



# *The Human Rights Advisory Panel*

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## **OPINION**

**Date of adoption: 17 May 2016**

**Case No. 08/10**

**Tomë KRASNIQI**

**against**

**UNMIK**

The Human Rights Advisory Panel, sitting on 17 May 2016  
with the following members present:

Marek Nowicki, Presiding Member  
Christine Chinkin  
François Tuklens

Assisted by  
Andrey Antonov, Executive Officer

Having considered the aforementioned complaint, introduced pursuant to Section 1.2 of UNMIK Regulation No. 2006/12 of 23 March 2006 on the establishment of the Human Rights Advisory Panel,

Having deliberated, makes the following findings and recommendations:

### **I. PROCEEDINGS BEFORE THE PANEL**

1. The complaint was introduced on 8 March 2010 and registered on the same day.
2. On 15 March 2010 and 11 May 2010, the complainant provided additional information to the Panel.
3. On 11 April 2012, the Panel communicated the case to the Special Representative of the Secretary-General (SRSG), for UNMIK's comments on its admissibility.

4. On 12 April 2012, the complainant submitted additional documentation to the Panel. This additional documentation was subsequently communicated to the SRSG on 14 May 2012.
5. On 31 May 2012, the SRSG submitted UNMIK's response.
6. On 26 September 2012, the Panel forwarded the SRSG's comments to the complainant inviting him to provide further comments if he wished to do so.
7. The complainant provided his response to the Panel in a letter dated 2 October 2012.
8. On 6 June 2013, the Panel declared the complaint partially admissible.
9. On 13 June 2013, the Panel communicated the decision to the SRSG and requested UNMIK's comments on the merits of the complaint. No response was received.
10. On 13 November 2013, and again on 28 January 2014 and 18 September 2014, the Panel reiterated its request to the SRSG to provide UNMIK's comments on the merits. No response was received.
11. On 4 December 2014, the SRSG requested from the Panel an "*a priori* advice" concerning of possibility of withdrawing its admissibility decision due to the participation in the decision of the Panel Member, Marek Nowicki. In this regard, the SRSG invoked Rule 12.1 of the Panel's Rules of Procedure.
12. On 22 October 2014 and again on 12 February 2015, the complainant provided additional information to the Panel. On 29 April 2015, the Panel responded to the complainant.
13. On 2 March 2015, the Panel requested the SRSG to clarify whether his letter of 4 December 2014 (see § 11 above), should be considered as raising an admissibility issue after the complaint had been declared admissible, pursuant to Section 2.3 of UNMIK Administrative Direction No. 2009/1 *Implementing UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel*, and on which of the grounds indicated therein. The Panel also requested the SRSG to provide relevant supporting documentation.
14. On 25 August 2015, the SRSG submitted UNMIK's response and raised additional comments on the admissibility of the complaint pursuant to Section 2.3 of UNMIK Administrative Direction No. 2009/1 cited above. With the same communication the SRSG requested the Panel to consider the withdrawal of the Panel Member, Marek Nowicki, from the case prior to the issuance of its findings. However, no supporting documentation was presented by the SRSG in support of this request.
15. On 11 December 2015, the Panel, without the Panel Member concerned being present pursuant to Rule 12. 2 of the Panel's Rules of Procedure, deliberated and concluded that no objective ground or element had been put forward by the SRSG to question the impartiality of Mr Marek Nowicki and thus the appropriateness of his participation in this case (see ECtHR [GC], *Kleyn and Others v. the Netherlands*, nos. 39343/98, 39651/98, 43147/98 and 46664/99, judgment of 6 May 2003, at §§ 195-202; and ECtHR, *Perote Pellon v. Spain*, no. 45238/99, judgment of 25 July 2002, at § 51).

16. On the same date, 11 December 2015, the Panel in full composition deliberated pursuant to Section 2.3 of UNMIK Administrative Direction No. 2009/1 and rejected the new admissibility issue raised by the SRSG in his communication of 25 August 2015. It therefore confirmed the complaint admissible.
17. On 15 December 2015, the Panel forwarded a note to the SRSG informing him of its deliberation on the issues of the composition of the Panel and the objections to the admissibility of the complaint (see §§ 14 and 15 respectively above) and requested the SRSG to provide UNMIK's comments on the merits of the complaint.
18. On 9 February 2016, the Panel received UNMIK's comments on the merits of the case.

## II. THE FACTS

### A. Background on pension reform in Kosovo

19. Prior to the conflict, Kosovo was included in the Yugoslav pension system. Within this system, and up until 1989, the Autonomous Province of Kosovo had an autonomous pension fund that collected contributions and paid benefits. The system, at that time, was a generation solidarity system, known as a "pay-as-you-go" system, through which active workers paid contributions to fund the benefits of current pensioners. The pensions were administered by the "Fund for Pension and Disability Insurance" which, however, was centralised in Belgrade as of 1989.
20. Following the end of the conflict, Kosovo was placed under the administration of UNMIK pursuant to UN Security Council Resolution 1244 (1999) of 10 June 1999. According to this Resolution, UNMIK's mandate included "performing basic civilian administrative functions" and "supporting the reconstruction of key infrastructure and other economic reconstruction", while developing and gradually transferring competencies to the Provisional Institutions for the Self-Government (PISG) of Kosovo.
21. As the payment of pension from Belgrade was suspended, by Regulation No. 2001/35 *on Pensions in Kosovo* of 22 December 2001 (later amended by UNMIK Regulation No. 2005/20 of 19 April 2005) UNMIK established a new pension scheme in Kosovo which provided for "basic" (old age, non-contributory) and mandatory individual "savings" (contributory) pensions. Pursuant to UNMIK Regulation No. 2002/15 of 26 July 2002, the payment of a basic pension became effective as of 1 July 2002, at the rate of 28 euros per month, for all those aged 65 and above, irrespective of previous contributions. According to the same Regulation, in the following years the rate of the basic pension was to be set annually by the Ministry of Finance of the PISG, based on a minimum-calorie Food Basket serving as a standard for basic consumption needs<sup>1</sup>.
22. The basic pension rate was increased to 35 euros in 2002, to 40 euros per month in 2004 and later, in 2009, to 45 euros per month. In 2007, the Administrative Instruction No. 11/2007 of the Kosovo Government for Execution of Decision of Government No. 13/277 established the right to basic pension increase to a total of 75 euros per month

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<sup>1</sup> See: Section 2 of UNMIK Regulation No. 2002/15 of 26 July 2002, *on the Promulgation of a Law Adopted by the Assembly of Kosovo on the Methodology for Setting the Level of Basic Pension in Kosovo, and Determining the Commencement Date for Provision of Basic Pensions*.

for all those who could offer proof that they had been paying contributions within the former-Yugoslavia system for 15 years.

## **B. The complainant's pension-related claims and proceedings**

23. The complainant is a resident of Kosovo residing in the municipality of Pejë/Peć. Born in 1938, the complainant has paid into a state Federal Republic of Yugoslavia pension fund, the "Fund of Pension and Disability Insurance", accruing the right to a pension as of 3 May 1998. He states that he received a pension equivalent to approximately 180 euros per month from that date until 1 December 1998. After this date, this pension was terminated without any prior notification or explanation being provided to the complainant.
24. The complainant states that following the establishment of UNMIK pursuant to UN Security Council Resolution 1244 (1999) he, along with other Kosovo Albanians, were prevented from obtaining this pension. The complaint contends that Serbs from Kosovo continued to receive this pension.
25. The complainant states that, since the year 2000, he has addressed both UNMIK and the local authorities to request the resumption of the payment of his contributory pension, to no avail.
26. According to the documentation presented to the Panel, on 11 December 2006 the complainant wrote a letter to the SRSG in this regard. By letter dated 1 February 2007, the acting Deputy SRSG, responded on behalf of the SRSG, that the complainant's letter raised a "very important and complex issue". However, since the pensions and social welfare were "transferred power", dealt with by the Ministry of Labour and Social Welfare (MLSW) of the PISG, it lay "outside the direct responsibility of UNMIK". The DSRSG advised the complainant to address his concerns directly to the Kosovo Assembly and the MLSW in order to "seek a resolution of this situation".
27. On 11 April 2007, the complainant addressed a complaint to the Department of Administration of Pensions in Kosovo (DAPK) of the Kosovo MLSW requesting the payment of the pension accrued under the former Yugoslav system. On 13 April 2007, the DAPK sent a written response to the complainant stating that the non-payment of the contributory pension was due to the "stolen funds by the Serbian occupants" which constituted an "unsolved political problem" and informing the complainant of the on-going pension schemes administered by the DAPK.
28. It appears that on 30 April 2007, following a complaint submitted by the applicant on 16 April 2007, the DAPK issued a decision recognising the complainant's right to an old age/basic pension, "gained through contributions to the fund of invalids and pensioners from December of the year 1998 and further". The complainant states that under this system, as of an unspecified date, he has been in receipt of a pension from the DAPK of approximately 45 euros per month. The complainant submits a certificate from DAPK dated 24 February 2010, which confirms this amount.
29. On 4 May 2007, the complainant commenced legal proceedings in the Basic Court (then known as Municipal Court) of Prishtinë/Priština against the Kosovo MLSW, seeking the "reinstatement of his status as a contributory pensioner", the backdated payments of sums that he claimed were owed to him following the suspension of payment of his pension and compensation for damage incurred due to this suspension.

On 7 January 2013, the Basic Court rejected the complainant's claim based on the lack of "passive legitimacy" of the Kosovo MLSW, since pursuant to Article 1.1 of UNMIK Regulation No. 1999/01 *on the Authority of the Interim Administration of Kosovo*, all legislative and executive powers in Kosovo were assumed by UNMIK in the relevant period.

30. On 7 October 2013, the Appeals Court of Prishtinë/Priština rejected the complainant's appeal, upholding the reasoning of the Basic Court. In its judgment, the Appeal Court stated that "the Pension fund before the war, and the current Kosovo Pension Fund have no succession in between, and therefore, the respondent has no obligation to pay the pensions from a fund was taken over by the Serbian state, an issue which will be subject to agreements between Kosovo and the Serbian state [...]".
31. On 12 February 2014, the Kosovo Supreme Court rejected the complainant's appeal against the judgment of the Appeals Court of Prishtinë/Priština mentioned above. The judgment of the Supreme Court states that the complainant's right to a basic pension within the Kosovo system was recognised as of 3 May 2003, first in the amount of 35 euros, subsequently of 45 euros. The judgment also states that, as of 23 September 2009, the complainant received a pension in the amount of 45 euros plus additional 35 euros based on his previous contributions to the ex-Yugoslavia system, for a cumulative amount of 80 euros.
32. On 22 February 2015, the Kosovo Constitutional Court ruled the complainant's claim that the judgments of the lower instance courts had violated his human rights manifestly ill-founded.

### **III. THE COMPLAINT**

33. Insofar as the complaint has been declared admissible, the complainant complains that from 12 December 1998 until April 2007 he has not been able to receive his pension based on his years of contribution to the former Yugoslav Fund of Pensioners and Disabled People. He blames UNMIK for not finding a solution to this problem, so that he could continue to receive a pension as a "contributory pensioner". He alleges 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).
34. Secondly, the complainant complains in essence that, because of the non-payment of his "contributory" pension during the period from 1999 to 2007, and because of the inadequacy of the old age pension granted to him thereafter, he was left without the financial means to sustain himself. In this regard, the complainant invokes a violation of his right to social security and to an adequate standard of living as guaranteed by Articles 9 and 11 respectively of the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as a violation of his right to be free from inhuman and degrading treatment as guaranteed by Article 3 of the ECHR.

## IV. THE LAW

### A. The parties' submissions

#### 1. *The complainant's submissions*

35. The complainant complains that, since 1999, he has not received the contributory pension accrued within the legal framework in force at the time of the "ex-Yugoslavia". He also states that, during the period 1999-2007 he has not received any pension at all and that, due to the inaction of UNMIK (and Kosovo authorities) the complainant turned from "a pensioner with rights" to "a real beggar living from the mercy of others". The complainant states that, starting from 2007, he has been in receipt of a 45 euros old age pension from the Kosovo DAPK which, however, does not suffice to even buy medicine.
36. The complainant states that he addressed UNMIK and the Kosovo authorities on this issue, including through court proceedings, but to no avail. For example, he states that none of the authorities concerned is ready to take responsibility for this issue. The Serbian Government explains that it stopped collecting contributions from Kosovo, thus it cannot pay pensions to "Kosovars". He also states that UNMIK declines any responsibility. The Kosovo authorities claim to have acquired the "rights" from the unilateral declaration of independence but do not to want accept any respective "obligations".
37. Concerning UNMIK's responsibility, the complainant states that, following the adoption of the United Nations Security Council Resolution 1244 (1999) and the establishment of UNMIK as the interim administration of Kosovo, the SRSG was vested with all legislative and executive powers in Kosovo. The complainant states that consequently UNMIK had the obligation to ensure the protection of human rights of all persons living in Kosovo and that these rights included the right to property stemming from pension entitlements. The complainant also states that until the Kosovo declaration of independence in February 2008, even when certain competencies were transferred from UNMIK to the PISG, the SRSG retained overall responsibility over the PISG, including the power to take "adequate measures against actions incompatible with the Constitutional Framework" of Kosovo.
38. With respect to the alleged violation of his property rights stemming from the non-payment of his pension, the complainant states that it was UNMIK's responsibility to take some action aimed at helping him and other Kosovo pensioners in a similar situation to receive the pension accrued in the framework of the former-Yugoslavia system. Therefore, UNMIK should be held responsible of "mismanagement" for its failure to do so.
39. With respect to the alleged violation of Articles 9 and 11 of the ICESCR and of Article 3 of the ECHR, the complainant states that UNMIK had the obligation under these provisions to take appropriate steps, individually or through international cooperation, to ensure the realisation of his right to social security and an adequate standard of living, without discrimination. However, UNMIK did not act to ensure the realisation of his acquired right to a pension and to alleviate his difficult financial situation, as well as that of other pensioners in the same situation.

## 2. *The SRSG's submissions*

40. In his communication to the Panel dated 25 August 2015, the SRSG raised additional objections to the admissibility of the complaint (see also § 14 above). *First*, the SRSG argued that the complainant failed to exhaust all available remedies in accordance with Section 3.1 of UNMIK Regulation No. 2006/12 on *the Establishment of the Human Rights Advisory Panel*. He argued that the complainant failed to provide evidence that he took steps to obtain payment of his pension from the Serbian authorities; in particular he did not file a claim against Serbia with the European Court of Human Rights (ECtHR).
41. *Second*, the SRSG stated that the complainant's case may be considered "resolved" in light of the judgment issued by the ECtHR in the case of *Grudić v. Serbia* on 17 April 2012, in which the Court found that Serbia had violated the ECHR for discontinuing the complainants' pension, accrued through contributions to the former Yugoslav Fund of Pensioners and Disabled Persons, Kosovo branch. The SRSG also stated that, in this judgment, the European Court requested the Serbian authorities to take appropriate steps to resume the payment of pensions to those in a similar situation to the complainants in the *Grudić* case. Consequently, in the view of the SRSG, the complainant in this case has lost his victim status pursuant to Article 37.1 of the ECHR.
42. In a subsequent note, received by the Panel on 9 February 2016, the SRSG provides his comments on the merits of the case. With respect to the complaint under Article 1 of Protocol No. 1 to the ECHR, the SRSG states that, in accordance with the UN Security Council Resolution No. 1244 (1999), UNMIK "takes full account of the principles of sovereignty and territorial integrity". Accordingly, in the view of the SRSG, "it is and it was beyond UNMIK's mandate and its competence to influence authorities outside of the territory of Kosovo including Belgrade authorities".
43. The SRSG acknowledges that "the facilitation of a political process designed to determine Kosovo future's status" is part of UNMIK's mandate. Nonetheless, in its role as interim administration of the territory of Kosovo, UNMIK was "restricted to address issues with the authorities in Belgrade and facilitate dialogue between the parties". Furthermore, issues such as the pension issue required "political readiness and willingness", as well as "functioning (administrative) channels of cooperation", elements that were absent in the period under the Panel's review. In this respect, the SRSG recalls that until recently Serbia has held the position that it had no obligation to pay pensions to all persons from Kosovo who had accrued pension rights on the basis of contributions paid to the former Yugoslav state pension fund as of 1999.
44. The SRSG states that, however, UNMIK did address the pension issue with the Serbian authorities "to the extent that it was able and within in [sic] the confines of its mandated tasks". The SRSG states that first, in the period 1999-2001, UNMIK reached out to the Belgrade authorities "in a low key and confidential manner".
45. The SRSG further states that, thereafter, UNMIK promulgated UNMIK Regulation No. 2001/35 of 22 December 2001 on Pensions in Kosovo, and a "more institutionalized approach followed". According to the SRSG, this would be substantiated by the establishment pursuant to the Regulation of a Pension Policy Working Group, composed by the Head of the Department of Labour and Social Welfare, the Managing Director of the Banking and Payment Authority in Kosovo, the Head of the Central

Fiscal Authority, other relevant members of the Economic and Fiscal Council, their designees and others appointed by the SRSG.

46. The SRSG also states that UNMIK's "efforts and positive measures" to address the pension issue in Kosovo are mentioned in a publication of 2003 by the International Labour Office titled "*Jobs After War: a Critical Challenge in the Peace and Reconstruction Puzzle*". The SRSG notes that this publication, at p. 415, states that "in 2002, negotiations started between the Serbian and Kosovo Ministries of Labour and Social Welfare and Pension Administrations on the non-payment of pensions to Kosovars".
47. The SRSG states that there are additional "confidential archived UNMIK documents" which mention negotiations held between the Belgrade authorities and UNMIK and which reflect the efforts made by UNMIK on the pension issue. In this regard, the SRSG lists a confidential "Note to the File" relating to the "Fourth High-Ranking Working Group Meeting" held in Belgrade on 31 May 2002, which reads: "the Working Group was also asked to take two big subjects: [...] and pensions". Further, the SRSG refers to "confidential e-mail correspondence" between UNMIK staff members, dated 5 June 2002, titled "Pension negotiations in Belgrade" which refers to a meeting between UNMIK officials and the Serbian Ministry of Social Welfare and the Serbian Pension Fund scheduled to take place on 7 June 2002. According to the SRSG, additional e-mails between UNMIK staff members identify the purpose of the meeting as the "exchange of information on pension issues related to Kosovo, with the goal of ensuring that the rights of eligible beneficiaries are protected".
48. The SRSG further argues 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. Nonetheless, the SRSG states that "it is evident that an agreement as a result of a political process on the final status of Kosovo facilitated with the support of UNMIK would have included an agreement on the pension issue". In this context, the SRSG argues that the "draft status settlement proposal formulated under the auspices of the Secretary-General Special Envoy, Martti Ahtisaari", which was drafted with the facilitation and support of UNMIK, represents "an additional positive measure for the protection of the rights of the people of Kosovo".
49. In light of the submissions above, the SRSG states that there has not been a violation of Article 1 of Protocol No. 1 to the ECHR by UNMIK.
50. Concerning the complaint under Article 3 of the ECHR, the SRSG states that after its arrival in Kosovo, UNMIK was "confronted with a multitude of needs addressed to the mission by the residents of Kosovo", including the establishment of peace, safety and security, humanitarian and social necessities, such as the resolution of the pension issue. The SRSG refers to a 2001 Technical Paper of the World Bank which emphasises the need for economic and social reforms as a prerequisite for peace in Kosovo and points out at the competing priorities of implementing a social welfare scheme in Kosovo while alleviating the humanitarian demands in a situation of "lack of administrative capacity". Quoting the Technical Paper, the SRSG lists some of the obstacles to the "immediate resumption of pension, such as
  - "1) the practical issues of resuming a pay-as-you-go system prior to re-introduction of a payroll tax or personal income tax; 2) payments would have been badly targeted, reaching only a comparative small proportions of those in

the various vulnerable groups and without regard to immediate need [...]; 3) operational difficulties in identifying and locating beneficiaries; 4) equity issues with respect to ethnic Albanians who lost pension entitlements because they had been prevented from working in the formal sector during the 1990s (would have required various difficulties, such as proof of work history prior to 1989, etc.) and 5) disadvantaging entitled beneficiaries of the Serbian Pension and Disability Fund. [...]"

51. Mentioning the same Technical Paper, the SRSG states that given the limited budgetary resources in 1999-2000, the UNMIK administration decided, appropriately, to "focus social transfer resources on an interim social assistance program" from November 1999 to April 2000. From May 2000, a new social assistance scheme was implemented in stages with support from local and international NGOs. However, the main "social insurance programs – pensions, child allowance and unemployment benefit – had not been reinstated".
52. The SRSG states that, thereafter and for the reasons stated above, UNMIK initiated a reform of the inherited pension system and introduced a new pension scheme. The SRSG states that UNMIK opted to adopt a "basic (flat) pension system" designed "with the intention of avoiding discrimination based on work history, sex, or ethnicity". Indeed, UNMIK Resolution No. 2001/35 establishing the new pension system in Kosovo, envisaged the provision of a basic pension of 28 euros – determined to be in line with the "extreme poverty line" for everyone over the age of 65, irrespective of previous employment or years of experience. In addition, as of October 2007, the Kosovo Government, through an Administrative Instruction, increased the basic pension for persons who had contributed to the Yugoslav pension fund for at least 15 years and could prove it to 75 euros. Furthermore, according to the SRSG, the World Bank indicates in the same Technical Paper that "the real value of pension received from Serbia for beneficiaries that had accrued pension rights from the Serbian pension fund as of 1999 amounted to around 20-30 *Deutsche Mark* (DM)".
53. Turning to the case of the complainant, the SRSG observes that, based on the documentation presented to the Panel, Mr Krasniqi received a pension of 45 euros per month and that there are no indications that, following the Administrative Direction of October 2007, he received an increase in pension payments. The SRSG states that that this increase could have "alleviated the Complainant's situation and would have contributed to an – if only slight – improvement" of his living conditions, also having considered that his former pension would have had a "real value" of pension equivalent to 20-30 euros per month.
54. The SRSG states that the European Court dismissed "the notion that the ECHR guarantees a minimum standard of living", as well as "socio-economic rights such as the right to work, the right to free medical assistance or the right to claim financial assistance from a State to maintain a certain standard of living". In this respect, he refers to the decisions in the case of *Pančenko v. Latvia* (1999) and *Larioshina v. Russia* (2002). In the latter, the European Court dismissed the applicant's claim that her pension – 653 Russian roubles per month equivalent to 25 euros at the time of the application – was inadequate to maintain an adequate standard of living.
55. The SRSG argues that UNMIK responded to the pension issue "as an interim administration of an impoverished territory with very limited budgetary resources and against a backdrop of competing priorities" in a post-conflict environment.

Notwithstanding these challenges, in the SRSG's view, UNMIK did establish "a pension scheme providing for an adequate pension and in compliance with international human rights standards".

56. Therefore, the alleged violations of Article 3 of the ECHR, and Articles 9 and 11 of the ICESCR are not "sustainable".

## **B. The Panel's assessment**

### ***1. Admissibility***

57. The Panel recalls that, by its decision 6 June 2013, it found the complaint admissible under Article 1 of Protocol 1 to the ECHR, Article 3 of the ECHR, and Articles 9 and 11 of the ICESCR. However, before considering the case on its merits, the Panel shall consider the additional objections to admissibility raised by the SRSG (see § 14 above) pursuant to Section 2.3 of UNMIK Administrative Direction 2009/01 and decide whether to accept the case, taking into account the admissibility criteria set out in Sections 1, 2 and 3 of UNMIK Regulation No. 2006/12.

58. On 11 December 2015, the Panel took full note of the admissibility issues which have been raised by the SRSG in his communication of 25 August 2015.

59. The Panel considers that the objection that the complainant did not exhaust the domestic remedies *vis-à-vis* the Serbian authorities is not new, as it has already been raised by the SRSG and dismissed by the Panel at the admissibility stage (see HRAP, *Tomë Krasniqi*, no. 08/10, decision of 6 June 2013, §§ 25, 28-30). The Panel reiterates that the present complaint is addressed against UNMIK, not the Serbian authorities, as also stated in the admissibility decision.

60. Further, insofar as the SRSG objected that the complainant did not file a claim with the ECtHR, the Panel recalls that the rule of exhaustion of remedies only refers to "domestic" remedies and, as such it is not a requirement to exhaust remedies envisaged in the framework of international organisations. The Panel therefore considers that lodging a complaint with the ECtHR, which is clearly not a domestic remedy, is not a remedy that should be exhausted in order to file a complaint before HRAP, in the meaning of Section 3.1 of UNMIK Regulation No. 2006/12.

61. Moreover, and insofar as the SRSG refers to the remedies allegedly made available within the process of the implementation of the *Grudić* judgment, the Panel notes that, according to the case-law of the ECtHR, the domestic remedies that an applicant is required to exhaust are, in principle, those existing at the moment of filing the application with the Court (see ECtH [GC], *Sejdović v. Italy*, no 56581/00, judgment of 1 March 2006, at § 46, and *Paksas v. Lithuania*, no. 34932/04, judgment of 6 January 2011, at § 75).

62. The Panel is aware that this general rule is subject to exceptions. For example, the ECtHR has accepted exceptions in the areas of length of proceedings, when new procedures have been introduced (see ECtHR, *Predil Anstalt v. Italy* (dec.); *Bottaro v. Italy* (dec.)), or when new compensatory procedures have been established in the case of violation of property rights (ECtHR, *Michalak v. Poland* (dec.), and [GC] *Demopoulos and Others v. Turkey* (dec.)). The ECtHR has held that it will consider case by case whether the newly established remedies are effective and accessible (in ECtHR, *Parizov v. the former Yugoslav Republic of Macedonia* (dec.), at §§ 41-47, the new remedy was not effective). In particular, the assessment as to whether a new remedy

shall be considered effective or not must be based on its concrete application (see ECtHR, *Nogolica v. Croatia* (dec.)).

63. The Panel, having noted that the *Grudić* judgment was issued in April 2012 (about two years after the complainant filed his case with the Panel), and having considered that the implementation of the above-mentioned judgment is still pending and under the enhanced supervision of the Council of Europe's Committee of Ministers, does not consider the measures adopted by the Serbian government thus far in order to implement the judgment to be an effective remedy that the complainant should have exhausted. The Panel therefore, unanimously, rejects the SRSG's objection in this regard.
64. Concerning the SRSG's argument with respect to the complainant's victim status, the Panel refers to the case-law of the ECtHR that an applicant would not lose his/her victim status unless the authorities concerned have acknowledged, either expressly or in substance the violation of a Convention right, and then afforded redress (see ECtHR [GC], *Nada v. Switzerland*, no. 10593/08, judgment of 12 September 2012, at § 128; ECtHR [GC], *Gäfgen v. Germany*, no. 22978/05, judgment of 1 June 2010, at § 115; and ECtHR, *Scordino v. Italy* (No.1), no. 36813/97, judgment of 29 March 2006, at § 180). In this respect, the SRSG has not provided evidence that any of the measures above have been taken in favour of the complainant. Therefore, the Panel, unanimously, rejects the argument of the SRSG that the complainant has lost his victim's status.

## 2. *Merits*

### a. *Alleged violation of the right to property*

65. The complainant complains that, by not taking measures to ensure the payment of the pension that he had accrued under the former Yugoslav system, UNMIK, which was mandated with the administration of Kosovo after June 1999, failed to protect his property rights in violation of Article 1 of Protocol No. 1 to the ECHR. In particular he complains that, in the period between 1999 and May 2007 he did not receive any pension at all. After May 2007, he received a basic old age pension in accordance with the new Kosovo pension system whose amount however, 45 euros per month, was much lower than the amount of his contributory pension under the former Yugoslav system.
66. For his part, the SRSG argues that UNMIK, in accordance with the UN Security Council Resolution No. 1244 (1999) establishing its mandate, fully respects the principles of states' sovereignty and territorial integrity. Consequently, in the SRSG's view, it was outside UNMIK's mandate to "to influence authorities outside of the territory of Kosovo including Belgrade authorities". Nonetheless, the SRSG states that UNMIK did address the "pension issue" by carrying out a number of "confidential" consultations and meetings with the Serbian authorities between 1999 and 2002 (see §§ 44-47 above). Further, amidst conflicting priorities and budgetary constraints in the aftermath of the conflict, UNMIK also established through the promulgation of UNMIK Regulation No. 2001/35 of 22 December 2001 *on Pensions in Kosovo*, a new pension system in Kosovo which became operational since 2002.
67. The Panel recalls that it has been established that accrued pension rights are considered property rights and that the reduction or discontinuance of a pension may therefore constitute an interference with the peaceful enjoyment of possessions protected by

Article 1 of Protocol 1 to the ECHR (see HRAP, *Krasniqi v. UNMIK*, no. 08/10, decision of 6 June 2013, at § 29 and the case-law of the ECtHR cited therein).

68. With respect to the SRSG's objection that undertaking any action "to influence" Serbian authorities to resolve the pension problem would be beyond UNMIK's mandate (see § 43 above), the Panel recalls that this part of the complaint concerns the alleged failure by UNMIK to fulfil its positive obligations stemming from Article 1 of Protocol No. 1 to the ECHR. In this respect, the Panel notes that a core part of UNMIK's mandate pursuant to UN Security Council Resolution No. 1244 (1999) was to "promote and protect human rights" in Kosovo. According to subsequent Regulations, UNMIK pledged to exercise its powers in Kosovo in accordance with "internationally recognised human rights standards" (see UNMIK Regulation No. 1999/1 *On the Authority of the Interim Administration in Kosovo*, at Section 2), and in particular in observance of the main international human rights instruments (see UNMIK Regulation No. 1999/24 *On the Law Applicable in Kosovo*).
69. In this context, the Panel recalls that Article 1 of Protocol No. 1 read in conjunction with Article 1 of the ECHR, requires states to "secure to everyone within their jurisdiction" the enjoyment of the rights guaranteed by the ECHR. In this regard, the Panel refers to the case law of the European Court stating that the effective exercise of the right protected by Article 1 of Protocol No. 1 to the ECHR "does not depend merely on the State's duty not to interfere, but may require the adoption of positive measures of protection ... particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and his effective enjoyment of his possessions" (see ECtHR, *Öneryıldız v. Turkey*, no. 48939/99, judgment of 30 November 2004, at § 134). With regard to the jurisdiction of UNMIK *vis-à-vis* the Serbian authorities, the Panel has already noted that the European Court has found that, in the presence of a factual situation which reduces the scope of jurisdiction of the authority concerned, and in order to fulfil its human rights obligations, "the state in question must endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign states and international organisations, to continue to guarantee the enjoyments of the rights and freedoms guaranteed by the Convention" (see ECtHR [GC], *Ilaşcu and Others v. Moldova and Russia*, judgment of 8 July 2004, at § 333; see HRAP, *Krasniqi v. UNMIK*, cited in § 67 above, at § 30). The Panel notes that, indeed, the SRSG implicitly accepts that UNMIK had such a responsibility to take measures concerning the suspension of pension payments in Kosovo, since he highlights the fact that UNMIK officials were mandated on a number of occasions to address this issue with the Serbian authorities (see §§ 44-47 above).
70. Having established the existence of UNMIK's positive obligations under Article 1 of Protocol No. 1 to the ECHR with respect to the complainant's claim, the Panel must assess whether UNMIK adopted adequate measures, within the limits of its power and mandate, to protect and ensure the complainant's pension rights.
71. The Panel notes, as stated by the SRSG, that between 1999 and 2002, diplomatic efforts in the forms of a handful of "low-key and confidential" encounters were held between UNMIK officials and Serbian authorities whereby the "pension issue" was addressed (see §§ 45-47 above), although this time is outside of its temporal jurisdiction. The Panel is not convinced that concrete measures were taken during this period to protect the pension rights of those eligible, including the complainant, since no supporting documentation has been provided by the SRSG which clarifies the scope or outcome of such diplomatic efforts.

72. Nonetheless, the Panel also notes that in the effort to resolve the pensions' problem in Kosovo, in 2001, UNMIK established from scratch a new pension scheme in Kosovo, which became operational starting from 2002. The Panel notes that this system provided for basic, old age, pensions to all those above 65 years of age, irrespective of any previous employment. The monthly amount of this pension was 28 euros in 2002, 35 euros in 2003 and 45 euros from 2004 until 2008.
73. Coming to the period within the Panel's temporal jurisdiction, starting on 23 April 2005, the Panel notes that the complainant had become eligible to receive a basic old age pension under the Kosovo pension scheme established by UNMIK since 2003, when he turned 65 years old. Indeed, according to a Supreme Court decision presented by the complainant, he has been in receipt of such a pension since May 2003 (see § 31 above).
74. In light of the above, the Panel considers that UNMIK, within the limits of its powers and in line with its mandate under UN Security Council Resolution 1244 (1999), took all possible steps to fulfil its positive obligations under Article 1 of Protocol No. 1 to the ECHR. The Panel accordingly finds that UNMIK did not violate the complainant's right to property.

***b. Alleged violation of Articles 9 and 11 of the ICESCR***

*i. General principles*

75. The complainant complains that the non-payment of his contributory pension during the period from 1999 to 2007, and the inadequacy of the old age pension granted to him thereafter amounted to a violation his rights to social security and to an adequate standard of living (Articles 9 and 11 of the ICESCR).
76. Both the right to an adequate standard of living and the right to social security are included in the Universal Declaration of Human Rights (UDHR) which states that "everyone, as a member of society, has the right to social security" (Article 22, UDHR) and that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control" (Article 25.1, UDHR).
77. The right to social security and the right to an adequate standard of living are also guaranteed in the ICESCR, which reads in relevant parts:

Article 9

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

Article 11.1

"The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation...”

78. The Panel notes that the right to social security has been strongly affirmed in international law, being embodied in several international human rights treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5 (e) (iv), the Convention on the Elimination of All Forms of Discrimination Against Women (Article 11 and 14) and the Convention on the Rights of the Child (Article 26), ILO treaties.
79. In its General Comment No. 19 *on the Right to Social Security (Article 9)*, the ICESCR Committee has spelled out the key features of this right and the scope of state parties’ obligations. The right to social security encompasses the right to access and maintain protection from social risks and contingencies, especially those resulting from circumstances outside people’s control, such as “work-related income due to sickness, disability, maternity, employment injury, unemployment, old age or death of a family member, unaffordable access to health care or insufficient family support ...”<sup>2</sup>. In this context, state parties are obliged to progressively ensure the right to social security to all individuals under their territories, providing specific protection for disadvantaged and marginalised individuals and groups<sup>3</sup>.
80. Specifically with respect to older persons, defined as those aged 60 and above, the Committee has held that, along with those who are in good health and whose financial situation is acceptable, there are many who do not have adequate means of support, and who feature among the most vulnerable, marginal and unprotected groups<sup>4</sup>. For this reason, and having considered that there is no binding human rights instrument that specifically protects the rights of older persons, the Committee has held that authorities are obligated under the Covenant to pay specific attention to promoting and protecting the rights of older persons especially in times of “recession” and of “restructuring of the economy”, when they are particularly at risk<sup>5</sup>.
81. The right to social security can be provided in various ways, including contributory/insurance-based schemes and or non-contributory/universal schemes. However, according to the Committee, a social security scheme in line with the Covenant standards should by law provide older persons, starting at a specific age, and within the limits of available resources, non-contributory old age benefits, social services and other assistance for those not provided with an insurance-based system<sup>6</sup>.
82. The ICESCR Committee has stated that “social security is of central importance for guaranteeing a life in dignity”<sup>7</sup>, highlighting the relationship between this right and the realisation of other economic and social rights human rights, primarily the right to an

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<sup>2</sup> Committee on Economic, Social and Cultural Rights, General Comment. No. 19 on the Right to Social Security (Article 9), adopted on 4 February 2008, UN Doc. E/C.12/GC/19, at § 2.

<sup>3</sup> Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, 31 March 2010, UN Doc. A/HRC/14/31, at § 47.; see also Committee on Economic, Social and Cultural Rights, General Comment No. 3 on the Nature of States Parties’ Obligations (Art.2 Para. 1 of the Covenant), 14 December 1990, UN Doc. E/1991/23, at § 12.

<sup>4</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 6 on the Economic, Social and Cultural Rights of Older Persons, 8 December 1995, UN Doc. E/1996/22, at § 17.

<sup>5</sup> *Ibid.*, at § 13.

<sup>6</sup> *Ibid.*, at § 30; and Committee on Economic, Social and Cultural Rights, General Comment. No. 19 cited in § 79 above, at § 15.

<sup>7</sup> *Ibid.*, at § 1.

adequate standard of living and the right to health. In this regard, in respect to the principle of human dignity contained in the preamble of the Covenant<sup>8</sup>, it is well-established that, whether in cash or in kind, and besides being available, accessible and affordable, pension benefits must be adequate “in amount and duration in order that everyone may realise his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care”. Further, the adequacy criteria should be monitored regularly to ensure that beneficiaries are able to afford the good and services they require to realise their Covenant rights<sup>9</sup>.

83. It is accepted that, pursuant to Article 2 of the ICESCR, which concerns the scope of states’ obligations under the Covenant, the full realisation of the right to social security and the right to an adequate standard of living can only be reached “progressively”, to the maximum of states’ available resources. However, it is understood that these provisions of the ICESCR also impose obligations which are of immediate effect. These include: the obligation to guarantee that the exercise of these rights shall be free from discrimination and ensuring at least the enjoyment of “minimum essential levels” of each of the rights concerned<sup>10</sup>.
84. This last obligation, with regard to the right to social security, requires ensuring access to a social security scheme that provides “a minimum level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuff and the most basic forms of education”<sup>11</sup>.
85. In the context of the right of older persons to an adequate standard of living, the Committee has held that, in line with Article 1 of the UN Principles for Older Persons adopted by the General Assembly in 1991, Article 11 of the ICESCR demands that the older persons should have at least access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help<sup>12</sup>.
86. The Committee has underlined that the minimum core obligations stated above, do apply “also in times of severe resource constraints”, where authorities have obligations to protect “the vulnerable members of society” (ICESCR Committee, General Comment No. 3 cited above, at § 12). Moreover, special attention should be given to ensure that a social security system can respond in times of emergency, such as during and after a natural disaster, armed conflict and crop failure<sup>13</sup>. In order for authorities to avoid responsibility to meet at least its minimum core obligations, they must demonstrate that all efforts have been made to use all resources that are at their disposal to satisfy, as a matter of priority, these core minimum obligations<sup>14</sup>.

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<sup>8</sup> *Ibid.*, at § 22.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*, at § 40; see also Committee on Economic Social and Cultural Rights, General Comment No. 3 cited in footnote 3, at § 10.

<sup>11</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 19, cited in § 79 above, at § 59; to be read in conjunction with General Comment No. 14 on the Right to the Highest Attainable Standard of Health (Article 12), 11 August 2000, UN Doc. E/C.12/2000/4, at §§ 43 and 44.

<sup>12</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 6, cited in footnote 4, at § 32.

<sup>13</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 19, cited in § 79 above, at § 50.

<sup>14</sup> *Ibid.*, at § 60.

*ii. Application of general principles in the present case*

87. The Panel notes that in the present case, the complainant was provided with social benefits under the former Yugoslav system, and specifically with a contributory pension equivalent to 180 euros per month, which he received until December 1998.
88. The Panel also notes that, due to the political situation following the Kosovo conflict and the issuance of UN Security Council Resolution 1244 (1999), under the UNMIK administration during the period 1999-2001, the complainant found himself with no pension benefits or any other social protection.
89. However, the Panel also notes that, starting from 2002, UNMIK did comply with its obligation under the ICESCR, specifically under Article 9 of the Covenant, to establish a social security scheme which included contributory as well as non-contributory, old age pensions, the latter being provided by law from 65 years of age. The Panel further notes that this scheme initially did not contain provisions for those workers who had paid contributions to the former Yugoslav system, like the complainant. Nonetheless, under this scheme, the complainant received since the moment he became entitled to it in 2003 an old age pension, whose initial amount was of 35 euros per month.
90. Coming to the period within its jurisdiction, the Panel notes that the complainant received in this period an old age pension of 45 euros monthly. Only as of September 2009, beyond the Panel's temporal jurisdiction, the complainant started to receive a cumulative pension of 80 euros, based on his age as well as his previous contributions to the Yugoslav pension system (see § 31 above).
91. The Panel considers that, through the establishment of a pension scheme in Kosovo, which included both contributory and non-contributory, old age, pensions UNMIK did comply with part of its obligations under the ICESCR, and in particular under Article 9 of the Covenant.
92. However, the Panel is concerned that the monthly amount of old pension envisaged in UNMIK Regulation No. 2005/31 and as such provided to the complainant in the period within the Panel's jurisdiction - 45 euros per month, that is about one and half euro per day - 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. In this regard, the Panel takes note of the complainant's statement that his pension was not even sufficient to buy the medicines he needed.
93. The Panel further takes note of the fact that for older persons, financial security and health are closely linked, since expenses for health care account for three quarters of the income of poorest groups<sup>15</sup>. It has been shown that, in these circumstances, "the positive impact of social protection initiatives on older persons' standard of living can be nullified by the burden posed by health-related costs"<sup>16</sup>.
94. The Panel notes that assessing the adequacy of pension and other social security benefits can be a complex and difficult exercise, especially considering that does not seem to be broad consensus among experts on what constitutes the best measure of

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<sup>15</sup> Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda, cited in footnote 3 above, at § 90.

<sup>16</sup> *Ibid.*

pension adequacy. Nonetheless, the Panel gives due consideration to the assessment made by the ICESCR itself Committee in November 2008 that the minimum levels of basic and contribution-based old-age pension benefits” provided by UNMIK in Kosovo were “insufficient to ensure an adequate standard of living to beneficiaries and their families”<sup>17</sup>. The Panel also notes that a similar assessment is contained, among other sources in a 2012 report of the Group for Legal and Political Studies<sup>18</sup>. The report, funded by UNDP, finds the amount of basic pension as inadequate to guarantee a decent standard of living in Kosovo. The report states that it has been calculated that “for the consumption of normal food in Kosovo, a person needs 3.01 € per day”; thus with a pension of 35/80euros “a pensioner is unable to cover the costs of food alone, even if housing and medical costs are already covered” and that “pensioners are left in a miserable state of poverty, living on only 1,5 € per day”<sup>19</sup>. The report also states that basic pensions in Kosovo have not been subject to indexation as prescribed by law but rather slightly increased in 2003, 2004 and 2009 on ad hoc basis<sup>20</sup>.

95. The Panel also notes that no arguments or evidence have been put forward by the SRSG that the complainant might have availed himself for the period under consideration of other sources of income or revenue to sustain a decent standard of living.
96. The Panel further recalls that it is a well-established principle that the minimum core obligations under the Covenant apply, and especially more so for the most vulnerable and marginalised people, even in times of resource constraints or in the aftermath of a conflict like in the case of Kosovo and rejects the SRSG’s argument in this respect (see § 66 above).
97. In light of the above, the Panel considers that in the particular circumstances of the case and in the absence of further information, by providing the complainant an old age pension inadequate to secure an adequate standard of living, UNMIK did not meet its core obligations under Article 9 and 11 of the ICESCR. The Panel therefore finds that these provisions have been violated.
98. Having regard to its findings under Articles 9 and 11 of the ICESCR, the Panel considers that it is not necessary to examine separately the merits of the complainant’s essentially identical claims made under Article 3 of the ECHR (see ECtHR, *Tešić v. Serbia*, nos. 4678/07 and 50591/12, judgment of 11 February 2014, at § 67).

## **FOR THESE REASONS,**

The Panel, unanimously,

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<sup>17</sup> ICESCR Committee, *Consideration of Reports Submitted by State Parties under Articles 16 and 17 of the Covenant, Document Submitted by the United Nations Interim Administration in Kosovo (UNMIK)*, 19 November 2008, UN Doc. E/C.12/UNK/CO/1, at § 21.

<sup>18</sup> Group for Legal and Political Studies, *Pension System in Kosovo: Review of Current State, Main Challenges and Gaps*, December 2012, accessed at <http://legalpoliticalstudies.org/download/Policy%20Report%2006%202012%20eng.pdf>, on 15 May 2016.

<sup>19</sup> At p. 15.

<sup>20</sup> At p. 8.

- 1. FINDS THAT THERE HAS BEEN NO VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE ECHR;**
- 2. FINDS THAT THERE HAS BEEN A VIOLATION OF ARTICLES 9 AND 11 OF THE ICESCR;**
- 3. FINDS THAT THERE IS NO NEED TO CONSIDER THE COMPLAINT UNDER ARTICLE 3 OF THE ECHR.**
- 4. RECOMMENDS THAT UNMIK:**
  - a. ACKNOWLEDGES ITS FAILURE TO MEET ITS OBLIGATIONS UNDER ARTICLES 9 AND 11 OF THE ICESCR, AND MAKES AN APOLOGY TO THE COMPLAINANT;**
  - b. TAKES APPROPRIATE STEPS TOWARDS PAYMENT OF ADEQUATE COMPENSATION TO THE COMPLAINANT FOR MORAL DAMAGE IN RELATION TO THE FINDING OF VIOLATIONS OF ARTICLES 9 AND 11 OF THE ICESCR;**
  - c. TAKES APPROPRIATE STEPS TOWARDS RELEVANT AUTHORITIES IN KOSOVO TO MAKE SURE THAT SOCIAL SECURITY BENEFITS, INCLUDING OLD AGE PENSIONS, ARE PROVIDED IN COMPLIANCE WITH APPLICABLE HUMAN RIGHTS STANDARDS;**
  - d. TAKES IMMEDIATE AND EFFECTIVE MEASURES TO IMPLEMENT THE RECOMMENDATIONS OF THE PANEL AND TO INFORM THE COMPLAINANT AND THE PANEL ABOUT FURTHER DEVELOPMENTS IN THIS CASE.**

Andrey Antonov  
Executive Officer

Marek Nowicki  
Presiding Member