.htm> [Accessed on: September 10, 2019].

of and for the benefit of the population of the territory, focussing on eventual independence of the territory, self-government, and economic sufficiency.³³ The author purports that Kosovo was “the best example of a political trusteeship”. UNMIK was a political trustee that exercised sovereignty and ruled Kosovo (while recognising Yugoslav sovereignty) on behalf of the Kosovo population, as the beneficiary of the political trusteeship, until the resolving of the political status of Kosovo.

26.According to the author, a prerequisite for nation-building is that the “political trusteeship” considers economic development as one of the top priorities. Perritt argues that in most trusteeships private sector economic development was rather neglected by the political trustee, focussing primarily on humanitarian relief, human rights work, and the establishment of local political institutions. According to the author, the case of the UNMIK trusteeship in Kosovo is not an exception. UNMIK did not properly differentiate between the legislative, executive, and judicial functions, which it exercised as a political trustee in Kosovo. It focussed almost exclusively on physical infrastructure reconstruction and macroeconomic stability, failing to consider economic development as a priority. Further, UNMIK impeded the work of the Kosovo government representatives in preparing and implementing strategies on private economic sector development. As a result, the poverty and unemployment rates remained high, while a strategy for self-sufficiency was rather inexistent. This lead to dissatisfaction with and criticism of UNMIK of the Kosovo population, as the trust beneficiary.

27.The lack of economic progress and development during UNMIK’s political trusteeship was considered to be mainly the result of the ambiguity or unclear understanding by UNMIK of UNMIK’s mandate granted by Resolution 1244, and the ambiguity and unclear understanding of the World Bank of its mandate granted by the World Bank Charter, about their responsibilities and rights to promote

³³ Ibid.

economic development in Kosovo.³⁴ However, the author explains that according to Resolution 1244, UNMIK had the power over the property as a common law trustee and hence, in line with the political trustee concept, the mandate to stimulate local economic development. Additionally, the World Bank identified a strategy for assisting economic development in Kosovo through UNMIK.

28.In line with the political trusteeship concept, UNMIK's (that is the trustee's) right to exercise sovereign authority in Kosovo was limited "only by what served the interests of peoples of Kosovo and by what would be consistent with its mandate to move toward final status."³⁵ Accordingly, UNMIK should have acted as the trustee of the Kosovo population and in accord with the interests of the Kosovo population in initiating a dialogue between Kosovo government representatives and Serbian government representatives in order to reach an agreement about the return of the Pension and Disability Fund of the Former Autonomous Province of Kosovo which was misappropriated by Serbia.

29.In 2005, the Minister Ibrahim Selmanaj³⁶ stated that the Ministry of Labour and Social Welfare of the Republic of Kosovo has requested from the UNMIK administration to start a dialogue with Serbia in order for the latter to return the Pension and Disability Fund. However, UNMIK as a trustee did not use its sovereign authority, granted by the Resolution 1244, to solve the problem of Kosovo citizens, as trust beneficiaries, who were denied their right to pension and disability benefits (a right they had earned based on the Article 163 of the 1974 Constitution of SFRY). There have been two non-political initiatives to resolve this issue on behalf of the Kosovo population undertaken by the international Ombudsperson of Kosovo, Mr.

³⁴ Perritt, H. (2004), 'Economic Sustainability and Final Status for Kosovo'. Available at: <https://www.law.upenn.edu/journals/jil/articles/volume25/issue1/Perritt25U.Pa.J.Int%27Econ.L.259%282004%29.pdf> [Accessed on: September 10, 2019].

³⁵ Perrit, H. (2010), 'The Road to Independence for Kosovo: A Chronicle of the Ahtisaari Plan'. Available at: <https://www.cambridge.org/core/books/road-to-independence-for-kosovo/2E3130A862C3A4515C6F3C22A0D3C7FF> [Accessed on: September 10, 2019].

³⁶Former Minister of Labour and Social Welfare in the Republic of Kosovo.

Marek Nowicki to the Serbian Ministry of Work, Employment and Social Policy.³⁷ In two separate responses to Ombudsperson's query, in 2003 and 2004, the Serbian government stated its opinion, inter alia, that the existing pension system in Serbia is based on the generation-solidarity program whereby current pension benefits are paid through current pension contributions. Given that Serbia has not been able to collect any pension contributions in Kosovo as of 1999, they explained that, for the time being, they suspended the payment of pension benefits to Kosovo residents who had been granted this right by the previous pension fund. But Kosovo pensioners would continue to receive pension benefits at a later time, without specifying any date. Also, the government of Serbia referred to the fact that Kosovo pensioners were receiving pension benefits through the new Kosovo pension system established through UNMIK Regulation 2001/35 (The Opinion of the Ministry for Social Affairs – Mišljenje Ministarstva za socijalna pitanja - no. 181-01-126/2003 of 7 March 2003, and the Opinion of the Ministry for Labour, Employment and Social Policy – Mišljenje Ministarstva rada, zapošljavanja i socijalne politike - no. 182-02-20/2004-07 of 18 June 2004 taken in *Grudic v. Serbia* case, 2012). According to them, this posed a serious issue. The Serbian government referred to Article 119 of the Pension and Disability Insurance Act of the Republic of Serbia which “provides that when a pensioner is entitled to two or more pensions within the territory of the Republic of Serbia, only one of those pensions may be paid, in accordance with the pensioner's own preference”, claiming that it would not be accepted if a certain person was to enjoy two pension benefits on the same basis. Thus, they claimed that it would not have been acceptable to pay. Further, the Serbian government purported that the pension liabilities are a political issue which could not be solved unilaterally by Serbia, but rather should be the subject matter of “a political solution, through negotiations”. Yet, as explained in more detail in this background note, these opinions were considered to not amount to domestic legislation by the Serbian Constitutional Court, and to be in violation of Article 1 of Protocol No. 1 according to the ECHR. In 2010, inter alia, the Minister of Finance

³⁷KosovaKosovo.com (2005), 'Albanian-Serb Information Exchange Forum' p.50. Available at: <http://kosovalive.org/wp-content/uploads/pdf/KosovaKosova.pdf> [Accessed on: September 10, 2019].

stated that “the potential debt involving situations such as the applicants’ would be very high indeed, and would significantly undermine the country’s financial stability.”³⁸ According to them, based on official data provided by the pension fund the total amount of liabilities was estimated at 1,008,358,614 Euros (“EUR”), which is “less than 10% of the total foreign currency reserves of Serbia”. Upon these two opinions of the above-mentioned Ministries of the Serbian government, the latter claimed that there have not been any institutional efforts to communicate with the Serbian government about the pension problem.

30. UNMIK’s neglect and lack of willingness to initiate, on behalf of the Kosovo population, the process of resolving problems relating to the Pension and Disability Fund of the former KSAP serves as evidence of UNMIK failing to exercise fully its sovereign authority, as the trustee of Kosovo, and its negligence in serving and protecting the interests of the Kosovo population, as its trust beneficiaries. The role as political trustee was granted to UNMIK as per Resolution 1244, whereby it was authorised to exercise sovereignty in Kosovo. Legal evidence in support of UNMIK’s reluctance to act as the political trustee of the Kosovo population is provided in the decision of the Human Rights Advisory Panel (HRAP) in the legal case Tomë Krasniqi against UNMIK.

31. In 2016, the plaintiff Tomë Krasniqi, a resident of the Municipality of Pejë (Kosovo), filed legal proceedings against UNMIK, inter alia, on the grounds that UNMIK failed to solve the problem regarding the pension fund and as a result failed to enable him to continue receiving his pension, alleging that “*this is in violation of his right to peaceful enjoyment of possessions pursuant to Article 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR)*.”³⁹ The plaintiff, who had contributed to the Pension and Disability Fund based on which he earned the right to a pension,

³⁸ European Court of Human Rights (2012), ‘Grudic v. Serbia. Judgment Strasbourg.’ Available at: http://www.zastupnik.gov.rs/uploads/cr/presude/u-odnosu-na-rs/grudic-protiv-srbije-p-br-31925-08/Grudic_p_3192508_eng.pdf [Accessed on: September 10, 2019].

³⁹ The Human Rights Advisory Panel (2016), ‘Krasniqi against UNMIK’ point 33, p.5. Available at: http://www.unmikonline.org/hrap/Eng/Cases%20Eng/08_10%20Krasniqi%20FINAL%2017may16.pdf [Accessed on: September 10, 2019].

as a property right, as per legal framework of Former SFRY, was denied this right without prior notification or explanation by the government of Serbia, upon the establishment of UNMIK following the Resolution 1244. The SRSG objected this complaint, inter alia, on the grounds that “UNMIK’s mandate to facilitate a political process in order to resolve the Kosovo status issue cannot be interpreted as an obligation to find a solution to the pension problem”, claiming that it was not in the mandate of UNMIK to exercise pressure on authorities outside of Kosovo.⁴⁰ According to the Security Council Secretary-General (SRSG), finding a solution to the pension fund problem in Kosovo is a “political matter” and the prerequisites for a solution are “political readiness and willingness”, as well as “functioning (administrative) channels of cooperation. Consequently, the pension issue should be addressed in a dialogue between Kosovo and Serbia, facilitated by the international community. Due to lack of evidence provided by the SRSG on this matter, in the HRAP’s opinion, although UNMIK implicitly recognised its responsibility to take measures on the suspension of the pension payments, it did not undertake concrete measures to protect the pension rights of eligible pensioners in Kosovo, in this case UNMIK’s trust beneficiaries. Consequently, the HRAP recommended that UNMIK “acknowledges its failure to meet its obligations under Article 9 and 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and makes an apology to the complainant”.

32. The plaintiff also claimed that as per Article 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR) his “right to peaceful enjoyment of possessions” was violated. Regarding this, in the HRAP’s opinion, although UNMIK failed to take concrete measures to solve problems related to the former fund, it did make efforts to solve the problem within the Kosovo Republic legal framework. It passed the UNMIK Regulation No. 2001/35 by which it established a new pension scheme which was operational as of 2002. Consequently, according to the HRAP,

⁴⁰ The Human Rights Advisory Panel (2016), ‘Krasniqi against UNMIK’ point 48, p.8. Available at: http://www.unmikonline.org/hrap/Eng/Cases%20Eng/08_10%20Krasniqi%20FINAL%2017may16.pdf [Accessed on: September 10, 2019].

UNMIK could not be held accountable for the violation of Article 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR). Yet, following the same reasoning used by the HRAP regarding the complaint about discriminatory treatment (see next paragraph) this violation is “exclusively imputable to the Serbian authorities” as it is the Belgrade-based Fund that has stopped paying to KS-Albanian retirees pension benefits accrued based on the legal framework of Former SFRY. Expressed differently, it is the Serbian authorities who violated the plaintiff’s property rights. Secondly, due to non-payment of his “contributory” pension and due to the inadequacy of the Kosovo pension benefit, the plaintiff complains that his right to “social security and adequate standard of living in old age was violated as per Articles 9 and 11 respectively of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Thirdly, his right to be free from inhuman and degrading treatment was violated as per Article 3 of the ECHR. According to the HRAP findings, the right to social security and to an adequate standard of living are guaranteed in the ICESCR, therefore, the Panel finds that UNMIK has violated Articles 9 and 11 respectively of the ICESCR. Given this finding, in the HRAP’s opinion, there is no need to consider the complaint under Article 3 of the ECHR.

33. Further, the plaintiff complained that while the right to pension was denied to KS-Albanians in that they stopped receiving pension benefits altogether, Serbs living in Kosovo continued to receive pension benefits on a regular basis. In this regard, the plaintiff alleged that this discriminatory treatment between KS- Albanian and KS-Serbian retirees was in violation of Article 14 of the ECHR. Yet, in support of UNMIK, the SRSG explained that UNMIK lacks “jurisdiction *ratione personae*” over the complaint about discriminatory practices in selecting beneficiaries and paying pension benefits. According to the decision of the HRAP, such alleged discriminatory treatment against KS-Albanian retirees is not related to the responsibility of UNMIK and it is “exclusively imputable to the Serbian authorities” as it is the Belgrade-based Fund that discriminates against KS-Albanian retirees in the selection and payment of pension benefits accrued as per legal framework of Former SFRY. To

conclude, the Serbian government is to be held accountable for discriminating against KS-Albanian pensioners and favouring KS-Serbian pensioners.

Estimation of pecuniary and non-pecuniary losses resulting from the abolishment of the former SCIPDI of KSAP and the subsequent suspension of payment of benefits from Serbia

34. Considering that *“justice delayed, is justice denied”*, negotiations about war reparations regarding the former Pension and Disability Fund of the KSAP, but not limited to it, are related to the future of Kosovo citizens rather than their past. This suggests that war reparations are first and foremost about *“justice done”* to the victims. Therefore, in addition to estimating the direct monetary losses resulting from the abolishment and misappropriation, as well as the subsequent suspension of payments of pension benefits, by Serbia to contributory pensioners of Kosovo, an estimation of the non-pecuniary losses, and any related costs are necessary.

35. In the legal case *Grudic v. Serbia*, as part of their arguments, the Serbian government has provided the European Court of Human Rights with an estimate *“of the total amount of the respondent State’s potential debt involving situations such as those of the applicant”*.⁴¹ The Serbian Government argued that the Serbian Pensions and Disability Insurance Fund had provided data that *“the sum in question had been estimated at 1,008,358,614 Euros (“EUR”), whilst the Ministry of Finance had itself set this sum at EUR 1,050,468,312...”*⁴² According to this, the Serbian government has made reference to two different estimates of the total sum of Serbia’s potential debt regarding Pension and Disability Benefits to Kosovo citizens. One estimate is calculated by Serbian Pensions and Disability Insurance Fund and the other by the

⁴¹ European Court of Human Rights (2012), ‘*Grudic v. Serbia. Judgment Strasbourg.*’ p.11 Available at: http://www.zastupnik.gov.rs/uploads/cr/presude/u-odnosu-na-rs/grudic-protiv-srbije-p-br.-31925-08/Grudic_p_3192508_eng.pdf [Accessed on: September 10, 2019].

⁴² Ibid.

Serbian Ministry of Finance. Yet, no details have been provided on the methods deployed, the time period in question, the number of the contributory pensioner or the amount of benefits used to estimate the potential debt. As explained in detail below, this amount is far lower than the EUR 2,045,520,750 approximated value of the potential debt calculated based on the available historical data for the period 1999-2014.

36. In the document titled “Brussels Dialogue – Topics for Next Phase” produced by the Cabinet of the Deputy Prime Minister Edita Tahiri for the purposes of the Brussels Dialogue between the government of the Republic of Kosovo and the government of the Republic of Serbia, and facilitated by the EU, reference is made to the original records of the Electronic Accounting Centre of the former Self-managing Community of Interest on 31.12.1998.⁴³ Table 1 shows that according to this source (henceforth first source) the total number of pension beneficiaries was 89,135 which were divided into three categories: 1) 33,308 old age pensioners, 2) 28,034 family pensioners and 3) 25,045 disabled pensioners. Additionally, there were 1,266 body injury pension beneficiaries and 1,252 were nursery and care pension beneficiaries.⁴⁴

37. As shown in Table 1, there is a slight difference between the data reported by the Cabinet of the Deputy Prime Minister and the data provided in the Registry of the Pension and Disability Fund of KSAP on Contributory Pensioners and Disabled for the year 1998 received by the Independent Federation of the Union of Pensioners and Disabled of Kosovo from the Ministry of Labour and Social Welfare (henceforth second source). These slight discrepancies are with regard to 1) the number of disabled pensioners which is greater by two beneficiaries as reported in the first source, 2) the number of family pensioners which is greater by one beneficiary as reported in the first source, 3) the number second and third level of disability

⁴³ Office of the Prime Minister (2014), ‘Brussels Dialogue – Topics for Next Phase’. Available upon request.

⁴⁴ When adding up these numbers by category the total does not match the total number of beneficiaries as reported in the document.

pension beneficiaries who are not reported at all by the first source. As a result, the total number of beneficiaries is slightly different between the two sources; the second source reports a total of 88.901 pension beneficiaries.

Table 1: Number of beneficiaries by pension category and their respective percentages in 1998, by the source of data

| Category | Number of beneficiaries* | % of total beneficiaries | Number of beneficiaries** | % of total beneficiaries |
|--|---------------------------------|---------------------------------|----------------------------------|---------------------------------|
| Old age pension | 33,308 | 37.46 | 33,308 | 37.37 |
| Disability pension | 25,045 | 28.17 | 25,042 | 28.10 |
| Family pension | 28,034 | 31.53 | 28,033 | 31.45 |
| Nursing and care | 1,252 | 1.41 | 1,252 | 1.40 |
| Body injuries | 1,266 | 1.42 | 1,266 | 1.42 |
| Disability pension - second and third level of disability | n/a | n/a | 224 | 0.25 |
| Total | 88,905 | 100 | 89,125 | 100 |

* Source 1: Numbers reported in the document titled “Brussels Dialogue – Topics for Next Phase” produced by the Cabinet of the Deputy Prime Minister Edita Tahiri for the purposes of the Brussels Dialogue.

** Source 2: Registry of the Pension and Disability Fund of KSAP on Contributory Pensioners and Disabled in 1998 (received from the Independent Federation of the Union of Pensioners and Disabled of Kosovo)

38. Table 2 reports the amounts of pension and disability benefits by category and as a total paid in 1998 to all Kosovo contributory pensioners, irrespective of ethnic background. The total sum of benefits paid in 1998 amounts to 75,243,465 EUR. Almost half of the total amount is paid to old age pension beneficiaries, while around one-third is received by the disability pension beneficiaries. Families of

contributory pensioners, who had acquired the right a to pension, received one-fourth of the total.

Table 2: Number of beneficiaries and amount of benefits, and their respective percentages by pension category (excluding the category “Disability pension – second and third level of disability”), in 1998

| Category | Number of beneficiaries | Percent of total beneficiaries | Pension benefits in EUR* | Percent of total pension benefits |
|---------------------------|--------------------------------|---------------------------------------|---------------------------------|--|
| Old age pension | 33,308 | 37.47 | 35,755,764.39 | 47.52 |
| Disability pension | 25,042 | 28.17 | 21,076,407.31 | 28.01 |
| Family pension | 28,033 | 31.53 | 18,000,190.29 | 23.92 |
| Nursing and care | 1,252 | 1.41 | 321,249.72 | 0.43 |
| Body injuries | 1,266 | 1.42 | 89,853.27 | 0.12 |
| Total | 88,901 | 100 | 75,243,464.98 | 100 |

Source: Registry of the Pension and Disability Fund of KSAP on Contributory Pensioners and Disabled in 1998 (received from the Independent Federation of the Union of Pensioners and Disabled of Kosovo)

Note: *The value is first converted into the DM currency and then into EUR, applying an exchange rate of 1/2 for EUR/DM.

39. The structure of beneficiaries and their respective benefits by ethnicity is reported in Table 3. The majority of the contributory pensioners were ethnic Albanian or Non-Serbian. Yet, their benefits in percentage terms are slightly lower than their number in percentage terms, leading to them having a lower average amount

benefit. So, the average benefit for Albanians and Non-Serbs was 18% lower than that of Serbs and Montenegrin, and 6% lower than the average of all ethnicities pooled together. Given that the formula for calculating pension contributions and benefits considered, inter alia, the income level of the workers, this may be due to Albanians and Non-Serbs having had lower income. The latter conclusion, however, may imply that Albanians and Non-Serbs were discriminated against relating to getting high-paying jobs in the Kosovo labour market.

Table 3: Number of pension beneficiaries and amount of pension benefits by ethnicity as of 31.12.1998

| | <i>Number of beneficiaries</i> | <i>Number of beneficiaries, in percent</i> | <i>Amount of benefits in DM</i> | <i>Amount of benefits in percent</i> | <i>Average amount of benefits</i> | <i>Discrepancy in percent*</i> |
|--------------------------------------|--------------------------------|--|---------------------------------|--------------------------------------|-----------------------------------|--------------------------------|
| <i>Albanians and others</i> | 61,705 | 69.23 | 7,001,203 | 64.98 | 113.46 | -6 |
| <i>Serbs and Montenegrins</i> | 27,430 | 30.77 | 3,773,265 | 35.02 | 137.56 | +14 |
| <i>All ethnicities</i> | 89,135 | 100 | 10,774,468 | 100 | 120.88 | 0 |

Source: Registry of the Pension and Disability Fund of KSAP on Contributory Pensioners and Disabled in 1998 (received from the Independent Federation of the Union of Pensioners and Disabled of Kosovo) and The Fund of the Self-managing Community of Interest Belgrade, Prishtina Branch

Note: * The discrepancy is calculated as the share between the average amount of benefit and the average for all ethnicities

40. In Table 4, based on the official data on annual average net wages provided by the Statistical Office of the Republic of Serbia (SORP) for the period 2008-2017, official data on annual exchange rates between the Dinar and Euro for the period 2002-2017 provided by the National Bank of Serbia (NBS), and data provided by an IFUP official on average monthly pension benefits and on the missing values on average net wages in Serbia, using 61,705 as the total number of pension beneficiaries for each year⁴⁵, the annual amount of the potential debt of Serbia to Albanian and Non-Serb contributory pensioners of Kosovo.

Table 4: Annual average net wage, monthly average pension benefit, and pension benefit debt of Serbia for the period 1999-2018⁴⁶⁻⁴⁷⁻⁴⁸⁻⁴⁹⁻⁵⁰

| Year | Annual average net wage in DINAR | Official exchange rate of Dinar against Euro | Average monthly net wage in EUR (Column 2/Column 3) | Average monthly pension benefit adjusted by the law, in EUR | Replacement rate in percent (column 4/column 5) | Total pension benefit debt in EUR (column 5*12months*61,705 beneficiaries) |
|-------------|---|---|--|--|--|---|
| 1998 | | | | | | |
| 1999 | | | 210 | 94.5 | 45 | 69,973,470 |

⁴⁵It has to be noted that due to lack of data, that 61,705 had to be used each year as the total number of beneficiaries to calculate the approximate value of Serbia's debt regarding pension benefits to Albanian and Non-Serb contributory pensioners of Kosovo.

⁴⁶The period 2006-2016 is based on own calculations using the sources provided below the table. The rest of the estimates have been provided by an IFUP official.

⁴⁷Statistical Office of the Republic of Serbia (2011), 'Statistical Yearbook 2011'. Available at: <http://www.stat.gov.rs/en-US/publikacije/?d=2&r> [Accessed on: September 10, 2019].

⁴⁸Statistical Office of the Republic of Serbia (2015), 'Statistical Yearbook 2011'. Available at: <http://www.stat.gov.rs/en-US/publikacije/?d=2&r> [Accessed on: September 10, 2019].

⁴⁹ Statistical Office of the Republic of Serbia (2017), 'Statistical Yearbook 2011'. Available at: <http://www.stat.gov.rs/en-US/publikacije/?d=2&r> [Accessed on: September 10, 2019].

⁵⁰ National Bank of Serbia (2019). Available at: https://www.nbs.rs/internet/english/scripts/kl_prosecni.html [Accessed on: September 10, 2019].

| | | | | | | |
|--------------|---------------|---------------|------------|------------|-------------|----------------------|
| 2000 | | | <i>310</i> | <i>140</i> | <i>45.2</i> | <i>103,664,400</i> |
| 2001 | | | <i>90</i> | <i>41</i> | <i>45.6</i> | <i>30,358,860</i> |
| 2002 | | <i>60.69</i> | <i>152</i> | <i>115</i> | <i>76</i> | <i>85,152,900</i> |
| 2003 | | <i>65.12</i> | <i>177</i> | <i>130</i> | <i>73.4</i> | <i>96,259,800</i> |
| 2004 | | <i>72.69</i> | <i>187</i> | <i>132</i> | <i>70.1</i> | <i>97,740,720</i> |
| 2005 | | <i>82.99</i> | <i>210</i> | <i>148</i> | <i>70.5</i> | <i>109,588,080</i> |
| 2006 | | <i>84.11</i> | <i>258</i> | <i>159</i> | <i>61.2</i> | <i>117,733,140</i> |
| 2007 | | <i>79.96</i> | <i>347</i> | <i>188</i> | <i>52.7</i> | <i>139,206,480</i> |
| 2008 | <i>392952</i> | <i>81.44</i> | <i>402</i> | <i>238</i> | <i>60.2</i> | <i>176,229,480</i> |
| 2009 | <i>380796</i> | <i>93.95</i> | <i>338</i> | <i>231</i> | <i>70.7</i> | <i>171,046,260</i> |
| 2010 | <i>409704</i> | <i>103.04</i> | <i>331</i> | <i>211</i> | <i>67.7</i> | <i>156,237,060</i> |
| 2011 | <i>455712</i> | <i>101.95</i> | <i>372</i> | <i>228</i> | <i>53</i> | <i>168,824,880</i> |
| 2012 | <i>496524</i> | <i>113.13</i> | <i>366</i> | <i>221</i> | <i>64.2</i> | <i>163,641,660</i> |
| 2013 | <i>527184</i> | <i>113.14</i> | <i>388</i> | <i>230</i> | <i>59</i> | <i>170,305,800</i> |
| 2014 | <i>534360</i> | <i>117.31</i> | <i>379</i> | <i>222</i> | <i>67.3</i> | <i>164,382,120</i> |
| 2015 | <i>533184</i> | <i>120.73</i> | <i>368</i> | <i>207</i> | <i>59.3</i> | <i>153,275,220</i> |
| 2016 | <i>553164</i> | <i>123.12</i> | <i>374</i> | <i>205</i> | <i>54.8</i> | <i>151,794,300</i> |
| 2017 | <i>574716</i> | <i>121.34</i> | <i>395</i> | <i>n/a</i> | <i>n/a</i> | <i>n/a</i> |
| 2018 | <i>n/a</i> | <i>n/a</i> | <i>n/a</i> | <i>n/a</i> | <i>n/a</i> | <i>n/a</i> |
| Total | | | | | | <i>2,325,414,630</i> |
| | | | | | | |

41. In Table 5, the total amount of potential debt of Serbia is reported by type of debt.

Pecuniary damage

As per ECHR Judgment in the legal case Grudic v. Serbia (2012), according to Table 4, in respect of their pecuniary damage, Serbia owes Albanian and Non-Serb contributory pensioners an estimated amount of 2,325,414,630 EUR for the period 1999-2016. Due to data unavailability, the total estimated debt figure does include the debt owed for the period 2017-2018 (the year when this estimation is produced). Further, it does not include the pension benefits not paid to contributory pensioners during 1998 in the war zone areas.

It has to be highly emphasised that this figure excludes all workers, who made compulsory contributions to the fund for at least 15 years and who could not satisfy the criterion on years of service due to unlawfully being laid off by the Serbian regime of that time. However, as per law, this category can buy-out the extra....

Non-pecuniary damage

As per ECHR Judgment in the legal case Grudic v. Serbia (2012), in respect of non-pecuniary damage, Serbia owes each contributory pensioner, that is, all 61,705 contributory pensioners an amount of EUR 7,000, plus any tax that may be chargeable. Accordingly, the total sum of debt in respect of non-pecuniary damage amounts to EUR 431,935,000 (61,705*7,000 EUR=431,935,000 EUR).

Costs and expenses

As per ECHR Judgment in the legal case Grudic v. Serbia (2012), in respect of costs and expenses, Serbia owes each contributory pensioner, that is, all 61,705 contributory pensioners an amount of EUR 1,500, plus any tax that may be chargeable. Accordingly, the total sum of debt in respect of costs and expenses amounts to EUR 92,557,500 (61,705*1,500 EUR=92,557,500 EUR).

Statutory interest

As per ECHR Judgment in the legal case Grudic v. Serbia (2012), referring to the Statutory Interest Act No. 31/11 of the Republic of Serbia, Serbia shall pay “statutory

interest (shall be paid) as of the date of maturity of a recognised monetary claim in Serbian dinars until the date of its settlement” (Article 1), which “shall be calculated on the basis of the official consumer price index plus another 0.5% monthly”.

Workers who had contributed for at least 15 years to the former SCIPDI of KSAP

This figure excludes the debt owed for the period 2017-2018 (the year when this estimation is produced), as well as the pension benefits not paid to contributory pensioners during 1998 in the war zone areas. It has to be highly emphasised that this figure also excludes all workers who made compulsory contributions to the fund for at least 15 years and who could not satisfy the criterion on years of service due to unlawfully being laid off by the Serbian regime of that time.

Table 5: Amount of Serbia’s potential debt in EUR to 61,705 contributory beneficiaries, by type of debt for the period 1999-2016⁵¹

| Type of debt | Amount in EUR |
|-----------------------------|---|
| Pecuniary damage | 2,325,414,630 |
| Non-pecuniary damage | 431,935,000 |
| Costs and expenses | 92,557,500 |
| Grand total | 2,849,907,130 |
| Statutory interest | Official CPI in the Republic of Serbia + 0.5% monthly |

42. In sum, the grand total amount of the potential debt of Serbia to the contributory pensioners in respect of pecuniary and non-pecuniary damage as well as costs and expenses, for the period 1999-2016 is estimated at 2,849,907,130, excluding statutory interest, excluding the debt owned during the period 2017-2018, the debt

⁵¹The period 2008-2016 is based on own calculations using the sources provided below the table. The rest of the estimates have been provided by an IFUP official.

owed to some of the contributory pensioners living in war zones during 1998, and the those who have made compulsory contributions for at least 15 years to the former SCIPDI of KSAP.

Conclusions

43. Pursuant to Article 53, Article 163 and 281 of the 1974 Constitution of the former SFRY, the 1982 Law on the Fundamental Rights to Pension and Disability of the former SFRY, and Article 50, 51 and 52 of the 1974 Constitution of the former KSAP, the former KSAP passed the 1976 Law on the Self-managing Community of Interest for Pension and Disability Insurance and the 1983 Law on Pension and Disability Insurance. The 1976 Law provided the legal grounds for the establishment and operation of the Self-managing Community of Interest for Pension and Disability Insurance. The SCIPDI, as an independent legal entity, managed and administered the social security system based on the principles of reciprocity and solidarity, and past labour in the territory of the former KSAP. To further regulate the field of pension and disability insurance, KSAP passed the 1983 Law, which was in accord with the 1982 Law on the Fundamental Rights to Pension and Disability Insurance of former SFRY. The 1983 KSAP Law envisaged the right to pension and disability insurance as a fundamental right for the territory of former KSAP.

44. As per these two laws, which were in full accord with the 1974 SFRY Constitution and the 1974 KSAP Constitution, the right to pension and disability insurance was a fundamental human right, which was ensured (acquired) based on work and compulsory contributions from income (Article 1, Article 3, Article 5, Article 8, Article 108 of the 1983 Law of KSAP) and as such it (i) could not be transferred to another person (Article 5, Law on the Principles of Pension and Disability Insurance 1982) and (ii) could not be repealed, except for claims on unpaid amounts and unpaid claims (Article 5, SFRY Law on the Principles of Pension and Disability Insurance 1982; Article 9, KSAP Law 1983).

45. Upon the violent abolishment of Kosovo's status as an Autonomous Socialist Province based on the Law on the Suspension of Operations of the Assembly of KSAP and the Executive Committee of the KSAP, the SCIPDI of former KSAP too was also abolished pursuant to the 1992 Law on Pension and Disability Insurance. As per the Serbian 1992 Law, the SCIPDI of all properties, inventory, assets, RIGHTS, and OBLIGATIONS of Kosovo SCIPDI were seized and transferred to the Serbian SCIPDI. Consequently, the SCIPDI of former KSAP was integrated into the Serbian SCIPDI.

46. It has to be strongly emphasized that as per law the Serbian SCIPDI took over all legal OBLIGATIONS of the SCIPDI of former KSAP, including the legal obligation to pay pension and disability benefits to contributory pensioners. Serbia respected these legal obligations until 1998/99, but not in full, and upon the establishment of UNMIK it suspended the payment of benefits to Albanian and Non-Serb contributory pensioners. Through the suspension of payment, Serbia violated the fundamental right to pension and disability insurance which is defined as a fundamental human right, which is not transferable and cannot be repealed, by the laws of former SFRY, former KSAP, and even by Serbia's existing legal documents.

47. Referring to the former Yugoslav, former KSAP, current Serbian and current international legal documents regulating the right to pension, the representatives of the Pensioners' Federation, explain that Serbia has violated their fundamental right to pension and disability insurance, through this Serbia has prevented them from enjoying their possessions peacefully, and Serbia has discriminated based on ethnic background by continuing to pay benefits only to Kosovo Serbs and Montenegrins. They consider that the problem of contributory pensioners had not been dealt with in a just manner by UNMIK and the Kosovo government. Further, they insist that the resumption of payment on a case by case basis is the only acceptable, just and lawful, and not arbitrary, solution to this problems, for the pension rights is a fundamental right, which is inalienable, and hence cannot be the subject matter of any political solution.

48. According to own estimations, which are based on the ECHR Judgment in the legal case *Grudic v. Serbia*⁵², and the calculations of an IFUP official (for the period for which data was unavailable), the grand total amount of the potential debt of Serbia to the contributory pensioners in respect of pecuniary and non-pecuniary damage as well as costs and expenses, for the period 1999-2016 is estimated at 2,849,907,130, excluding statutory interest, excluding the debt owned during the period 2017-2018, the debt owed to some of the contributory pensioners living in war zones during 1998.

49. Again, it has to be strongly emphasised that this estimate does not include the debt owed by Serbia to those who have made compulsory contributions for at least 15 years to the former SCIPDI of KSAP. Therefore, this issue has to be taken seriously and the Kosovo government has to collect data on this category in order to estimate the potential debt to them by Serbia prior to negotiating about the debt owed to contributory pensioners.

Recommendations

50. Given the conclusions provided in the previous section, particularly the Judgment of the European Court on Human Rights, Serbia by unlawfully abolishing and misappropriating the SCIPDI Fund and by unlawfully suspending payments to Albanians and non-Serbs in Kosovo, has violated their fundamental right to pension and has prevented contributory pensioners from peacefully enjoying their pension. In order for justice to be done, it is recommended that:

- i.** The Republic of Serbia officially accepts that the right to pension is a fundamental right acquired through work and compulsory contributions and as

⁵² European Court of Human Rights (2012), '*Grudic v. Serbia*. Judgment Strasbourg.' Available at: http://www.zastupnik.gov.rs/uploads/cr/presude/u-odnosu-na-rs/grudic-protiv-srbije-p.-br.-31925-08/Grudic_p_3192508_eng.pdf [Accessed on: September 10, 2019].

such it is regulated as a fundamental human right which (i) cannot be transferred to another person and (ii) cannot be repealed, except for claims on unpaid amounts and unpaid claims;

- ii.** The Republic of Serbia officially accepts the responsibility for the pecuniary and non-pecuniary damages caused to the contributory pensioners;
- iii.** The Republic of Serbia provides a public apology to the contributory pensioners for the pecuniary and non-pecuniary damage caused by the unlawful suspension by the Republic of Serbia of the payment of pension and disability benefits
- iv.** The Republic of Serbia officially accepts its legal, political, as well as moral obligation to compensate the contributory pensioners for all the pecuniary and non-pecuniary damages as per ECHR's decision in the legal case *Grudic v. Serbia*. Hereby, the Republic of Serbia, on a case by case basis, has to pay (i) in respect of non-pecuniary damage, EUR 7,000, plus any tax that may be chargeable, (ii) in respect of costs and expenses, EUR 1,500, plus any tax that may be chargeable, and (iii) in respect of their pecuniary damage, their due pensions, together with statutory interest for the period "calculated on the basis of the official consumer price index plus another 0.5% monthly".
- v.** The Republic of Serbia, as per ECHR's judgment⁵³ takes all "appropriate measures to ensure that its competent Serbian authorities implement the relevant laws in order to secure payment of the pensions and arrears in question, it being understood that certain reasonable and speedy factual and/or administrative verification procedures may be necessary in this regard."
- vi.** That the Republic of Serbia, following Recommendation no. 5, agrees to a time plan on the execution in full of the payments.

⁵³ Ibid.

- vii.** The governments of Kosovo and Serbia, do not obfuscate the issue of contributory pensioners with political or other issues, which are subject to negotiations, but rather explicitly acknowledge that the right to pension and disability insurance is a fundamental human right, as per the former SFRY, former KSAP and current Serbian and international legal documents, therefore it has to be solved for each contributory pensioner on a case by case basis.

- viii.** That the Kosovo and Serbia governments agree to identify all contributory pensioners who have paid compulsory contributions to the former SCIPDI of KSAP for at least 15 years but were unlawfully lay off, and treat this category of contributory pensioners based on former SFRY and former KSAP laws.

- ix.** That the Kosovo government makes use of all relevant and appropriate documents to build the arguments when negotiating on behalf of its citizens in the Brussels Dialogue.

- x.** The Brussels Dialogue Facilitator, i.e. the EU, as well as the international community take all necessary measures to ensure that the Republic of Serbia, as per ECHR's decision, agrees "to take all appropriate measures to ensure that the competent Serbian authorities implement the relevant laws in order to secure payment of the pensions and arrears in question, it being understood that certain reasonable and speedy factual and/or administrative verification procedure may be necessary in this regard."

- xi.** The Kosovo government, as per the request of the contributory pensioners, should seriously deal with further amending and supplementing Law No. 04/L-101 on Pension Funds of Kosovo, to ensure that the basic pension and the additional EUR 35 of pension received by the contributory pensioners be replaced by the term "social assistance to contributory pensioners".

Annexes

Annex A - Social Insurance in former FPRY prior to the 1974 Constitution of SFRY

As per the Law on Social Insurance of Workers, Employees and Civil Servants adopted in 1946 by the former SFRY, it was the responsibility of the federal state to insure workers, employees, and officials. Within this so-called state social insurance system, contributions were collected from employers and employees, while the guarantor of all the rights and benefits of social security was the state in that the financing was regulated through the state budget.⁵⁴ The State Institute for Social Insurance, as a legal entity, operated the system, which was managed and supervised by the Ministry of Labour of the former SFRY.

The adoption in 1952 of the By-law on the Establishing the Institute for Social Insurance and on the Temporary Management of Social Insurance Resources characterised a new era in the development of the social security system in the SFRY. In subsequent years, aiming at complementing the social welfare system additional by-laws were passed, including the 1953 By-law on Financing Social Insurance and the 1955 By-law on Organising Social Insurance. Through these by-laws, the social security system was to some extent decentralised in that certain social insurance responsibilities were transferred to the institutes for social insurance established in the respective republics of SFRY.

Pursuant to the 1963 Constitution of the Socialist Federal Republic of Yugoslavia (SFRY), new developments took place in the field of social insurance. The Black Letter Law on Retirement Insurance and amendments on the Law on Health insurance and amendments to the Law on Disability Insurance were adopted whereby social insurance was considered an institution of mutual insurance of all working people. Following the 1968 and 1971 amendments to the SFRY Constitution, in the legal documents the term “social insurance” was replaced by the term “social security” which was broader in meaning. In 1972, SFRY adopted Law no. 35/72 on Fundamental Rights to Pension and Disability Insurance,⁵⁵ which envisaged that republics to develop their legal infrastructure and aligning it to their

⁵⁴Institute for Social Insurances (2019), ‘History’. Available at: <http://www.zso.gov.rs/english/istorijat.htm> [Accessed on: September 10, 2019].

⁵⁵In 1972, KSAP also adopted its Law no. 37/72 on Pension and Disability Insurance.

specific needs and capacities. This characterised the end of the unified social insurance system which used to determine the rights and obligations at the federal level.

There were numerous changes during 1952-1972 in the legal infrastructure which aimed at complementing the regulation of social security, and which provided for the decentralisation of the social security system through transferring the powers in the field of social security from the federal level to the republics and provinces. Still, this new system, although to a large extent decentralised, was different from the self-managing social security system established pursuant to the 1974 Constitution of former SFRY.

Annex B - Interviews with contributory pensioners

For purposes of this background note, contributory pensioners are Kosovo residents who have worked and have contributed to the former KSAP Pension and Disability Fund as per the legal framework of Former SFRY and former KSAP. In interviews with representatives of the Independent Federation of the Union of Pensioners, Disabled and Old Aged of Kosovo, and contributory pensionaries, they all unequivocally explained that three key arguments have guided the different activities of their long fight for their right to pension benefits. First, as per legal framework of former SFRY and the Convention for the Protection of Human Rights and Fundamental Freedoms, and as per Serbian domestic legislation (according to the decision of the Constitutional Court of Serbia), Serbia has violated their right to pension benefits, as a property right, by arbitrarily suspending the payment of pension contributions to Kosovar contributory pensioners. Second, Serbia has discriminated against, based on ethnic background, against the KS-Albanian and other non-Serb minority contributory pensioners by continuing to provide pension benefits only to KS- Serbs contributory pensioners. Third, Serbia by violating their right to pension has prevented them from enjoying their possessions peacefully, as per the Convention for the Protection of Human Rights and Fundamental Freedoms. The key activities that contributory pensioners have undertaken jointly or individually consist of individual legal proceedings against UNMIK, legal proceedings against Serbia, continuous meetings and

written communication with Kosovo Institutions, and legal proceedings against the Kosovo government.

According to the representative of the Independent Federation of the Union of Pensioners, Disabled and Old Aged of Kosovo, as per legal framework of former SFRY and former KSAP, the right to pension and disability benefits, was a right earned based on workers' mandatory contributions from income. As such, the right to pension was legally considered as a personal property right and hence is inalienable (see Section 4 for details on the legal framework on defining the right to pension as a property right). Referring to the decision of the European Court of Human Rights in the legal case *Grudic v. Serbia*, one of the representatives emphasised that the right to pension was considered by this Court as constituting a possession according to Article 1 of Protocol No. 1 to the Convention. Additionally, the ECHR, making reference to Article 110 of the Pension and Disability Act of Serbia, stated that 'pension and disability rights shall only be terminated if it transpires that one no longer meets the original statutory requirements.' The same decision was made by the Constitutional Court of Serbia on the termination of a recognised right to pension. This means that no one can be arbitrarily deprived of it. Consequently, Serbia, by arbitrarily suspending the payment of pension benefits to contributory pensioners in Kosovo without any prior notice or justification, has violated this right. Also, in doing so, Serbia has prevented Kosovar contributory pensioners from peacefully enjoying their possessions. The representative further raised the issue of Serbia trying to justify the discontinuance of pension payment with the fact that because its pension fund was a "pay-as-you-go" system and Serbia could not collect insurance contributions in Kosovo after 1999. Further, it was purported that this justification had no legal grounds and therefore was irrelevant, for, as per the decision of the ECHR which was based on Article 169 of the Pension and Disability Act of Serbia, a recognised pension right was not dependent on whether the government could collect pension insurance contributions in a specific territory.

The representatives constantly referring to the legal case *Grudic v. Serbia* and *Skenderi and four other applicants v. Serbia*, argued that as the right to pension is a property right and inalienable, government institutions have to respect it. Given this, it was stated that the

Federation has continuously insisted that Kosovo institutions provide support to the contributory pensioners in requesting from Serbian authorities the resumption of the payment of their contributory pension from the Belgrade fund in which they have contributed for 40 years. The Federation has continuously explained and insisted that the resumption of payment is the only acceptable, just and lawful, and not arbitrary, solution to these problems, for the right to property, which is inalienable, cannot be the subject matter of any political solution. Any political solution to this problem involving a reduction or non-resumption of payment would imply a violation of the contributory pensioners' right to a pension. The Federation's opinion about the reduction and/ or discontinuance of payment being unlawful derives from the assessment of the Court. Further, it was emphasised that the Federation considers it unacceptable that contributory pensioners are forced by their financial situation to individually take legal actions against Serbia whereby they have to pay high fees to lawyers for legal representation.

According to the legal case *Grudic v. Serbia*, the government of Serbia claimed that Serbian courts could not rule on the "merits of pension claims", as the documentation was missing or destroyed and due to the reluctance of Kosovo institutions to cooperate on this issue. On this matter, one of the representatives purported that the Federation has been through a long and challenging process of trying to get access to the documentation on contributory pensioners up to 1998 from the Ministry of Labour and Social Welfare (MLSW) of Kosovo, as the competent institution. In 2016, they again officially requested from the Ministry to provide them with access to the database. Given the MLSW's reluctance to respond, they filed a complaint with the Ministry on the issue, to no avail. It has to be noted that, in 2013, the MLSW did not respond to the request of the Government Professional Committee of the Republic of Kosovo on the issue of Kosovar pensioners seeking compensation from the government of Serbia due to the unlawful suspension of the payment of their pension benefits. Consequently, in 2018, the Federation took legal actions with the Basic Court of Prishtina against the MLSW complaining that it remained silent and did not respond to their requests and complaints relating to being provided with access to the documentation on the contributory pensioners of the 1990s. The justification of the MLSW for not responding to the request and complaint was that it would have been a violation of Law No.

03/L-172 on the Protection of Personal Data if the MLSW granted access to the documentation to the Federation. The Court's decision declared the complaint of the Federation admissible and ordered the MLSW to provide the Federation with the registry of contributory pensioners of the 1990s. Upon the Court's decision, the Federation received a copy of the registry.

The representatives argued that, in the aftermath of the war, the contributory pensioners' rights to pension have been violated by the UNMIK administration as well as by the Kosovo institutions. According to them, the UNMIK Regulation 2001/35 on the establishment of the pension and disability fund, and all other subsequent legal documents approved by the Kosovo Assembly during the UNMIK administration and upon the declaration of independence in 2008, have envisaged a discriminatory treatment of the contributory pensioners. The reason for this is that Regulation 2001/35 that regulated the basic pension did not recognise the right to pension earned by pensioners who contributed to the previous fund. Instead, it discriminated against them in that it followed the principle of universal coverage providing basic pension benefits to all Kosovo citizens aged 65 and older, irrespective of work experience and amount of previous pension contributions. In 2007, the Kosovo government in a legal effort to recognise the right to pension of contributory pensioners by allowing for an increase of 35 euros per month in pension benefits of pensioners who could provide evidence that contributed for at least 15 years to the old fund. This legal change was again discriminatory in that it discriminated against those who have contributed to the old fund for less than 15 years as it put them in the same category with pensioners who have had no work experience prior to 1999. They claim that all other contributory pensioners agree with them on the issues that the domestic legal framework treats them in a discriminatory manner and that it violates their right to a pension. Further, they explain that upon consultations with legal experts, lawyers, and other experts in the field of pensions, what they receive is legally defined as social assistance, due to their pension benefits being paid directly from the state budget rather than the pension fund to which they have contributed. Accordingly, what they receive is not pension benefits but rather social assistance and should be defined as such in the current legislation.

Further, they emphasise that the pension benefits ever since the establishment of the fund have been inadequate. They have remained inadequate even after the 2007 decision when the benefits increased by 35 euros for contributory pensioners. In this case, they even refer to the opinion of the HRAP which states that the pension benefit “was not adequate to ensure the complainant’s access to basic services and goods necessary for the realisation of an adequate standard of living and health”⁵⁶. The representatives of the Federation claim that the financial situation of contributory pensioners is even worse than that shown in the GPLS study. They argue that compared to the amount that they are legally entitled to, referring to the pension benefits received by KS-Serbian contributory pensioners from the Belgrade-based fund, what they receive is far from being just and sufficient to enable an adequate standard of living, especially when considering that they have made compulsory contributions during their working life.

⁵⁶ The Human Rights Advisory Panel (2016), ‘Krasniqi against UNMIK’, p.16. Available at: http://www.unmikonline.org/hrap/Eng/Cases%20Eng/08_10%20Krasniqi%20FINAL%2017may16.pdf [Accessed on: September 10, 2019].

