

Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges

Edited by Walter Kälin, Rhodri C. Williams,
Khalid Koser, and Andrew Solomon

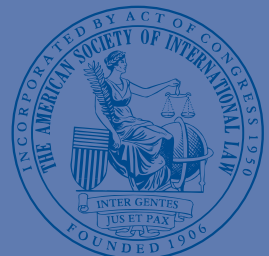
BROOKINGS

u^b

UNIVERSITÄT
BERN

Brookings-Bern Project on Internal Displacement

THE AMERICAN SOCIETY OF INTERNATIONAL LAW



Chapter 12

The Right to Social Security Including Pensions

Anne Charbord*

INTRODUCTION

In the course of displacement, internally displaced persons (IDPs) often leave everything behind, including their property, their belongings, and their employment. National governments, which have primary responsibility for the protection, security, and welfare of IDPs, must ensure that, both during displacement and in finding durable solutions to displacement, IDPs are able to enjoy the same rights as the rest of the population, without discrimination. This often implies taking measures to address their specific needs, as a particularly vulnerable category of the population. The protection of IDPs includes ensuring that their economic, social, and cultural rights are fully respected, which is a crucial aspect of ensuring that durable solutions are sustainable. And this includes examining the issue of their right to social security.

The issue of social security has for a long time been addressed outside the human rights framework. It has been seen as a needs-based charity, or as an element of a state's social policy, on which international law had little or no bearing. Since the adoption of the Universal Declaration of Human Rights (UDHR) and of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the right to social security has clearly been a part of international human rights law. Additionally, a number of other international human rights conventions, at the universal and at the regional level, expressly refer to it.

There is no doubt that the “right to social security” represents an important legal guarantee aimed at ensuring the right of everyone to live a life in human dignity in difficult situations, including ill-health, disability, unemployment, injury, death, maternity, and other unforeseen situations which may cause

* Anne Charbord has worked for the OSCE in Bosnia and in Kosovo and is currently working for the UN Office of the High Commissioner for Human Rights.

distress. It is fundamental to social justice and crucial to ensuring that individuals do not fall below a defined minimum subsistence level or poverty line.

While the right to social security can be broadly described as protecting the material conditions necessary for an adequate standard of living and from the life-threatening and degrading conditions of poverty and material insecurity, its content and scope of application remain somewhat unclear. It is often linked to a number of other human rights, such as the right to an adequate standard of living, the right to health, the right to food, and even, in specific cases, to the right to property. Some link it to civil and political rights, such as the right to life and the prohibition of cruel, inhuman, degrading treatment or punishment.

There are a number of approaches to the concept of social security. These range from a narrow approach, limited to support in case of loss of income, to a more classical approach which identifies nine social risks—as reflected in International Labour Organization (ILO) conventions on the topic—to even broader approaches, which take poverty as a starting point. Pensions, or old-age benefits, may be considered as a specific aspect of the protection afforded by social security.

At the outset, it is important to highlight that the distinction between social security and social assistance is highly controversial and may appear blurred and arbitrary. While both are designed to ensure that the basic needs of the beneficiaries are covered, it is generally accepted, however, that social assistance refers to benefits which are based solely on an individual's needs, without any requirement of affiliation to a social security scheme, requirement of professional activity, or payment of contributions. Social security, on the contrary, is based on affiliation to social security schemes and, as such, is based on entitlements. The benefits are granted in the event of a risk arising, but are not intended to compensate for a state of need as such.

This chapter will focus on the right to social security, as protected in a number of international instruments, including pensions as a specific aspect of social security protection. This chapter will not focus on social assistance nor will it examine the issue of the provision of services that are basic for survival,

including essential food and drinking water, basic shelter and housing, and essential medical services and sanitation. They may either fall under the examination of the provision of humanitarian assistance, or be considered part of the substantive right itself, such as the right to health or the right to food.

A pre-condition for a right to social security of IDPs, and for a right to access social security, is that social security schemes have been set up by the state.¹ Where this is the case, it is particularly important that IDPs do not lose their acquired rights because they are, or have been, displaced. IDPs are generally at greater risk of impoverishment than the rest of the population. Social security aims at ensuring that particularly vulnerable categories of the population, such as the elderly, the disabled, and the sick are able to cope with their situation, without falling below a defined poverty level. As such, ensuring that particularly vulnerable IDPs—the elderly, the disabled²—are able to maintain their right to social security benefits, which are often their only means of survival, is especially important. It contributes to providing them with the possibility of re-establishing themselves and reintegrating back into society.

LEGAL FRAMEWORK

This section will first examine a number of rights which provide the international background to IDPs' right to social security, and right of access to social security. These include the rights to social security, to equality and non-discrimination as well as property under international and regional human rights law. The chapter will then focus on the relevant provisions of the *Guiding Principles on Internal Displacement* (the *Guiding Principles*), which do not expressly mention such a right. The last sub-section will focus on the applicability of the right to social security in this context.

¹ This study therefore concentrates on states which have adopted such regulatory frameworks before the onset of internal displacement, as discussed in Part II below.

² The Conference on Internal Displacement in the IGAD Region recognized that the 'elderly and disabled IDPs were also particularly vulnerable groups within internally displaced populations, who merited special attention and support,' *see* Report of the Expert Meeting, Brookings SAIS Project on Internal Displacement, August 20-September 2, 2003.

Relevant Guiding Principles

The *Guiding Principles* do not expressly address the right to social security or the more specific aspect of pensions. However, a number of the Principles are relevant to the subject matter of this chapter.

Principle 1(1) states that “[i]nternally displaced persons shall enjoy, in full equality, the same rights and freedoms under international law and domestic law enjoyed by other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.” Principle 4 provides for non-discrimination in the application of the *Guiding Principles*.

In addition, Principle 19 states that:

- (1) All wounded and sick internally displaced persons as well as those with disabilities shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention they require, without distinction on any grounds other than medical ones. When necessary, internally displaced persons shall have access to psychological and social services.
- (2) Special attention should be paid to the health needs of women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counseling for victims of sexual or other abuses.
- (3) Special attention should also be given to the prevention of contagious and infectious diseases, including AIDS, among internally displaced persons.

Principle 28(1) affirms IDPs’ right to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country, and places the responsibility on competent authorities to establish conditions as well as to provide the means to allow such return. Also, Principle 29(1) affirms that IDPs who have returned to their homes or places of habitual residence or who have resettled in another part of

the country shall not be discriminated against as a result of their having been displaced and sets forth their right to participate fully and equally in public affairs at all levels and have equal access to public services.

The rights to property and possessions are also protected during displacement and in the context of durable solutions (Principles 21 and 29(2)). Finally, Principle 20 relates to the right of recognition as a person before the law as well as the right to necessary documentation to enable enjoyment and exercise of IDPs' legal rights.

Legal Basis

Universal Human Rights Law

Article 22 of the Universal Declaration of Human Rights (UDHR)³ states that “[e]veryone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.” Article 25 of the UDHR states that “[e]veryone 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 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴, affirms “the right of everyone to social security, including social insurance.” In addition, Article 10(2) recognizes the right of working mothers “to adequate social security benefits” and Article 10(3) requires states parties to undertake special measures of protection and assistance for children and young persons. Although the ICESCR does not contain a definition of

³ Universal Declaration of Human Rights, U.N. Doc A/810, at 71 (1948).

⁴ International Covenant on Economic, Social and Cultural Rights, U.N. Doc. A/6316 (1966).

“social security,”⁵ the Committee on Economic, Social and Cultural Rights’ General Comment to Article 6 on the economic, social and cultural rights of older persons states:

[t]he right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.⁶

The right to social security is also enshrined in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁷ the Convention on the Rights of the Child (CRC),⁸ the Convention on the Elimination of All Forms of Racial Discrimination (CERD),⁹ the International Convention on the Protection of the Rights of All Migrant Workers and

⁵ After this manuscript was finalized, the Committee on Economic, Social and Cultural Rights adopted General Comment No. 19, The Right to Social Security, UN Doc E/C.12/GC/19, art. 9 (2008).

⁶ *Id.* ¶ 2.

⁷ Convention on the Elimination of All Forms of Discrimination against Women (1979), G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, arts. 11(1), 14(2), U.N. Doc. A/34/46, Sept. 3, 1981.

⁸ Convention on the Rights of the Child, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. No. 49 at 167, art. 26(1), U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1989).

⁹ G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, art. 5(e)(iv), U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, Jan. 4, 1969.

Members of Their Families,¹⁰ and the 1951 Convention relating to the Status of Refugees (the Refugee Convention). Article 24(1)(b) of the Refugee Convention¹¹ accords refugees the same treatment as nationals with respect to “social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme).”

ILO Convention 102 on Social Security (minimum standards)

The ILO Social Security (Minimum Standards) Convention (the ILO Social Security Convention)¹² establishes nine branches of social security. They are medical care, sickness benefit, unemployment benefit, old age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit, and survivor’s benefit.¹³ It is the only international instrument, based on basic social security principles, that establishes universal minimum standards for all nine branches of social security.¹⁴

¹⁰ G.A. Res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, art. 27(1), U.N. Doc. A/45/49 (1990), July 1, 2003.

¹¹ Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force Apr. 22, 1954.

¹² C102 Social Security (Minimum Standards) Convention, 1952.

¹³ Other relevant ILO Conventions include: Maternity Protection Convention (Revised), 1952 (No. 103); Equality of Treatment (Social Security) Convention, 1962 (No. 118); Employment Injury Benefits Convention, 1964 (No. 121); Invalidity, Old Age and Survivors’ Benefits Convention, 1967 (No. 128); Medical Care and Sickness Benefits Convention, 1969 (No. 130); Maintenance of Social Security Rights Convention, 1982 (No. 157); Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168).

¹⁴ Other ILO documents which refer to social security include the Declaration of Philadelphia, Annex to the Constitution of the ILO, adopted by the ILO, May 10, 1944 and the Conclusions concerning social security adopted by the ILO, 89th session, 2001 which re-affirmed that social security was a basic human right, ¶ 2.

Regional Human Rights Law

Article 9 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador)¹⁵ states that “[e]veryone shall have the right to social security protecting him from the consequences of old age and disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence.” The African Charter on Human and Peoples’ Rights (AfCHPR)¹⁶ does not expressly recognize a right to social security. However, Article 13(3) affirms that “[e]very citizen shall have the right of access to public property and services in strict equality of all persons before the law” and Article 18(4) states that the aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Article 12 of the European Social Charter¹⁷ reaffirms the right of all workers and their dependents to social security and places a number of positive obligations on state parties to achieve this right.¹⁸ Article 30 of the same

¹⁵ O.A.S. Treaty Series No. 69 (1988), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82 doc.6 rev.1 at 67 (1992).

¹⁶ African [Banjul] Charter on Human and Peoples' Right, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

¹⁷ European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89.

¹⁸ For the purpose of this article, social security covers a number of schemes, which must have three characteristics: (1) the social security system should cover the traditional risks: health care, sickness, unemployment, old age, employment injury, family, and maternity; (2) it must be collectively financed, which means funded by contributions of employers and employees and/or by the state’s budget. (3) Article 12§1 recognizes the right to social security to workers and their dependents, including those who are self-employed. This means it must cover a significant percentage of the population as regards sickness insurance and family benefits, and of the active population as regards sickness and maternity benefits, unemployment benefits, pensions, and work accidents or occupational diseases benefits. When the system is financed by taxation (or budgetary resources), its coverage in terms of persons

Charter requires states parties “to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance,” thereby clearly distinguishing between social security and social assistance.

Right to Equality and Non-discrimination in the Application of the Right

Although its exact contours may be unclear, the right to social security, including pensions and other benefits, is protected under international human rights law. In order to ensure that the analysis is complete, the right to non-discrimination in the application of the right to social security and the principle of equality need to be included.

Article 2(2) of the ICESCR, which states that “[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,” is a general non-discrimination clause—an accessory clause—in that it is a right to not be discriminated against in the application of the rights protected by the Covenant. This type of clause is found in virtually all other human rights instruments. Although IDPs are not specifically mentioned, “other status” certainly includes discrimination based on the fact of having been internally displaced.

The right to equality—or of equal protection of the law—is enshrined in Article 26 of the ICCPR, which provides that:

[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and shall guarantee to all persons equal and effective protection against discrimination on any

protected should rest on the principle of non-discrimination, without prejudice to the conditions for entitlement.

ground, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Reference to such a “right to equality” can be found in a number of other human rights instruments,¹⁹ with the notable exception of the ICESCR and the ECHR.²⁰ It prohibits discrimination in law or practice in any field regulated and protected by a state’s public authorities when not based on objective and reasonable criteria. In contradistinction to the principle of non-discrimination in the application of the rights contained in the ICESCR, this right applies regardless of whether the subject matter falls under the ambit of the right protected by the ICCPR.

What became known as the “social security cases against the Netherlands” were the first communications in which a violation of the prohibition of discrimination was alleged independently of any right protected by the ICCPR.²¹ In these cases, the United Nations Human Rights Committee (the Human Rights Committee) determined that Article 26 of the ICCPR also applies to social and economic rights and that the non-discrimination clause in Article 26 of the ICCPR covers all spheres of state activity, not only those that fall within the scope of another right recognized in it. The Human Rights Committee emphasized that Article 26 did not “require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State’s sovereign power, then such legislation must comply with Article 26 of the Covenant.” As such, the right to equality protects against discrimination in social security systems on prohibited grounds and discrimination may arise from the exclusion of certain groups

¹⁹ See UDHR, art. 7; ACHR, art. 24; AfCHPR, arts. 3(1), 3(2).

²⁰ See, however, Protocol No. 12 to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms of September 4, 2000 providing in Article 1(1) that “[t]he enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. “

²¹ See Broeks and Zwann-de Vries cases, communications No. 172, 182/84.

from eligibility for benefits, or from compliance with conditions in order to qualify for benefits.

The Dutch cases referred to discrimination based on sex—which is one of the grounds specifically mentioned in Article 26, but in other cases, the Human Rights Committee has found violations of Article 26 when social security schemes discriminated on the ground of nationality,²² which is not a ground explicitly included in Article 26. As such, there is no doubt that a social security system which would exclude solely on the basis of internal displacement would be contrary to this Article.

*The Right to Property*²³

An analysis of the legal framework applicable to social security and pensions would not be complete without noting that certain social security benefits, including pensions, have been considered as protected under the right to property in regional human rights law.

In *Gaygusuz v. Austria*,²⁴ the European Court of Human Rights (the ECtHR) examined emergency assistance granted by the Austrian Government to individuals who had exhausted their entitlement to unemployment benefits. The ECtHR noted that entitlement to this social benefit was linked to the payment of contributions to the unemployment insurance fund, which was also precondition for the payment of unemployment benefits. It follows that there is no entitlement to emergency assistance where such contributions have not been made. The ECtHR concludes that “the right to emergency assistance [...] is a pecuniary right for the purposes of Article 1 of Protocol No. 1.”²⁵ [This]

²² See, e.g., *Gueye et al v. France*, communication 196/1983.

²³ See chapter ten on the right to property in this volume.

²⁴ ECtHR, *Gaygusuz v. Austria*, Aug. 31, 1996, case No. 39/1995/545/631.

²⁵ ‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the

provision is therefore applicable without it being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay taxes or other contributions.” The Court went on to find a violation of the right to non-discrimination linked to Article 1 of Protocol 1, in that the authorities’ refusal to grant the applicant emergency assistance was based solely on his nationality, which was not considered by the Court as based on any reasonable and objective justification.

In the case of *Azinas v. Cyprus*,²⁶ the ECtHR considered that where an employer has given a more general undertaking to pay a pension on conditions which can be considered to be part of the employment contract, the individual acquired a right which constituted a “possession” within the meaning of Article 1 of Protocol No. 1 and the ECtHR subsequently found a violation of the applicant’s right to property. The case was subsequently reviewed by the Grand Chamber, which considered it inadmissible.

Within the Inter-American system, social security benefits have also been considered as protected under the right to property.²⁷ In the case of “*Five pensioners*” v. *Peru*, the Inter-American Court of Human Rights stated that from the time that the applicants ceased to work and opted for the retirement set forth in the law, they acquired the right to their pensions being regulated by the terms and conditions established in the law. In other words, the pensioners acquired a right to property related to the patrimonial effects of the rights to a pension.²⁸

right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties’.

²⁶ ECtHR, *Azinas v. Cyprus*, June 20, 2002, No. 56679/00.

²⁷ Article 21 of the IACHR, which states: ‘1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law’.

²⁸ IACtHR, (Ser. C), No.98/2003.

Analysis of the Legal Framework and Applicability to IDPs

The *Guiding Principles* do not expressly refer to a right to social security or access to pensions and other benefits of a similar nature. However, it is clear from an analysis of the different provisions, both under international and regional human rights law, as well as from the *Guiding Principles* that—if such mechanisms exist in the country where displacement occurs—IDPs have the right to take part in social security schemes as well as a right to access social security benefits, without which IDPs' right to social security becomes ineffective. This is the case both during displacement and in the context of return or resettlement, once durable solutions become possible.

It is clear that IDPs are entitled to benefit from the right to social security as provided under international human rights law, even though this right is not specifically mentioned in the *Guiding Principles*. IDPs normally retain citizenship and do not lose, as a consequence of being displaced, the rights granted to the population at large. In the context of ensuring IDPs' dignity and their economic, social and cultural reintegration, the *Guiding Principles* highlight that IDPs must enjoy equal access to public services, which may include pensions and other entitlements. It is clear that the principle of non-discrimination and equality are crucial in this subject matter. IDPs are entitled to non-discriminatory application of the rights protected under international law, but they are also entitled to equality in the application of laws relating to rights that are not protected under international human rights law or the *Guiding Principles*. Finally, the right to property, which is expressly addressed by the *Guiding Principles*, may also be relevant. Insofar as the benefits derived from a social security scheme are considered as possessions, IDPs should be protected against unjustified interference by the state and should be repaired in case of violation.

As such, even if not expressly referred to in the *Guiding Principles*, IDPs are entitled to equally contribute to schemes set up by the state, both during and after displacement. The state must ensure equal, non-discriminatory access to benefits, both during and after displacement, and in case of a violation, the state must ensure compensation and reparation.

OVERVIEW OF OBSTACLES TO THE IMPLEMENTATION OF THE GUIDING PRINCIPLES

This section will focus on highlighting the main issues in ensuring that IDPs are able to benefit from the right to social security as well as access to pensions and other benefits, both during displacement and after displacement. The section refers to a number of country-specific situations taken from the states of the former Yugoslavia. The primary reason this region was chosen is because of the high level of social protection that existed before the conflicts that led to internal displacement. As such, it provides a valuable example of the challenges encountered by IDPs in ensuring their right to equal access to social security. Before examining the country-specific examples, this section focuses on trends in the regulatory framework.

Regulatory Framework

While the international standards exist, both under international human rights and under international labor law, there is no single model of social security. This may be explained by the fact that the models adopted depend on a number of varying factors, including a country's history, political system, and levels of economic development. By way of example, systems may be private or public, run at the state or sub-state level, by private enterprises, or within a planned economy. There may also be private schemes. The level and types of coverage also varies between states. It is clear, however, that no matter what type of system is chosen, a number of principles must be respected, including that social security schemes must not be discriminatory; be secure; and be run according to principles of transparency and good governance.²⁹

As part of their obligations under the ICESCR, states undertake to “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the

²⁹ See International Labour Organization [ILO], *Social Security: A New Consensus*, ¶ 4 (2001).

adoption of legislative measures” (Article 2.1). In further defining states’ obligations, the UN Committee on Economic, Social and Cultural Rights (the Committee) stated that this placed at least two obligations of immediate effect on states, the “undertaking to guarantee” and the obligation to prevent discrimination in the application of the right.³⁰ The Committee notes that in some cases, including the right to social security, “legislation may [...] be an indispensable element for many purposes. States may also need to adopt administrative, financial, educational and social measures as well as provide an effective remedy.”³¹

Turning to the states that will be examined below, the manner in which social security is regulated reflects the fact that the models vary greatly. A common trend throughout these states is that the varying social security schemes are regulated by laws and by-laws. In Croatia, Serbia and Montenegro, the financing, administration and regulatory framework for the social security schemes is to be found at the state level, whereas in Bosnia and Herzegovina, these are to be found at the sub-state—Entity or Cantonal—level. The organization, number, and administration of the schemes also differ from one state to the other.

Country-specific Examples: Overview of States from the Former Yugoslavia

Under the Socialist Federal Republic of Yugoslavia (SFRY), the citizens’ basic right to social security was established by Article 281 of the 1974 Constitution. Based on this provision, the SFRY enacted the Law on Basic Rights of Pension and Disability Insurance,³² which granted a set of equal minimum rights to be enjoyed by all the citizens of the Yugoslav Federation and regulated the rights of citizens who moved from one Republic to another. In addition, as the six Republics each had their own pension fund, they had

³⁰ See Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of States Parties’ Obligations (art. 2, ¶ 1, of the Covenant), ¶¶ 1-2.

³¹ *Id.* ¶ 3.

³² SFRY Official Gazette Nos. 23/82, 77/82, 75/85, 8/87, 65/87, 87/89, 54/90, 84/90.

competency to develop their own laws and each pension fund was permitted to have its own statutes.

In principle, after having contributed to the national pension fund through employment in state or private enterprises, individuals were entitled to “old age pensions” following the attainment of a certain age, fulfillment of a certain number of working years, or a combination of the two. The pension base was calculated on the average of the individual’s ten best working years. Other types of pensions existed, such as family pensions,³³ “anticipated” old age pensions, and special service pensions.³⁴ It should also be recalled that the Yugoslav Army (JNA) had a special fund, which was separate from any one of the Yugoslav Republics and controlled from Belgrade.

Bosnia and Herzegovina (BiH)

The ethnic nature of the conflict seriously disrupted the pension system in BiH and resulted in the creation of three separate funds.³⁵ This mainly, if not only,

³³ For example, a widower who was not receiving a pension was entitled to claim the pension of the dead spouse and children under the age of 27 and enrolled full time in school were entitled to claim a family pension.

³⁴ Large pensions granted to individuals who were considered as having made special contributions to the life of the state (artists, politicians, etc.). The granting of these special service pensions was a political decision, and, sometimes, contributions to the fund did not need to be made. Also included in this category were the pensions granted by Article 42 of the R.S. Law on Pension and Disability Insurance to individuals who participated in the R.S. army between 1992 and 1995, who were entitled to pension and disability insurance calculated as doubled in duration.

³⁵ For a full review of the BiH pension system, see the Office of the UN Commissioner for Refugees [UNHCR], *Pension and Disability Insurance Within and Between Bosnia and Herzegovina, the Republic of Croatia, the Federal Republic of Yugoslavia in the Context of the Return of Refugees and Displaced Persons*, Oct. 2001; see also Organization for Security and Co-operation in Europe [OSCE], Human Rights Department, *Falling Through the Cracks: the Bosnian Pension System and its Current Problems* (1999).

affected the displaced population. Without being exhaustive, this section will highlight the main problems faced by IDPs since the end of the conflict.

Division of Funds and Devolvement of Competences

In 2006, the UN Committee on Economic, Social and Cultural Rights observed that:

the constitutional framework for Bosnia and Herzegovina, imposed by the Dayton Peace Agreement, which divides the state party into two Entities (the decentralized Federation of Bosnia and Herzegovina consisting of 10 Cantons and the centralized Republika Srpska) as well as one district (the District of Brcko), confers limited responsibility and authority to the Government at the State level, in particular in the field of economic, social and cultural rights, and creates a complex administrative structure, which often results in the lack of harmonization of laws and policies relating to the equal enjoyment of economic, social and cultural rights by the populations of the two Entities, the Cantons of the Federation and the municipalities of the same or different entities.³⁶

This is certainly true of social security, including pensions, which was a case in point.

During the conflict, the fund of the Republic of BiH was split into three separate funds, the Social Fund of Pension and Disability Insurance of Bosnia and Herzegovina (the Sarajevo Fund), the Bureau of Pension and Disability Insurance of Mostar (the Mostar Fund),³⁷ and the Public Fund of Pension and

³⁶ Comm. on Econ., Soc. and Cultural Rights, *Concluding Observations—Bosnia and Herzegovina*, Jan. 24, 2006, ¶ 8, E/C.12/BIH/CO/1.

³⁷ Decree of the War Presidency of Herceg-Bosna, Jan. 1, 1994.

Disability Insurance of Republika Srpska (the RS Fund).³⁸ Each Fund became exclusively responsible for the pensioners living in its administrative area.³⁹

After the conflict, despite efforts on the part of the international community to instigate and encourage co-operation between the Funds, any contact—including exchange of basic information—was discouraged or prevented by the local authorities in power. This situation continued well after the end of the conflict, when legislation on pension and disability insurance was adopted at the Entity level, where the constitutional competencies lie.⁴⁰

Following a High Representative decision, the Sarajevo and Mostar Funds were *de lege* merged in 2000⁴¹ though the *de facto* merger only occurred in

³⁸ This Fund started functioning in 1992, when pension officials living in the R.S. asked pensioners to re-register with their local branch office.

³⁹ Within the Federation, the Mostar Fund became responsible for Cantons 2, 8, and 10; the Sarajevo Fund was responsible for Cantons 1, 3, 4, 5, and 9; Cantons 6 and 7 were split between the two Funds depending on the majority ethnic group in each municipality.

⁴⁰ In respect of the Federation, under Part II, Article 2(e) of the Federation Constitution, responsibilities for social welfare policy lie with the Federation and Cantonal authorities. For Entity-level legislation in the Federation, see the Law on Pension and Disability Insurance adopted in 1998 (FBiH Official Gazette 29/98, July 23, 1998) and amended by the High Representative's Decision of Nov. 12, 2000, Decision of the High Representative Amending the Federation Law on Pension and Disability Insurance. For the R.S., its Constitution is much less clear: the R.S. Constitution only refers to 'social policy' and 'increase[ing] of the social welfare of citizens' in Article 51. However, since the BiH Constitution does not assume functions and powers in relation to social welfare or pensions, under its Article III 3. (a), these functions and powers are assigned to the institutions of the Entities. For Entity-level legislation in the R.S., see the Law on Pension and Disability Insurance (R.S. Official Gazette No. 32/00, Sept. 22, 2000), amended by the High Representative's Decision amending the R.S. Law on Pension and Disability Insurance of Nov. 12, 2000.

⁴¹ See High Representative, Decision of the High Representative Imposing the Federation Law on Pension and Disability Insurance Organization, Nov. 12, 2000.

2002. In the intervening period, the three Funds entered into an agreement⁴² whereby they regulated a certain level of co-operation and interaction. The agreement provided that the Fund that had made payments to pensioners before it came into force would continue to pay the pensions to the same pensioners, regardless of the pensioner's place of temporary or permanent residence. This meant that those who received a pension from their area of displacement would continue to receive their pension in their place of return, even if this area was located in the other Entity.⁴³ The RS Government unilaterally withdrew the RS Fund from the agreement in March 2002.⁴⁴ Although both the RS Fund and the Sarajevo Fund continued to pay those pensioners already recognized as beneficiaries, the absence of legal obligations added to the precarious situation of IDPs.

In 2003, the state level Ministry for Refugees and Displaced Persons issued the Strategy of BiH for the Implementation of Annex VII of the Dayton Agreement (the Strategy).⁴⁵ The stated aim was to have the Strategy implemented by 2006. One aspect of the Strategy was to secure the conditions for sustainable return, which included pension-disability insurance, health care, and education. The Strategy recognized that one of the impediments to a state-level effort in these fields was the fact that the competencies were at the level of the Entities.

To date, there is still no state level agreement nor is there a uniform system between both Entities, as was highlighted by a number of human rights treaty

⁴² Agreement on the Mutual Rights and Obligations in the Implementation of the Pension and Disability Insurance dated Mar. 27, 2000 and entered into force May 18, 2000, RS Official Gazette No. 15/00 and Federation BiH Official Gazette No. 24/00.

⁴³ 'One of the difficulties is that coverage cannot be transferred from one entity to another. This poses an obstacle to persons considering return and has turned into a problem for returnees.' RSG on human rights of IDPs, Report following his visit to BiH, E/CN.4/2006/71/Add.4, ¶ 49.

⁴⁴ Official Gazette of the R.S., No. 10/02, Mar. 4, 2002.

⁴⁵ Annex 7 of the Dayton Peace Agreement dealt with the issue of returns.

bodies.⁴⁶ By way of example, the Committee on Economic Social and Cultural Rights expressed concern that the absence of an inter-Entity agreement on pensions prevented many returnees moving from one Entity to the other from enjoying access to pension benefits and health care and recommended that the state party promote the adoption of an inter-Entity agreement on pension rights.⁴⁷ The Representative of the Secretary General (RSG) on the Human Rights of IDPs said that “[a]ccess of IDPs and returnees to health care and social security is adversely affected by the lack of harmonization between the relevant legislation and welfare systems of the two entities.”⁴⁸ More recently, the Laws on IDPs which were adopted at the state and Entity levels in 2005 and 2006 do not refer to pensions or to social security,⁴⁹ either during displacement or upon return.

⁴⁶ There is, however continued reference to the idea of a united pension fund under the authority of the state-level Ministry of Civil Affairs. *See, e.g.*, ILO SRI Newsletter, 2006/1.

⁴⁷ ¶¶ 20, 42, E/C.12/BiH/CO/1, Jan. 22, 2006.

⁴⁸ *See* report of the RSG on human rights of IDPs following his visit to BiH, E/CN.4/2006/71/Add.4, ¶ 49.

⁴⁹ They do however all refer to other basic rights, such as food, clothing, health care, education. The RS and BiH Laws specifically refer to welfare in the case of unemployment, which is more linked to social assistance as defined in the introduction than to social security. *See also* Law on displaced persons and returnees in the Federation of BiH and refugees from BiH, March 16, 2005, Law on displaced persons, returnees and refugees in the Republika Srpska, April 26, 2005, Law on refugees from BiH and displaced persons in BiH, 2003. As highlighted by the RSG on human rights of IDPs, “[a]ccording to both laws, IDP status including its entitlements ceases upon return to a person’s pre-war place of residence, ‘when a safe and dignified return to her/his former place of residence is possible, but a displaced person has not returned there, or when this person voluntarily decided to permanently settle in another place.’ Finally, it should be mentioned that the 2007 Programme on solving the problems of displaced persons, returnees, and refugees refers to health care and allocates funds for “sustainable return,” without specifying to what, in practice, the funds should be allocated.

Access to Documentation, Payment of Fees and Transfer of Pensions⁵⁰

IDPs faced serious administrative difficulties in registering with a new pension fund. Because the Sarajevo Fund kept all of the documents relating to employees throughout BiH, it was often extremely difficult for pensioners to obtain the necessary evidence of their employment and their contributions needed for new registration. In addition, the Funds themselves contributed to making the task cumbersome. By way of example, in 1998, the Sarajevo Fund stated that it would make documents available to the Mostar and the RS Funds, but at prohibitive administrative fees.

Further, it was difficult for IDPs or returnees to access their pension when they received it from a different area than the one where they lived, since the Funds had no mechanism for paying pensions to an address on one of the territories administered by another Fund. If an IDP wanted to collect his/her pension, s/he was obliged to make the journey and collect it in person. Even though in many cases the overriding issue was that of security, where this was not the case, it was a disproportionate monthly burden on the pensioner. Indeed, in some cases, the pension amount did not warrant the expense of travel. It was only in 2001 that payment could be done directly by post or through a bank. However, it was reportedly inconsistently applied, and the requirement imposed by the Mostar Fund for testimonial documentation to be obtained from the municipality and the police was particularly burdensome and represented another obstacle to IDP return.

Health Insurance⁵¹

The problem of medical insurance is also closely linked to that of pensions, since the pension funds contribute directly to the public health sector. As such, pensioners living in one Entity but receiving payments from another were unable to realize secondary social benefits related to their pension, such as health care. Health insurance for pensioners was geographically fixed to the

⁵⁰ See Chapter 9 of this volume on the recovery of personal documentation.

⁵¹ See Chapter 6 of this volume on the right to health and basic services.

Entity of their pension registration. If a pensioner moved from one Entity to the other, their health insurance did not follow, and treatment incurred their personal liability.⁵²

On 5 June 2001, health care officials of the Federation, Brcko District, and of the Republika Srpska entered into an agreement⁵³ which stipulates that pensioners who have returned from one Entity to the other were entitled, upon certification from the pension fund in their area of displacement, to insured health care services pursuant to the legislation in their place of return.⁵⁴ It was however reported that the RS Fund failed to provide the needed certification for returnees to the Federation.⁵⁵

⁵² On March 31, 2000, the agreement on Mutual Rights and Obligations in the Implementation of Pension and Disability Insurance was concluded between the Institute of pension and disability insurance of Mostar, the Social Fund for pension and disability insurance of Bosnia and Herzegovina, and the Public fund for pension and disability insurance of the RS.

⁵³ Agreement on the Manner and Procedure of Using Health Care Services of Insurees in the Territory of Bosnia and Herzegovina Outside the Territory of the Entity, Including Brcko District, in Which they are not Insured, OG BiH No. 30/2001.

⁵⁴ See The Office of the UN High Commissioner [UNHCR], *Pension and Disability Insurance Within and Between Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia in the Context of the Return of Refugees and Displaced Persons*, at 7 (Oct. 2001).

⁵⁵ See International Crisis Group, *The Continuing Challenge of Refugee Return in Bosnia and Herzegovina*, at 21-22 (Dec. 13, 2002). See also the RSG on IDP's Report following his visit to BiH: 'As the first major inter-entity agreement prepared and negotiated without the intervention of the international community, the directors of the entities and the Brčko District health insurance funds signed an agreement in 2001 securing for all those insured in one entity, health coverage in another. The implementation of the agreement, however, is reportedly unsatisfactory,' ¶ 49.

Differences in Amounts

When the Funds were divided, the records and other documentation relating to workers and pensioners remained under the control of the Sarajevo Fund. Consequently, neither the Mostar Fund nor the RS Fund had even the most basic information about the entitlements of new or existing pensioners. As such, they had to create their own systems where entitlements were calculated according to very different criteria. Since it had possession of the pre-conflict records, the Sarajevo Fund was able to install a multi-level ranking system, very similar to the pre-war system. The RS Fund resorted to calculating based on an individual's level of education⁵⁶ and in Mostar, it was decided that instead of developing new criteria, the same amount of money would be granted to all pensioners every month, depending on the amount of money available.

In addition to the fact that pension levels were low throughout the state and that pensioners often did not receive the full amount owed to them as a result of the absence of harmonized legislation between the two Entities and of state-level legislation regulating pensions and other benefits, the difference in levels between the three Funds (at first) and the two Funds (as of 2000/2002) were particularly problematic for IDPs and returnees. Because the Funds had different pension calculation schemes as well as different scales, the amounts of benefits varied and pensions were much lower in the RS than in the Federation.⁵⁷

This issue was examined by the Human Rights Chamber for Bosnia and Herzegovina (the Human Rights Chamber)⁵⁸ in the case of *Klickovic, Pasic*

⁵⁶ The Law entered into force on Jan. 1, 1994.

⁵⁷ It should be highlighted that in the FBiH, there are just 1.15 contributors for each pensioner (344,000 contributing workers and 299,000 pensioners), while in RS the number of pensioners actually exceeds scheme contributors by about one third (144,000 contributing workers to 189,000 pensioners). See the ILO SRO newsletter, 2006/01.

⁵⁸ The Human Rights Chamber was a body established by Annex 6 of the 1995 Dayton Peace Agreement, and was entrusted to resolve or decide on applications

*and Karanovic.*⁵⁹ The applicants had retired in Sarajevo in 1981 and 1982, respectively. In May 1992, they both stopped receiving their pension from the SRBiH upon displacement to the Republika Srpska, and only started receiving a pension from the RS Fund in 1996. Both applicants returned to Sarajevo in 2001. When they applied to the Sarajevo Fund to receive their pension, they were informed that according to the agreement signed between the Funds in 2000, they were not entitled to a pension from a Sarajevo Fund, but would continue to receive it from the RS Fund. For the applicant, this meant a loss of half of their pensions.

The Human Rights Chamber did not find a violation of the right to property on the basis that “the applicants do not have a right to receive a particular amount of pension payment.” The Chamber also examined the situation from the point of view of Article 9 of the ICESCR, which provides a right to social security. It found that there was a disparity between the situation of the applicants and those other SRBiH pensioners whose pension rights matured before the conflict broke out in 1992 and who remained in the Federation throughout the conflict.

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

[...]

concerning alleged or apparent violations of human rights. 250 KM in the R.S. versus 500 KM in the Federation for one and 190 KM versus 350 KM for the other.

⁵⁹ See Human Rights Chamber, *Klickovic, Pasic and Karanovic v. FBiH, R.S. and BiH*, Case No. CH/02/8923, CH/02/8924 and CH/02/9364, Jan. 10, 2003.

Indeed, it appears that the present applicants (and others who were internally displaced and have returned to the Federation) are in a worse situation than Federation pensioners who moved to other countries during the armed conflict. Many Federation pensioners who moved to other countries during the armed conflict continue to enjoy full pension rights from the Federation Fund.⁶⁰

The Chamber concluded that in view of the fact that the cost of living in the Federation was higher than that in the RS, this differential treatment was a significant obstacle to the return of displaced persons. The fact that the only reason put forward for the differential treatment of these individuals was the displaced persons status, which cannot serve as a basis for the differential treatment, it is thus discriminatory. They have thus been discriminated against in their enjoyment of their right to social security, as provided for by Article 9 of the ICESCR.⁶¹

This issue was also examined by the RSG on the Human Rights of IDPs and the UN Committee on the Elimination of Racial Discrimination. The RSG found that “individual return decisions and sustainability are influenced by the difference in pension amounts between entities in conjunction with differences in the cost of living”⁶² and the Committee on the Elimination of Racial Discrimination requested that the state parties ensure that pension benefits are provided on a non-discriminatory basis.⁶³

In conclusion, the separation of the SRBiH Pension Fund into three and then two funds has disproportionately affected IDPs, who had to re-register in their Entity of displacement and, upon return, were unable to re-register in their

⁶⁰ *Id.* ¶¶ 87-88.

⁶¹ *Id.* ¶¶ 89-91.

⁶² See Report of the RSG on human rights of IDPs following his visit to BiH, E/CN.4/2006/71/Add.4, ¶ 59.

⁶³ Comm. on the Elimination of Racial Discrimination [CERD], *Concluding Observations on BiH*, Apr. 2006, CERD/C/BIH/CO/6.

Entities of return. However, this issue was never addressed as an issue for which IDPs needed specific assistance. The splintering of the pension system and the continuing absence of competency at the state level for social security issues and pensions in particular, has clearly had a discriminatory effect on IDPs both during displacement and after return and has certainly been an impediment for those IDPs who considered return, but were not able to envisage it without access to social and economic rights on a non-discriminatory basis.

Croatia

Access to full pensions and to other social benefits for a number of IDPs has been, and still is, extremely problematic. While the Government of Croatia has accepted in principle that one's working years between 1991 and 1995 should be recognized, even for those mainly ethnic-Serb IDPs who found themselves in areas not controlled by Croatian authorities during the conflict, the government has also set down a number of restrictive conditions rendering the recognition of these years very difficult for IDPs.

The main issue is that of obtaining recognition of employment carried out during the conflict in areas which were not under the control of Croatian authorities (i.e., including Eastern Slavonia and Krajina). In 1997, Croatia adopted the Law on Convalidation,⁶⁴ whose objective was to allow individuals to file claims for validation of documents issued in these areas, in particular those which proved employment. This was a precondition for the recognition and realization of pension rights and other social benefits.

The Decree on Implementation of the Law on Convalidation for administrative areas of labor, employment, pension and disability insurance⁶⁵ stipulated that a requirement to obtain the validation of working years for pension benefits was the possession of a status of a contributor registered in the records of the administrative bodies in charge of pension and disability insurance. Additionally, the Decree provided for (1) a very restrictive deadline for

⁶⁴ See Official Journal No. 104/97.

⁶⁵ See Official Journal No. 51/98.

applying (before 10 April 1999) as well as (2) limitative residency requirements for applying.

These requirements have meant that a number of IDPs were unable to obtain validation of the documents which were necessary for them to have access to their pensions and other benefits, including disability insurance.⁶⁶ In addition, there are reports that even those who did apply within the strict deadline faced difficulty obtaining the recognition of their working years.⁶⁷ In particular, there is no standardized practice regarding whether witnesses may be heard in cases where documents have been destroyed. Finally, the time spent in paramilitary units is not subject to validation as part of one's working years and in practice, this has often meant that those who had spent some time in those units were also denied recognition of the working years that were not spent in paramilitary units.⁶⁸

Both the Law on Convalidation and its Decree have primarily negatively affected those mainly ethnic-Serb IDPs who lived in Serb-controlled areas between 1991 and 1995. The non-realization of pension rights as well as of disability insurance has deterred a number of elderly and disabled IDPs from returning to their pre-war place of residence. Return in the absence of the validation of their documents meant either obtaining lower benefits than those to which they were entitled or losing the benefits altogether.

In a number of cases, those IDPs who did decide to return, suffer from living on a much lower income than what they need. After his visit to the Balkans in 2005, the RSG on the Human Rights of IDPs said that:

⁶⁶ The re-opening of the deadline is one of the topics discussed as part of the Sarajevo Process and has also been highlighted as one of the short-term priorities within the EU Accession Partnership process—see Decision of the European Council dated Feb. 20, 2006.

⁶⁷ See ECRI Report, June 14, 2005, ¶¶ 41, 42.

⁶⁸ See OSCE Regional Legal Assistance Programme, *A Study on Access to Pertaining Rights and (Re)integration of Displaced Persons in Croatia, BiH and Serbia in 2006* (Mar. 2007).

[m]any IDPs are marginally aware of the rights to which they are entitled, both under domestic and international law. Others are unable for practical reasons to access entitlements and remedies provided in Government offices. These disadvantages are coupled with local administrative systems which too often have cumbersome and complex requirements, particularly in the area of documentation and registration. This frequently results in aggravated helplessness, disorientation and disempowerment suffered by IDPs, who become even more firmly locked into their existing situations. Obstacles to access to health care, education, social security benefits and other State services or to the labor market can easily become insurmountable. Since there seems to be no social safety net for those who fall outside the system, those who have not managed to get into the system, owing to the burdensome administrative practices, are further marginalized and pushed into the informal economy.⁶⁹

While Croatia did address the issue of right to social security and access to benefits through the Law on Convalidation, this law had and continues to have an indirect discriminatory effect on the mainly ethnic-Serb IDP population.

Serbia

As highlighted by the RSG on the Human Rights of IDPs, Serbia and its people have undertaken very considerable efforts to welcome, assist, and protect persons displaced from Kosovo. In particular, Serbia has recognized, in accordance with the *Guiding Principles*, that as citizens remaining within their own country, IDPs have, in principle, the same rights as anyone else. Despite this positive approach, the overall situation of many IDPs in Serbia remains difficult, in particular as regards the enjoyment of their economic, social and cultural rights. Some of these difficulties are caused by the overall difficult economic situation in Serbia. Thus, to a certain extent, IDPs are suffering from the same economic and administrative difficulties being

⁶⁹ See Report to the General Assembly, ¶ 28, U.N. Doc. A/60/338 (Sept. 7, 2005).

experienced by the rest of the resident population. However, IDPs face additional problems and hurdles, some of which are due to the fact that special needs stemming from their being displaced are not sufficiently acknowledged, while others are caused by a lack of adequate policies and structures to address their plight.⁷⁰

In Serbia proper, a Law on Refugees (the Refugee Law) and a National Strategy for Resolving the Problems of Refugees and IDPs (the Refugee and IDP Strategy) were adopted in May 2002. The Refugee and IDP Strategy focuses mainly on return of IDPs to Kosovo as the preferred solution. Both the Refugee Law and the Strategy fail to address the rights of IDPs during displacement, including access to pensions and health insurance for those displaced. From a practical perspective, this remains extremely problematic in light of the continuing difficult situation in Kosovo and leaves IDPs from Kosovo living in an unstable situation, with no real prospect of finding durable solutions to their displacement anytime soon. In particular, their equal access to economic, social, and cultural rights needs to be addressed during displacement in that access to social benefits is a crucial part of IDP protection due to IDPs' specific vulnerability, economic and otherwise.

Although IDPs in Serbia are legally entitled to the same rights and services as other citizens, in practice, many displaced people are not able to access this social protection. "IDPs who applied for their pensions prior to 1999 are reportedly receiving them, but those who became eligible and/or applied after that time are eligible only for 'provisional pensions' pending collection of all required documents. The amounts of the provisional pensions are much lower than the amounts beneficiaries of pensions would normally expect."⁷¹

The fact that IDPs have problems accessing their pensions has two main root causes. First, a lack of access to personal documentation proving their entitlements and second, the failure by employers to make the necessary

⁷⁰ See Report of the RSG on human rights of IDPs following his visit to Serbia and Montenegro, ¶¶ 30-31, E/CN.4/2006/71/Add.5.

⁷¹ See Report of the RSG on human rights of IDPs following his visit to Serbia and Montenegro, ¶ 39.

contributions. A last issue is the fact that IDPs often are not legally employed and therefore their periods of work are not counted in any future social benefits to which they may be entitled. As such, IDPs often face direct and indirect discrimination.

Access to documents

IDPs may face difficulty in obtaining a number of documents that may be needed for a number of purposes, from ID cards, to proof of residence, including birth, marriage, and death certificates. For example, most of these documents were left in Kosovo during IDPs' flight and may have been destroyed or lost. Additionally, it is often dangerous for IDPs to return to their former place of residence.⁷² An additional burden is that there is no agreement on recognition of documents between the United Nations Mission in Kosovo (UNMIK) and Serbia.

⁷² See Report of the RSG on human rights of IDPs following his visit to Serbia and Montenegro: Problems in obtaining documents (Guiding Principle 20, ¶ 2) are a major issue for IDPs and the key to many other problems, in particular access to health care and to other state services to which they are entitled. The documentation and registration requirements for all Serbians are complicated and cumbersome. For people who are already at a disadvantage due to their displacement, these hurdles can become insurmountable. Seven 'dislocated registry offices' or 'registry offices in exile' have been set up in central and southern Serbia to facilitate replacement or issuing of documentation for IDPs from Kosovo. Nevertheless, many still have to travel far distances (e.g., from Belgrade to registry offices in southern Serbia), office staff are overburdened, and many of the documents issued are temporary. As a result, many IDPs lack critical documents for services such as social welfare,' ¶ 32. See also CESCR: 'The Committee expresses its deep concern about the uncertain residence status of and the limited access by refugees, returnees from third countries and internally displaced persons, including internally displaced Roma, to personal identification documents, which are a requirement for numerous entitlements such as eligibility to work, to apply for unemployment and other social security benefits, or to register for school.' The Committee 'calls on the State party to assist refugees, returnees and internally displaced persons by facilitating the procedures necessary to obtain personal documents, including birth certificates, identity cards and work booklets, to enable them to enjoy their economic, social and cultural rights,' ¶¶ 14, 42, E/C.12/1/Add.108 (2005).

As such, up to seventeen different documents may be necessary to prove eligibility for social protection.⁷³ Two documents are particularly important for obtaining access to work-related entitlements. The first of these is a work booklet. A work booklet is a personal employment record document of education and employment, kept by the company of current employment until the termination thereof. This document is important for claiming pensions, obtaining new employment, and receiving unemployment benefits.

As highlighted by the RSG on the Human Rights of IDPs,⁷⁴ these documents may be difficult for IDPs to access because the files kept by the companies for which the individual worked prior to displacement may have been lost or destroyed.⁷⁵ According to the Office of the United Nations High Commissioner for Refugees (UNHCR), there is an obvious lack of diligence and good faith by employee records staff to process requests for such documents.⁷⁶ Additionally, even when work booklets are available, there is a tendency among certain institutions to introduce additional conditions regarding data that must be provided to acquire work booklets. Such conditions often amount to being manifestly unreasonable.⁷⁷

⁷³ International Committee of the Red Cross [ICRC], *The Situation of IDPs in Serbia and Montenegro*, Issues Paper (May 2005).

⁷⁴ See Report of the RSG on Human Rights of IDPs following his visit to Serbia and Montenegro, 'IDPs have had particular trouble obtaining 'working booklets' which are necessary to obtain regular jobs or unemployment benefits and pensions if their former employer is no longer in business or has moved, or if they have lost these documents,' E/CN.4/2006/71/Add.5, ¶ 34.

⁷⁵ IDPs who used to work for state owned companies in Kosovo are reportedly the ones facing the least hurdles in obtaining copies of their work documents.

⁷⁶ UNHCR/Praxis, *Analysis of the Situation of Displaced Persons from Kosovo in Serbia, Law and Practice*, at 19 (Mar. 2007).

⁷⁷ By way of example, 'prior to 2004, persons wishing to obtain an original work booklet from the Kosovo Pension Administration could do so in person or through a proxy, upon submission of the organization's and applicant's name. In 2006, persons wishing to obtain the original of a work booklet must do so personally, while a proxy can obtain only a copy of it. The interested party must provide his/her 10-digit

Another form that is necessary is the M-4 form, which provides a record of an employee's years of insurance, personal income, and remuneration. It contains the evidence of the monthly contributions to the pension fund made by the employer for the employee, and is necessary for the calculation of pension benefits. Again, these forms were often left in Kosovo and are difficult for IDPs to obtain. Additionally, the conditions set forth by the Serbian authorities may be considered to be wholly unreasonable under the circumstances.⁷⁸

Even though the Government of Serbia chose return of IDPs as the preferred durable solution, it must be recognized that some effort has been put into alleviating the plight of those displaced and encouraging local integration. A special unit was created within the Serbian Pension Fund which deals with IDPs and the Ministry for Labor, Employment and Social Policy, which is responsible, *inter alia*, for providing the social benefits of pensions and disability in the field has issued a recommendation to the Serbian Pension Fund asking for a more flexible approach in regard to the required documentation. The unit has proposed acceptance of alternative documents such as receipts or statements as valid proof of employment.⁷⁹

registration number (written on the work booklet) and a copy of his/her pension check (if the pension was paid before Jan. 1, 1999). If he/she does not know the exact registration number or had not retired before 1999, he/she must contact the former employer in Kosovo to obtain the relevant number. The institutions or companies are often not able to provide such details. Even if the requested registration number can be obtained most IDPs cannot or fear travel to Kosovo, and are thus unable to obtain their original work booklets. Copies of work booklets are worthless as evidence in Serbia.⁷ *Id.* See also PRAXIS, *Access to Documents for IDPs in Serbia*, at 15 (Feb. 2007).

⁷⁸ The Serbian Pension Fund recognizes only the original M4 Forms issued by the Fund itself. In a majority of cases, this documentation was left in Kosovo. In the meantime, UNMIK started issuing M4 Forms based on the Kosovo Pension Fund's documentation, but the Serbian Pension Fund does not recognize such documents. See UNHCR/Praxis, *Analysis of the Situation of Displaced Persons from Kosovo in Serbia, Law and Practice*, at 32 (Mar. 2007). See also PRAXIS, *Access to Documents for IDPs in Serbia*, at 19 (Feb. 2007).

⁷⁹ UNHCR/Praxis, *Analysis of the Situation of Displaced Persons from Kosovo in Serbia, Law and Practice*, at 33 (Mar. 2007).

Absence of Payment of Contributions to the Pension Fund from Employers

IDPs may not be receiving their pensions also because, although legally employed, their employers have not contributed to the pension fund. Through the Law on Linkage of the Years of Employment,⁸⁰ the Republic of Serbia accepted to compensate the Pension Fund for all employers who did not pay their contributions in the period from 1991-2003. More than 300,000 claims have been submitted in the period October 2005-January 2006. However, the number of IDPs who benefited from this law remains unknown.⁸¹

Another important issue is the presence of a large number of IDPs in Serbia who work in the informal or “grey economy” sector.⁸² This leaves them in a particularly vulnerable situation, as their employers do not pay any pension, social, or health insurance. This leaves them outside the scope of social security protection and, in addition, their employers do not contribute to the income tax, which also means that they are not contributing to funding government programs to help the most vulnerable.

As such, in Serbia, the main problem appears to be the fact that the chosen preferred solution for IDPs has been return. As such, measures to encourage integration have been scarce, although recently a few measures have been taken to alleviate the burden placed on IDPs by taking into account their specific situation. In practice, however, much still needs to be done to ensure that IDPs are not being discriminated against in their access to pensions specifically, and economic, social, and cultural rights more generally.

⁸⁰ Official Gazette Republic of Serbia, No. 85/05.

⁸¹ *Id.*

⁸² See Report of the RSG on human rights of IDPs, ‘Unemployment is generally high in Serbia but particularly high among the displaced. Among those IDPs who do work, more than half are employed in the ‘grey market’ (e.g., unregulated jobs with no benefits),’ ¶ 32. See also Conclusions of the CESCR, ‘[t]he Committee is equally concerned that many persons, especially Roma, internally displaced persons and refugees, work in the informal economy or in the low-income sector without adequate working conditions and social security coverage.’

Montenegro

In Montenegro, IDPs, who are mainly from Kosovo, are not recognized as citizens. As such, IDPs are not granted permanent residence unless they were born in Montenegro or owned property in Montenegro prior to being displaced to Montenegro. They receive temporary residence cards through the Montenegro Commissariat for Displaced People.⁸³

Additionally, in May 2003, the Montenegro Government issued a decree amending the Decree on Employment of Non-Resident Physical Persons. Article 1 of the Decree defines a non-resident physical person as a person who “does not have habitual residence or centre of business and livelihood interests on the territory of the Republic of Montenegro.” Since IDPs are not entitled to permanent residence permits in Montenegro, the Decree applies to them. The Decree imposes a tax of 2.50 Euro per day on employers hiring non-permanent residents. Employers who violate the provision are subject to high fines. Consequently, the legal framework—which includes citizenship, residency, and employment—acts as a strong disincentive to Montenegrin employers in the hiring of IDPs. The RSG has qualified this practice as discriminatory against IDPs.⁸⁴

⁸³ Before separation, Montenegro gave priority to Republican citizenship over state citizenship, and IDPs, mainly from Kosovo, were considered as citizens of Serbia.

⁸⁴ ‘While certain measures to protect the local population on the labor market may be justifiable, the combination of these measures put IDPs at an enormous disadvantage in terms of work. It is a form of discrimination that is incompatible with Guiding Principle 22, ¶ 2(b). Furthermore, as many IDPs left their work booklets behind in Kosovo, employment is extremely difficult even for those who qualify as Montenegrin citizens. [A]s temporary residents IDPs are subjected to higher tax obligations and do not have access to services other than basic health and basic education. They are not assisted in receiving care in Serbia for conditions that cannot be treated in Montenegro, whereas Montenegrin citizens do. They are not eligible for social welfare and cannot acquire real estate. All non-residents and non-Montenegrins are subject to these laws and not IDPs in particular. However, the Representative would like to point out that, unlike migrant workers, IDPs often have not had the choice of where they flee to. Furthermore the relevant laws seem to have changed after the IDPs had reached their current places of residence, without taking into account their particular situation, difficulties they were facing and the consequences these legislative changes

Being unable to legally have access to employment,⁸⁵ IDPs often have no other option than to work in the so-called grey economy, leaving them in a very vulnerable position. They remain outside any form of legal protection and do not contribute to social security schemes, including pensions, unemployment benefits, and disability insurance. Finally, their employers are not subject to taxation on their employment, which limits the government's ability to provide basic services for the most vulnerable. Additionally, regarding those IDPs who are already entitled to access their pensions accrued during their working life, as in Serbia, the issue of obtaining the work booklets is an important obstacle. This leads to poverty, consisting of both low income⁸⁶ and lack of access to services and equal treatment under the law.⁸⁷

would have for them. Thus, the combined effect of these measures on IDPs is discriminatory' RSG Report, visit to Serbia and Montenegro, E/CN.4/2006/71/Add.5, ¶¶ 50-52.

⁸⁵ In 2004, the Government of Montenegro adopted a new law on employment, which allows for employment of IDPs, under very restrictive conditions: Law on Employment and Work of Foreigners: 'A foreigner can be hired, in other words can conclude a labor contract, if he/she has permission for temporary residence, that is temporary stay in Republic and if he/she gets a work permit (art. 2).' A work permit is the document in which an employer can offer a work contract or a special contract to a foreigner. A work permit for a foreigner is issued by the Employment Fund of Montenegro. The Government of Montenegro decides, based on its emigration policy, the conditions and movement of the labor market, including the annual number of foreign work permits (quota) it issues. *See* Strategy on Refugees and IDPs, 2005.

⁸⁶ See the figures given by the Strategy for resolving the issues of refugees and IDPs issued by the Government of Montenegro in 2005: 'among the total number of displaced persons from Kosovo, 44.3% are supported persons, while 39.4% are unemployed, making 83.7% of the entire internally displaced population that are without any work engagement. Among this population, 7.6% are temporarily occupied, primarily in the sphere of the grey economy. Only 1.3% of displaced persons work in state-owned companies, while only 0.8% of them work regularly in the private sector. Pensions are received by 6.7% of displaced persons. According to the heads of households surveyed, the primary source of income for almost half of displaced non-Roma households (47.7%) is the temporary or permanent employment of some household member. For a smaller portion of households (16.7%), pensions represent the primary income. Generally, incomes of displaced persons are irregular,

The Strategy that was adopted in April 2005 sets forth returns as the preferred durable solution for displacement. As such, it addresses the issue of pensions mainly as an element of the sustainable returns of IDPs to their places of origin (mainly Kosovo). While acknowledging that the conditions of return depend mainly on the situation in the area of origin, the government views its role as one of support in achieving the program goals and of providing information to potential returnees regarding the possibilities of return. One of the elements includes the realization of their basic rights, which includes pensions.⁸⁸ Regarding pensions for those IDPs that chose to remain in Montenegro, the Strategy states that those legally employed have access to the same rights as Montenegrin citizens.⁸⁹

INTERNATIONAL ROLE

Just as most states examined have failed to deal with the issue of social security, including pensions, in a comprehensive way, so have most international organizations and NGOs. UNHCR stands out as an agency which has tackled the issue of social security of pensions in the region as an issue which is crucial to IDPs both during displacement and as an important element of creating the conditions conducive to sustainable returns,⁹⁰ in addition to

differing from period to period. Two-thirds (68.6%) of displaced non-Roma households reported that they did not have enough money to pay for food during the month that preceded the survey; 65.9% did not have enough funds to provide for three meals per day.’ According to the ICRC, although these figures were an estimate, in 2003, 60% of Roma IDPs and 48% of non-Roma IDPs were living below the Montenegro Poverty Level. This meant that 54% (8,945 people) of the displaced population was living in poverty. See Household Economy Assessment, Apr. 2005.

⁸⁷ See ICRC, *The Situation of IDPs in Serbia and Montenegro*, Issues Paper, at 11 (May 2005).

⁸⁸ See point 6.1 of the Strategy.

⁸⁹ See §6.2.1 of the Strategy.

⁹⁰ The Office of the UN High Commissioner for Refugees [UNHCR], *Pension and Disability Insurance Within and Between Bosnia and Herzegovina, the Republic of*

tackling issues which are a pre-condition to ensuring that social security rights are respected, such as accessing necessary documentation. At a more regional level, the Organization for Security and Cooperation in Europe (the OSCE) has also made attempts at addressing the issue of pensions as part of its work on economic, social, and cultural rights.⁹¹

SUMMARY OF RECOMMENDATIONS

1. National authorities must protect the right to social security and must ensure equal, non-discriminatory access to benefits, both during displacement and once durable solutions to displacement have been found in national laws and policies pertaining to IDPs.
2. National laws and policies should take into account the particular vulnerabilities of certain categories of IDPs such as the elderly, sick, and disabled.
3. A national focal point must be identified to ensure that there is responsibility for the protection of the right of equal access to social security.
4. In their efforts to ensure that durable solutions to displacement are found, national authorities must take into account economic, social, and cultural rights as part of ensuring the sustainability of return. This includes ensuring that IDPs will have equal, non-discriminatory access to social security benefits, whether they choose to resettle in another part of the country, to integrate locally, or to return to their places of habitual residence.
5. National authorities must issue replacement documentation, free of charge, to IDPs as soon as possible without imposing unreasonable conditions such as having to return to the place of origin. Where replacement documentation is

Croatia and the Federal Republic of Yugoslavia in the Context of the Return of Refugees and Displaced Persons (October 2001).

⁹¹ Organization for Security and Co-operation in Europe [OSCE], *Falling Through the Cracks: the Bosnian Pension System and its Current Problems* (1999).

issued, national authorities must ensure general recognition of the replacement documentation.

6. A permanent national mechanism for the recognition of the years of service prior to displacement, during displacement, and post displacement must be set up, which would allow for all of the years of service of an individual to be taken into account without punishing individuals for displacement or return.

7. National authorities must ensure that IDPs can access their social security benefits in the area of their residence, both during and post displacement without unreasonable conditions for accessing benefits, such as having to return to the place of origin or to the place of displacement.

8. National authorities must ensure that during displacement, IDPs have equal access to legal employment opportunities and that they contribute to social security schemes that are in place and ensure that when permanent solutions are found, IDPs do not lose their benefits.

9. National authorities should provide that IDPs who have been discriminated against in their access to social security have access to reparations or compensation, ensuring that IDPs who have been delayed in receiving their social security benefits obtain them retroactively and are able to present their grievances in court or before other appropriate decision-making bodies.

10. The International Labour Organisation (ILO) should be encouraged to be more directly engaged on the issue of IDPs and social security with individual states and internationally.

11. UNHCR and other international organizations and NGOs should continue to engage on the issue of social security with national authorities.

12. National authorities should ensure the cessation, non-recurrence, and prevention of violations of the right to social security of IDPs.