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To the Honorable Committee of Ministers of the Council of Europe

OPINION

OF THE OMBUDSPERSON OF THE REPUBLIC OF KOSOVO

regarding the execution of the judgment of the European Court of Human Rights in the case of

Grudić v. Serbia

Application No. 31925/08

Pristina, 11 February 2016

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STATEMENT

In the matter of *Grudić v. Serbia*, Application no. 31925/08 (2012), the Republic of Serbia abruptly discontinued pension payments to the applicants, two Kosovo residents, despite the fact that they had fulfilled the statutory requirements for receiving such pensions. The European Court of Human Rights unanimously held that this discontinuation violated the applicants' right to the peaceful enjoyment of their possessions, under Article 1 of Protocol No. 1 of the European Convention on Human Rights, and ordered Serbia to afford the applicants just satisfaction in accordance with Article 41 of the Convention (see *Grudić*, §§90–96). The Court also held—pursuant to Article 46, paragraph 2, of the Convention—that due to the large number of other Kosovo residents whose pensions may likewise have been wrongfully discontinued, "the respondent Government must take all appropriate measures to ensure that the competent Serbian authorities implement the relevant laws in order to secure payment of the pensions and arrears in question" (*Grudić*, §99).

Rule 9.2 of the *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements* provides: "The Committee of Ministers shall be entitled to consider any communication from . . . national institutions for the promotion and protection of human rights, with regard to the execution of judgments under Article 46, paragraph 2, of the Convention."

In accordance with this rule, I write to express my grave concern that the Republic of Serbia has failed to fulfill its obligations under *Grudić* "to secure payment of the pensions and arrears in question" to Kosovo residents. Based on the Republic of Serbia's own publicly available submissions to the Court and to the Committee of Ministers, it appears that Serbia has been violating both the letter and the spirit of the *Grudić* judgment, specifically by (1) relying on erroneous legal grounds to deny potentially thousands of legitimate applications from Kosovo for the resumption of pension payments; and (2) placing unlawful restrictions on the payment of arrears, including statutory interest, to those few Kosovo residents whose applications have turned out to be successful.

The present Opinion begins with a brief background summary of the *Grudić* judgment and the execution of that judgment thus far. It then lays out in detail the legal defects behind Serbia's staggering 96.1% denial rate of applications submitted by Kosovo residents for the resumption of pension payments, as well as the illegal 12-month restriction Serbia has placed on the payment of arrears. The Opinion also raises the possibility that, in light of the extraordinarily high proportion of applications (84.3%) that have been deemed to lack sufficient documentation, Serbia may be allowing the political dispute over the sovereignty of the Republic of Kosovo to obstruct the full execution of the *Grudić* judgment. Finally, the Opinion concludes by indicating the steps that the Republic of Serbia must take in order to comply fully with the Court's judgment.

BACKGROUND

1. The judgment of the European Court of Human Rights in *Grudić v. Serbia*

The applicants in *Grudić* were a married couple living in Kosovo who had been granted disability pensions in 1995 and 1999, respectively, by the Serbian Pensions and Disability Insurance Fund ("SPDIF") (*Grudić*, §§6–7). In 9 June 1999 and 15 January 2000, respectively, the SPDIF abruptly ceased paying their monthly installments, without explanation (*id.*, §9). Eventually, after the applicants sought in 2003 to have their pension payments resumed, the SPDIF issued formal decisions in 2005 suspending their pensions retroactively (*id.*, §§10–11). The SPDIF's justification for the suspension, according to the Court's judgment, was that "Kosovo was now under international administration" (*id.*, §11), and that "since the respondent State has been unable to collect any pension insurance contributions in Kosovo as of 1999, persons who had already been granted SPDIF pensions in this territory could not continue receiving them" (*id.*, §13).

The Court unanimously rejected this justification. The point of departure for the Court's judgment was that "[t]he first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful" (*id.*, §73). Since "the applicants' existing pension entitlements constituted a possession within the meaning of Article 1 of Protocol No. 1" (*id.*, §77), the SPDIF's suspension of the pensions "clearly amounted to an interference with the peaceful enjoyment of their possessions" (*id.*). The suspension was therefore subject to the requirement of lawfulness.

The Court's application of the lawfulness requirement relied crucially on an Opinion adopted in 2005 by the Supreme Court of the Republic of Serbia, Civil Division, regarding pension rights in Kosovo: "In response to the situation in Kosovo, this Opinion states . . . that one's recognised right to a pension may only be restricted on the basis of Article 110 of the Pensions and Disability Insurance Act" (*Grudić*, §31). See also *id.*, §80 ("the Supreme Court, . . . concerning the situation in Kosovo, specifically noted that one's recognised right to a pension may only be restricted on the basis of Article 110").

Article 110, in turn, recognizes only two grounds on which a beneficiary's insurance rights under the Act may be lawfully restricted. First, these rights are to be terminated if "during the exercising of the rights, the conditions for acquiring and exercising the right cease to exist" (Pensions and Disability Insurance Act, Article 110, para. 1), or in the words of the *Grudić* judgment, "if it transpires that one no longer meets the original statutory requirements" for acquiring and exercising those rights (*Grudić*, §26). Second, insurance rights are also to be terminated if a beneficiary is already "exercising the rights under such insurance with a mandatory pension and disability insurance organization from a state formed in the territory of the former Yugoslavia" (*id.*, Article 110, para. 2). Besides these two grounds, Article 110 does not countenance any other legal basis for terminating, or otherwise restricting, a beneficiary's insurance rights. In particular, there

is "no reference to a possible indefinite suspension of pensions in this provision" due to the inability of SPDIF to collect current contributions from a given territory (*Grudić*, §78).

The Court found that neither of the two grounds specified in Article 110 for lawful termination of pensions, had been fulfilled in the case of the applicants (*id.*). It thus concluded that "the interference with the applicants' 'possessions' was not in accordance with relevant domestic law" (*id.*, §81), and therefore that Serbia had violated the applicants' rights under Article 1 of Protocol No. 1 of the Convention (*id.*, §83).

Upon its finding of a violation, the Court ordered the Republic of Serbia to afford just satisfaction to the applicants in accordance with Article 41 of the Convention. In addition to awarding each applicant EUR 7,000 in non-pecuniary damages, the Court ordered "the respondent Government [to] pay the first and second applicants . . . their pensions due as of 9 June 1999 and 15 January 2000, respectively . . . , together with statutory interest" (*Grudić*, §92). The *Grudić* judgment thus entitled the applicants not only to the resumption of their pension payments, but also the payment of arrears **from the respective dates on which these payments were suspended**, including statutory interest.

Furthermore, the Court noted that the finding of a violation imposed broader obligations on the Republic of Serbia, since there were likely many more Kosovo residents whose pensions had been discontinued by the SPDIF on the same unlawful basis as those of the applicants, and who were therefore—like the applicants—entitled to the resumption of pension payments and the payment of arrears, including statutory interest. In fact, even the Republic of Serbia, in its own filings before the Court, openly admitted that the number of similarly situated Kosovo residents was considerable: "The Government noted that the total amount of the respondent State's potential debt involving situations such as the applicants' would be very high indeed . . . . [O]fficial data provided by the SPDIF indicat[ed] that the sum in question had been estimated at 1,008,358,614 Euros ("EUR"), whilst the Ministry of Finance had itself set this sum at EUR 1,050,468,312[.] (*Grudić*, §71). The Court thus held that "[i]n view of . . . the large number of potential applicants, the respondent Government must take all appropriate measures to ensure that the competent Serbian authorities implement the relevant laws in order to secure payment of the pensions and arrears in question" (*id.*, §99), further emphasizing that "[i]t is understood that certain reasonable and speedy factual and/or administrative verification procedures may be necessary in this regard" (*id.*). The Court ordered these measures to be undertaken within six months from the date on which the judgment becomes final (*Grudić*, Conclusion, §3(d)).

2. The execution of the *Grudić* judgment thus far

With the Court's judgment becoming final on 24 September 2012, the Committee of Ministers, at its 1157th meeting, held on 6 December 2012, "invited the Serbian

authorities to provide, as soon as possible, an action plan setting out the measures taken and/or envisaged and to keep the Committee informed on the developments of the situation" (Decision no. 3).

In response to the Committee's invitation, the Republic of Serbia forwarded a copy of a letter it had sent to the European Court of Human Rights on 20 December 2012, in which it had requested an extension, due to a delay in the execution of the general measures ordered by the Court. Serbia offered a number of excuses for this delay. Among other excuses, it claimed that due to the adoption of "Rule no. 2001/35 – *On the Pensions in Kosovo* by UNMIK on 22 December 2001, many citizens of Kosovo and Metohija, former beneficiaries of pensions of the Pension and Disability Insurance Fund of the Republic of Serbia, accomplished the right to pension from the international administration, recognizing the working years accomplished with the Pension and Disability Insurance Fund of the Republic of Serbia." And "[b]earing in mind the fact that beneficiary may not accomplish the right to pension on the same grounds from both the international administration and the Republic of Serbia," Serbia claimed that it needed extra time in order "to compare data about the pension beneficiaries together with UNMIK." Furthermore, as a general matter, the letter states that "the Republic of Serbia does not recognize the so-called acts of the Republic of Kosovo, so that all the documentation to be submitted to prove the right to pension by potential beneficiaries should be issued by UNMIK." And finally, at the conclusion of the letter, the Republic of Serbia indicated that "the steps would also be undertaken to make this issue the subject of negotiations between Belgrade and Pristina, which have been in progress and have been developing in positive direction."

A few months later, at its 1164th meeting, held on 7 March 2013, the Committee of Ministers reported that it had finally received an action plan from the Republic of Serbia that included "a calendar for the measures to be taken for the execution" of the *Grudić* judgment, as well as "information on the measures taken for the identification and verification of persons who will be entitled to the resumption of payment of pensions and arrears" (Decision no. 1). In addition, noting that the European Court of Human Rights had extended the deadline for implementation of these measures to 24 September 2013, the Committee "encouraged the Serbian authorities to intensify their efforts with a view not only to bringing the verification process to an end but also to taking all the appropriate measures within this new deadline" (Decision no. 3).

On 8 April 2013, Serbia sent to the Committee a "Report on Measures Undertaken to Implement the Action Plan of the Government of the Republic of Serbia Concerning the Payment of Pensions Accomplished in the Territory of AP Kosovo and Metohija." That report informed the Committee, among other things, that 1,643 applications for the resumption of pensions had been filed thus far. But at its meeting held on 6 June 2013, the Committee asked for more information. Specifically, it "invited the Serbian

authorities to provide information on the number of applications received, including the number of applications with incomplete documentation, and the number of decisions rendered so far, including the breakdown of positive and negative decisions" (Decision no. 2). It also solicited further information on measures undertaken to secure the payment of arrears (Decision no. 3). In view of the extended deadline of 24 September 2013 that the Court granted to Serbia, the Committee also encouraged Serbia to take all appropriate measures to meet that deadline (Decision no. 4).

On 20 September 2013, just days before the expiration of the extended deadline, Serbia sent a "Follow up Report in the Case of Grudić v. Serbia Concerning the General Measures," in which it reported that 8,151 applications for the resumption of pension payments had thus far been received, and that out of this number, only 1,278 (15.7%) were submitted with all required documentation. Out of the applications that Serbia deemed complete, only in 37 cases (2.9%) was a positive decision rendered for the resumption of payment of pensions. Furthermore, "[t]he decisions on resumption of payment of pensions also stipulate payment of arrears up to 12 months back." This Follow Up Report gives no indication that Serbia has paid statutory interest on these arrears, despite the *Grudić* judgment's instructions.

The 1,241 negative decisions, according to Serbia "were made solely because the applicants provided evidence in their applications that they are beneficiaries of pensions on the territory of the Autonomous Province of Kosovo and Metohija." Serbia claims that "in compliance with the UNMIK regulations, all persons having residence in this territory and at least 15 years of previous pension insurance with the Pension and Disability Fund of the Republic of Serbia are entitled to pension." And "[s]ince the provisions of the relevant Serbian legislation exclude a possibility to receive simultaneously two pensions their applications were rejected for this reason."

Shortly after Serbia's report, the Committee of Ministers met once again regarding the execution of the *Grudić* judgment, at its 1179th meeting on 26 September 2013. At this meeting, the Committee, noting the low number of positive decisions on applications for the resumption of pension payments, "stressed in this respect the importance of ensuring that any refusal of resumption of payment of pension has a clear basis in domestic law" (Decision no. 2). The Committee further "invited the Serbian authorities, in close co-operation with the Secretariat, to provide further information as regards the resumed payment of pensions, including the legislative provisions justifying refusal of such payments and the handling of the payment of arrears" (Decision no. 4). Finally, considering that the Court's extended deadline of 24 September 2013 had passed, the Committee called upon Serbian authorities to secure the payment of pensions and arrears "without any delay" (Decision no. 5).

In its final "Follow Up Report in the Case Grudić v. Serbia Concerning the General Measures," submitted on 24 October 2013, the Republic of Serbia provided its final set

of updated statistics. In its report Serbia stated that 8,238 applications had been submitted thus far for the resumption of pension payments. Out of those, it deemed 1,295 (15.7%) to have been accompanied by complete documentation. From this smaller number, the total number of positive decisions for the resumption of pension payments was 51 (3.9%).

For these 51 successful applicants, "[t]he decisions on resumption of payment of pensions also stipulate payment of arrears up to 12 months back in accordance with Article 123 of the Law on Pension and Disability Insurance." Article 123, in turn, states that "[t]he accrued monthly installments of pension, cash compensation for bodily damage, not disbursed due to circumstances cause by the beneficiary, shall subsequently be disbursed for up to 12 months, effective retroactively from the date of the beneficiary, the circumstances no longer present, submitting a request for the disbursement." Once again, this Follow Up Report, like the last one, says nothing about the payment of statutory interest.

Serbia also outlined for the Committee what it saw as the statutory basis for its 96.1% refusal rate of applications for resumption of pension payments. Serbia claimed that "[i]n almost all cases the legal basis for rejection of the applications was the fact that those applicants have already been beneficiaries of pension in Kosovo." However, despite the *Grudić* judgment's clear statement that "concerning the situation in Kosovo, . . . one's recognised right to a pension may only be restricted on the basis of Article 110 of the Pensions and Disability Insurance Act" (*Grudić*, §80), Serbia based its nearly wholesale rejection of pension applications from Kosovo on a separate statutory provision, Article 119: "According to Article 119 of the Law on Pension and Disability Insurance, *a beneficiary of pension accomplishing the right to two or several pensions in the territory of the Republic of Serbia may only use one of the above pensions according to his/her choice*" (emphasis in text).

In the last meeting at which the execution of the *Grudić* judgment was discussed, the 1186th meeting of the Committee of Ministers, held on 5 December 2013, the Committee "noted the explanations given by the Serbian authorities on the legal basis for the rejection of resumption of payment of pensions as well as the judicial review procedures open to those whose applications are rejected, and instructed the Secretariat to carry out an in-depth analysis of this issue in close co-operation with the Serbian authorities" (Decision no. 2). The Committee also "invited further the Serbian authorities to provide, as soon as possible, concrete information to the Committee on the issue of payment of arrears as requested by the Court in its judgment" (Decision no. 3). Also regarding the question of arrears, the notes from the Committee's December 2013 meeting indicate that, in its view, Serbia is obligated to pay arrears beyond merely 12 months. The notes recall that "in the *Grudić* judgment the European Court awarded just satisfaction on

account of pecuniary damages sustained as a result of the suspension of the applicants' pensions from 1999 and 2000 respectively." From this fact, the Committee reasoned that "the unpaid arrears between the date of the suspension of payment of pensions at issue and the date of their resumption are due. Information in this respect is still awaited."

Finally, the 8th Annual Report (2014) of the Committee of Ministers on the supervision of the execution of judgments and decisions of the European Court of Human Rights, published in March 2015, states that following the Committee's meeting in December 2013, "information is awaited on the handling of applications lodged following the measures adopted so far—notably in the light of the outcome of a number of additional cases brought before the Court and communicated to the Government."

To my knowledge, this 2014 annual report provides the latest available information on the execution of the Court's judgment in *Grudić*.

ARGUMENT

A. By rejecting applications from Kosovo residents on the basis of Article 119 of the Pensions and Disability Insurance Act, Serbia has acted in direct disobedience of the *Grudić* judgment's clear and categorical statement that "concerning the situation in Kosovo, . . . one's recognised right to a pension may only be restricted on the basis of Article 110 of the Pensions and Disability Insurance Act" (*Grudić*, §80).

As we have just seen, the Republic of Serbia, in its last "Follow Up Report in the Case Grudić v. Serbia Concerning the General Measures," finally revealed the purported legal basis on which it has refused almost every fully documented application from Kosovo residents (96.1%) for the resumption of pension payments. But, in relying on Article 119 of the Pensions and Disability Act, the Republic of Serbia blatantly ignores the *Grudić* judgment's clear and repeated statements, on the basis of an Opinion of the Civil Division of the Supreme Court of Serbia, that "[i]n response to the situation in Kosovo, . . . one's recognised right to a pension may only be restricted on the basis of **Article 110** of the Pensions and Disability Insurance Act" (*Grudić*, §31; emphasis added), also re-emphasized, using almost the exact same words, later in the judgment: "concerning the situation in Kosovo, . . . one's recognized right to a pension may only be restricted on the basis of **Article 110** of the Pensions and Disability Insurance Act" (*Grudić*, §80; emphasis added).

It is worth noting that, before the Committee of Ministers pressed the Republic of Serbia to cite "the legislative provisions justifying refusal of [pension] payments" (Decision no. 4, 1179th Meeting of the Committee of Ministers, 26 September 2013), it seems not to have occurred to anyone that Article 119 could even possibly be used as a legal justification for denying pension payments to Kosovo residents. Article 119 is not mentioned once in the Supreme Court Opinion relied upon in the *Grudić* judgment.

Indeed, I know of no publicly available document, before the Follow Up Report of 24 October 2013, in which any competent institution of the Republic of Serbia has attempted to claim that Article 119 of the Pensions and Disability Insurance Act could serve as a basis for disqualifying Kosovo residents from exercising their insurance rights under that Act.

A closer examination of the statutory context of Article 119 reveals why it is wholly inapplicable to the situation of Kosovo. In the translation adopted by the Republic of Serbia's Follow Up Report, Article 119 provides that "a beneficiary of pension accomplishing the right to two or several pensions in the territory of the Republic of Serbia may only use one of the above pensions according to his/her choice." As we saw above, Serbia argues that this provision prevents residents of Kosovo from simultaneously receiving both the basic pension provided for by UNMIK Regulation 2001/35, which is based solely on age, and the pension they are entitled to under the Pensions and Disability Insurance Act of Serbia, which is based on employment contributions. See Pensions and Disability Insurance Act of Serbia, Article 3 ("Mandatory pension and disability insurance is the insurance whereby the rights, **based on employment**, in case of old age, disability, death, and bodily damage shall be ensured"; emphasis added).

But when Article 119 prohibits a beneficiary from exercising "the right to two or several pensions in the territory of the Republic of Serbia," this does not include the pension provided for by UNMIK Regulation 2001/35. Rather, the words "two or several pensions" allude to the three types of pensions delineated in Article 18 of the Pensions and Disability Insurance Act, which states that "[p]ension and disability rights shall entail: (1) in case of old age – a right to receive old age pension; (2) in case of disability – a right to receive disability pension; (3) in case of death . . . a right to receive family pension[.]" In other words, what Article 119 forbids is a beneficiary receiving more than one of the three general types of pensions provided for in the Act.

The validity of this reading is reinforced by the statutory context of Article 119. Just two provisions ahead of Article 119, the Act states: "**In case a family pension beneficiary is not being disbursed family pension he/she is entitled to receive, . . . due to his/her receiving old age or disability pension**, during that period, other core family members shall be disbursed a family pension in the amount determined as if the pension beneficiary were not entitled to family pension" (Pensions and Disability Insurance Act, Article 117, emphasis added). Article 119 simply makes explicit what was already implicit in the portion of Article 117 highlighted above: if a beneficiary meets the statutory requirements for receiving more than one of the three pensions provided for in the Act (old age, disability, and family pensions), he or she cannot receive all of them but rather must choose one. But the pension provided for by UNMIK Regulation 2001/35, quite obviously, is not one of the three pensions referred to in the Pensions and Disability

Insurance Act of the Republic of Serbia. Therefore, there is no basis for reading Article 119 of the Act as forcing Kosovo residents to choose between their UNMIK pensions and the pensions they are entitled to receive from the SPDIF.

This explains why the 2005 Opinion of the Civil Division of the Supreme Court of Serbia, and the *Grudić* judgment relying upon it, paid no attention to Article 119 and instead stated categorically that "concerning the situation in Kosovo, . . . one's recognized right to a pension may **only** be restricted on the basis of Article 110 of the Pensions and Disability Insurance Act" (*Grudić*, §80; emphasis added). By ignoring Article 110 and rejecting 96.1% of applications from Kosovo residents on the basis of the wholly irrelevant Article 119, the Republic of Serbia has acted in direct disobedience of the *Grudić* judgment and has thereby unlawfully interfered with the right of potentially thousands of Kosovo residents to peaceful enjoyment of their possessions.

B. Article 110 of the Pensions and Disability Insurance Act does not permit Serbia to reject applications from Kosovo residents on the ground that they are receiving a Basic Pension provided for by UNMIK regulations, because receiving the Basic Pension does not in any way constitute "exercising the rights under . . . insurance" provided by the Serbian Pensions and Disability Insurance Fund (*id.*, Article 110).

Because Article 110 is the sole provision on the basis of which Serbia may lawfully restrict pension insurance rights, we must ask whether, under that provision, there are any grounds for rejecting applications from Kosovo residents due to their receiving the Basic Pension provided for by UNMIK. As we saw above, Article 110 provides for only two grounds on which to terminate pension insurance rights. First, insurance rights may be terminated "if it transpires that one no longer meets the original statutory requirements" for acquiring and exercising those rights (*Grudić*, §26). Receiving the Basic Pension from UNMIK plainly does not affect whether one "meets the original statutory requirements" for being entitled to a pension (*e.g.*, having made the requisite employee contributions, making a proper showing of disability, etc.). Even the Republic of Serbia does not attempt to claim that receiving the UNMIK pension affects one's meeting of these original requirements.

Thus, the only possible basis in Article 110 for rejecting applications from Kosovo residents would be paragraph 2 of the provision, which states that a beneficiary's insurance rights are to be terminated if he or she is already "exercising the rights under such insurance with a mandatory pension and disability insurance organization from a state formed in the territory of the former Yugoslavia" (*id.*, Article 110, para. 2).

As we have seen above, the Republic of Serbia has claimed that receiving the Basic Pension according to UNMIK Regulation 2001/35 somehow constitutes exercising the rights one has earned under the Pension and Disability Insurance Act, or is in some way related to one's SPDIF insurance. See the Republic of Serbia's 20 September 2013

Follow Up Report ("in compliance with the UNMIK regulations, all persons having residence in this territory **and at least 15 years of previous pension insurance with the Pension and Disability Fund of the Republic of Serbia** are entitled to pension," emphasis added), as well as the 20 December 2012 letter sent by the Republic of Serbia to the European Court of Human Rights, and forwarded to the Committee of Ministers ("since . . . the adoption of the Rule no. 2001/35 – *On the Pensions in Kosovo* by UNMIK on 22 December 2001, many citizens of Kosovo and Metohija, former beneficiaries of pensions of the Pension and Disability Insurance Fund of the Republic of Serbia, accomplished the right to pension from the international administration, **recognizing the working years accomplished with the Pension and Disability Insurance Fund of the Republic of Serbia**," emphasis added).

Serbia's claim here, that receiving a pension under UNMIK Regulation 2001/35 is in some way linked to one's rights as a contributor to the SPDIF, is **demonstrably false**. Section 4.1 of the Regulation in question clearly states that the Basic Pension is the entitlement of "all persons habitually residing in Kosovo and who have reached Pension Age." The *Grudić* judgment also makes this abundantly clear, stating that the Regulation provides that "all persons 'habitually residing' in Kosovo, aged 65 or above, shall have the right to a 'basic pension'" (*Grudić*, §39). Thus, whether one is entitled to pension payments under Regulation 2001/35 does not depend in any way on one's having made previous contributions to the SPDIF insurance scheme. Indeed, throughout the entire Regulation, there is not even a single mention—or even a suggestion—that a person's pension rights under the Regulation could be connected to his or her entitlements as a contributor to the SPDIF. Therefore, we may conclude that receiving the UNMIK Basic Pension does not constitute "exercising the rights under . . . insurance" provided by the SPDIF. For this reason, Article 110 provides no justification for Serbia's rejection of 96.1% of applications from Kosovo residents due to their receiving the Basic Pension provided for by UNMIK Regulation 2001/35. I would emphasize that these residents still have not received the pension payments that they have rightfully earned based on their many years of contributions to the SPDIF. By denying them their insurance rights simply on the basis of their having received the UNMIK Basic Pension, the Republic of Serbia is unlawfully interfering with their right to peaceful enjoyment of their possessions, in the same way as it did with the *Grudić* applicants.

Nonetheless, for the sake of transparency and full disclosure, I would like to note that the Republic of Kosovo currently has a statute in force that, unlike UNMIK Regulation 2001/35, does allow Kosovo citizens to benefit from their status as contributors to SPDIF. This statute, Law No. 04/L-131 of the Republic of Kosovo on Pension Schemes Financed by the State ("Law on Pension Schemes"), provides that, besides the "Basic Age Pension," which "shall be paid to all persons who are permanent citizens of the Republic of Kosovo, who possess identification documents and who have reached the age of sixty-five (65)" (*id.*, Article 7, para. 1), Kosovo citizens with insurance rights

under SPDIF are eligible for the "age contribution-payer pension" (*id.*, Article 8, para. 1, subpara. 2), the "work disability pension" (*id.*, Article 11, para. 1), and the "family pension" (*id.*, Article 12, para. 1-2), on the basis of contributions paid to the SPDIF in the former Yugoslavia. Receiving any of these three non-basic pensions could possibly serve as grounds for terminating pension payments from the Republic of Serbia according to the criteria of Article 110, para. 2, of the Pensions and Disability Insurance Act, because receiving the non-basic pensions could legitimately be considered as "exercising the rights under [SPDIF] insurance with a mandatory pension and disability insurance organization from a state formed in the territory of the former Yugoslavia."

Three important points, however, must be emphasized. *First*, out of the three non-basic pensions provided for by the Republic of Kosovo Law on Pension Schemes, only one of them, the age contribution-payer pension, is currently being paid out to eligible Kosovo residents. By contrast, those residents who are eligible for the work disability pension and the family pension have not received, and are not presently receiving, the benefits to which they are entitled. The reason for this is simple: The Republic of Serbia is still in possession of all contributions paid to the SPDIF by Kosovo residents prior to 1999, and has not yet agreed to transfer them to the Republic of Kosovo. Even the current age contribution-payer pension beneficiaries are not being paid out of any kind of pension fund. Rather, they are being paid out of the Republic of Kosovo's general state budget. See Law on Pension Schemes, Article 5 ("Financial means for payment of all pensions set forth by this Law shall be provided from the Budget of Republic of Kosovo"). The contributions paid by these beneficiaries before 1999 remain with the SPDIF to this day. This fact not only makes it impossible for the Republic of Kosovo to disburse the work disability and family pensions on the basis of Kosovo residents' contributions to the SPDIF, but it also threatens the sustainability of even the age contribution-payer pension that is currently being disbursed to eligible beneficiaries.

As mentioned above, the Republic of Serbia has offered the helpful suggestion that the matter of pensions be discussed in ongoing negotiations for the normalization of relations between the Republic of Serbia and the Republic of Kosovo. To the extent that the aim of such negotiations would be to ensure the full transfer of Kosovo residents' SPDIF contributions from the Republic of Serbia to the Republic of Kosovo, I wholeheartedly support this effort. But I would emphasize that any attempt, in the course of these negotiations, to curtail the lawfully earned pension entitlements of Kosovo residents would be a direct violation of these individuals' right to peaceful enjoyment of their possessions under the terms of the *Grudić* judgment. The right of Kosovo residents to receive pensions on the basis of their prior contributions is now a matter of settled law under the Court's ruling. It cannot be sacrificed to the cold calculus of political bargaining.

Second, to the extent that Serbia's rejection of applications from Kosovo residents for resumption of pension payments was based on these residents' having received the UNMIK Basic Pension, all of these rejections must now be reevaluated, for the reason that we have already cited: receiving the Basic Pension paid by UNMIK does not provide sufficient grounds for termination of one's pension rights under Article 110 of Serbia's Pensions and Disability Insurance Act. Rather, in order to properly assess applications received from Kosovo residents, Serbia must obtain information on current pension payments not from UNMIK, but from the Republic of Kosovo's Ministry of Labour and Social Welfare. Only the latter can provide accurate data on whether Kosovo residents who have applied to SPDIF for resumption of pension payments are already receiving the age contribution-payer pension under the Republic of Kosovo's Law on Pension Schemes.

Third, even in those cases in which SPDIF rejects an application for the resumption of pension payments, on the ground that the applicant is presently receiving the age contribution-payer pension from the Republic of Kosovo, the SPDIF is still obligated under the *Grudić* judgment to pay arrears to such applicants, from the date of the suspension of an applicant's SPDIF pension payments until the date on which he or she began to receive the age contribution-payer pension from the Republic of Kosovo, together with statutory interest. The failure of the Republic of Serbia to pay full arrears, including statutory interest, to Kosovo residents whose pensions were wrongfully terminated is of great concern. We turn to this issue presently.

C. By placing a 12-month limit on arrears paid to Kosovo residents, the Republic of Serbia contradicts both (1) the *Grudić* judgment, which requires that arrears be calculated from the date on which the beneficiary's pension was wrongfully discontinued (*id.*, §92), and (2) the Serbian Pensions and Disability Insurance Act, which provides for a 12-month cap on arrears only if the discontinuation of the pension was "caused by the beneficiary" (*id.*, Article 123).

The Republic of Serbia's own account, it has placed a 12-month limit on the amount of arrears it has paid out to Kosovo residents. See the Republic of Serbia's Follow Up Reports of 20 September 2013 ("The decisions on resumption of payment of pensions also stipulate payment of arrears up to 12 months back") and 24 October 2013 ("The decisions on resumption of payment of pensions also stipulate payment of arrears up to 12 months back in accordance with Article 123 of the Law on Pension and Disability Insurance"). Article 123 in turn states that "[t]he accrued monthly installments of pension, cash compensation for bodily damage, not disbursed due to circumstances caused by the beneficiary, shall subsequently be disbursed for up to 12 months, effective retroactively from the date of the beneficiary, the circumstances no longer present, submitting a request for the disbursement."

This 12-month restriction on the payment of arrears represents a serious violation of the Republic of Serbia's obligations under *Grudić* and is entirely unjustified, even by Article 123, relied upon by Serbia.

In the case of the two applicants in *Grudić*, the Court's judgment expressly ordered "the respondent Government [to] pay the first and second applicants . . . their pensions due **as of 9 June 1999 and 15 January 2000**, respectively . . . , together with statutory interest (*Grudić*, §92, emphasis added). The highlighted dates are of the utmost importance, because they are the dates on which the two applicants' pensions were abruptly discontinued by SPDIF (see *Grudić*, §9). Thus, the *Grudić* judgment stands for the principle that those Kosovo residents whose pensions are wrongfully discontinued are entitled not merely to 12 months worth of arrears, but to arrears covering the entire period during which their pensions were unlawfully suspended. This point is made explicit in the notes to the Committee of Ministers' meeting held from 3–5 December 2013, in which it is stated that "the unpaid arrears between the date of the suspension of payment of pensions at issue and the date of their resumption are due." The Court's judgment in *Grudić* allows nothing less than the payment of arrears for the entire period of unlawful suspension, without the imposition of a 12-month limit.

Even more remarkable, however, is that the 12-month limit imposed by the Republic of Serbia is not even justified by the statutory provision that Serbia itself cites in support of that limit. The language of Article 123 makes very clear that the 12-month limit applies only when the beneficiary's pension payments are not disbursed "**due to circumstances caused by the beneficiary**." In the case of Kosovo residents like the applicants in *Grudić*, the failure to disburse pension payments was plainly not "due to circumstances caused by the beneficiar[ies]." Rather, the disbursement failure was the direct result of the SPDIF's decision to suspend the pensions on grounds that the Court in *Grudić* found to be unlawful. In these circumstances, neither the *Grudić* judgment nor Article 123 of Serbia's Pensions and Disability Insurance Act can justify the Republic of Serbia's failure to pay arrears to Kosovo residents, covering the full period of unlawful suspension of pension payments.

The Follow Up Reports submitted by the Republic of Serbia also suggest two other serious legal failures in Serbian authorities' payment of arrears. *First*, these Reports are completely silent about the payment of statutory interest. The right to receive interest payments on the overdue payment of arrears was emphasized in the *Grudić* judgment (see *id.*, §92). Just as the applicants in that case were judged to be entitled to statutory interest, so also should such interest be paid to all Kosovo applicants to whom arrears are due.

Second, the Follow Up Reports submitted by the Republic of Serbia indicate that only in those cases in which authorities made a decision for the resumption of pension payments did they also agree to the payment of arrears. But there are likely a considerable number

of applicants who may not currently be eligible for resumption of pension payments, due to their receiving the age contribution-payer pension from the Republic of Kosovo, but who are nonetheless entitled to the payment of arrears. They would be so entitled as long as it is the case that their pensions had been unlawfully suspended before they began receiving the age contribution-payer pension. Both of the above legal failures must be addressed by the Republic of Serbia in order to ensure its full compliance with the Court's judgment.

D. The Republic of Serbia's insistence that "all the documentation to be submitted to prove the right to pension by potential beneficiaries should be issued by UNMIK" may be severely impeding the execution of the *Grudić* judgment.

The final concern I wish to express is in regard to the overwhelmingly large number of applications that the Republic of Serbia has deemed to lack sufficient documentation. In its final Follow Up Report, Serbia stated that out of the 8,238 applications it had received thus far for resumption of pension payments, it judged that only 1,295 (15.7%) to have been accompanied by all required documents. In light of the Republic of Serbia's claimed ongoing cooperation with UNMIK on the issue of pensions, and its declaration that "all documentation to be submitted to prove the right to pension by potential beneficiaries should be issued by UNMIK" because "the Republic of Serbia does not recognize the so-called acts of the Republic of Kosovo," I sent a letter to the Special Representative of the Secretary General and Head of UNMIK, Mr. Zahir Tanin, on 21 January 2016, to achieve some clarity regarding the Republic of Serbia's alarmingly high rejection rate. Among other things, I asked whether UNMIK was "aware of any document or documents that are required for submission with pension applications, but that citizens of Kosovo have difficulty obtaining." To this date, I have not received a response from Mr. Tanin, and thus am unable to draw any firm conclusions on the reasons behind Serbia's finding of endemic lack of documentation on the part of Kosovo applicants.

One possible explanation for the alleged large-scale lack of documentation, however, is that UNMIK is no longer issuing civil documents for Kosovo residents. The authority for issuing identification documents in the territory of the Republic of Kosovo has been transferred to the Ministry of Internal Affairs by the Law on Identification Cards No. 03/L-099, which entered into force on 1 November 2008. Serbia's refusal to accept the validity of any documents issued in Kosovo except those issued by UNMIK may thus provide one explanation for why such a high proportion of Kosovo residents' applications have been refused as incomplete: applicants are no longer able to obtain identification documents from UNMIK. Therefore, full implementation of the *Grudić* judgment—which entails the payment of pensions, arrears, and statutory interest to all Kosovo residents fulfilling the statutory requirements for receiving such pensions—may

require Serbia to lift its categorical refusal to accept identification documents issued by the Republic of Kosovo.

CONCLUSION

For the foregoing reasons, I humbly conclude that, in order to bring the Republic of Serbia into full compliance with the European Court of Human Rights' judgment in the case of *Grudić v. Serbia*, Serbian authorities must:

(1) reassess all applications from Kosovo residents for the resumption of pension payments in cases in which the applications were rejected on the basis of the applicants' having received the Basic Pension provided for by UNMIK Regulation 2001/35;

(2) publicly announce, for the benefit of Kosovo residents who have not yet applied for resumption of pension payments, that their having received the Basic Pension provided for by UNMIK Regulation 2001/35 will no longer be considered as a disqualifying factor;

(3) publicly announce that current recipients of the age contribution-payer pension from the Republic of Kosovo, even if they would not be eligible for resumption of pension payments from the Republic of Serbia, may nonetheless be eligible for the payment of arrears, including statutory interest, for the period of time prior to their receiving pension payments from the Republic of Kosovo;

(4) render positive decisions for the resumption of pension payments in the case of all Kosovo residents who fulfill the original statutory requirements for receiving pension payments under the Pensions and Disability Insurance Fund and who are not presently receiving the age contribution-payer pension from the Republic of Kosovo;

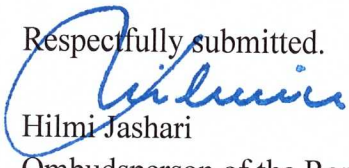
(5) pay arrears in full, including statutory interest, to Kosovo residents whose pensions were unlawfully suspended, from the date on which payments were suspended until the date on which (a) those pension payments were resumed by the Republic of Serbia, or (b) the applicants began receiving the age contribution-payer pension from the Republic of Kosovo;

(6) clarify precisely what missing documentation is responsible for the Republic of Serbia's rejection of 84.3% of applications from Kosovo residents as incomplete, and if necessary, accept documentation from the Republic of Kosovo as valid for the purposes of executing the *Grudić* judgment in full; and

(7) take all necessary measures to transfer to the Republic of Kosovo all contributions that were paid by Kosovo residents prior to 1999 and that remain in the possession of SPDIF, as a long-term solution for ensuring the sustainability of

pension payments to Kosovo residents who made contributions to SPDIF in accordance with law.

Respectfully submitted.



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