

Social security rights of the IDPs and residents living in non-government-controlled territories. Experience of pan-European states

LILIAN APOSTOL

WEBINAR, 25 NOVEMBER 2020, KYIV

«SOCIAL RIGHTS PROTECTION OF INTERNALLY DISPLACED PERSONS AND OTHER VULNERABLE GROUPS: EUROPEAN SOCIAL CHARTER, OTHER EUROPEAN STANDARDS AND ADMINISTRATIVE COURTS CASE LAW IN UKRAINE»





International Standards

Selected practices

EXPERIENCE MEMBER-STATES



Conclusions





International Standards





General framework

- ICESCR Article 9 (social security) + Article 1 (non-discrimination)

IDPs should benefit from social services but only 'when necessary'

- UN IDPs Guiding Principles – Principles 18 & 19

IDPs identity documents in spite of principle of non-recognition

- UN IDPs Guiding Principles – Principle 20

ILO promotes reintegration and asks for portability of the work-related entitlements

- ILO Recommendation no. 205

Jurisdiction NO ordinary understanding as with civil and political rights

- ICJ and CESCR – recognise the doctrine of “effective control”

Social and economic rights

- self-imposed
- due respect of non-discrimination
- progressive implementation

Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights

- Recommendary
- No clear assessment of Parent-State’s duties in case of loss of effective control over the portion of its own territory



General Comment no. 19 of the UN CESCR

39. Internally displaced persons should not suffer from any **discrimination** in the enjoyment of their right to social security and States parties should take **proactive measures to ensure** equal access to schemes, for example by waiving, where applicable, residence requirements and making allowance for provision of benefits or other related services at the place of displacement. Internal migrants should be able to access social security from **their place of residence**, and **residence registration** systems should not restrict access to social security for individuals who move to another district where they are not registered.

COUNCIL OF EUROPE

COMMITTEE
OF MINISTERS
COMITÉ
DES MINISTRES



CONSEIL DE L'EUROPE

COMMITTEE
OF MINISTERS
COMITÉ
DES MINISTRES

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

Focus on

- housing rights,
- compensations for the loss of properties,
- restitution and
- investigations of serious human rights violations

...necessity of the IDPs reintegration

- CM, 'Recommendation Rec(2006)6 of the Committee of Ministers to Member States on Internally Displaced Persons

IDPs' social security rights

- Little or nothing about



European
Social
Charter

Charte
sociale
européenne

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE



European
Social
Charter

Charte
sociale
européenne



ESC Article 12 (social security)

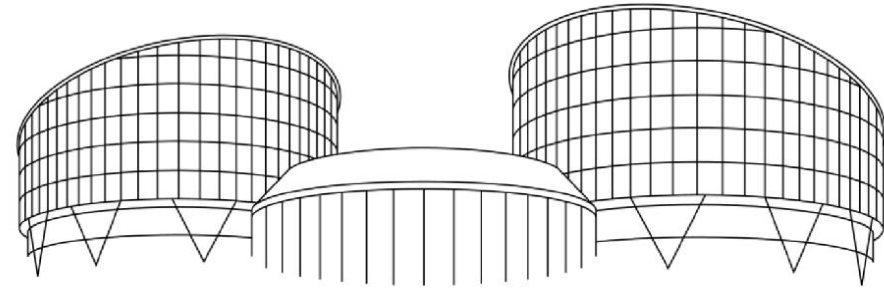
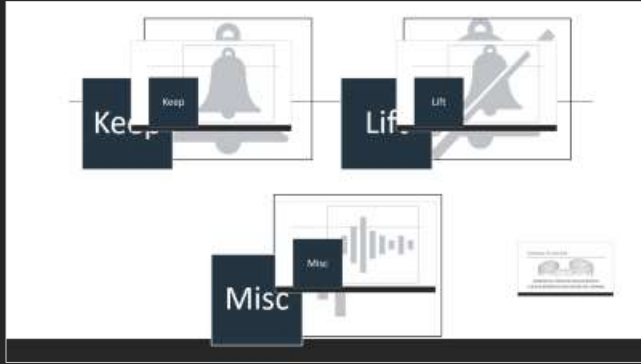
ECSR

- No clear references to IDPs
- Equates the status of IDPs with Refugees

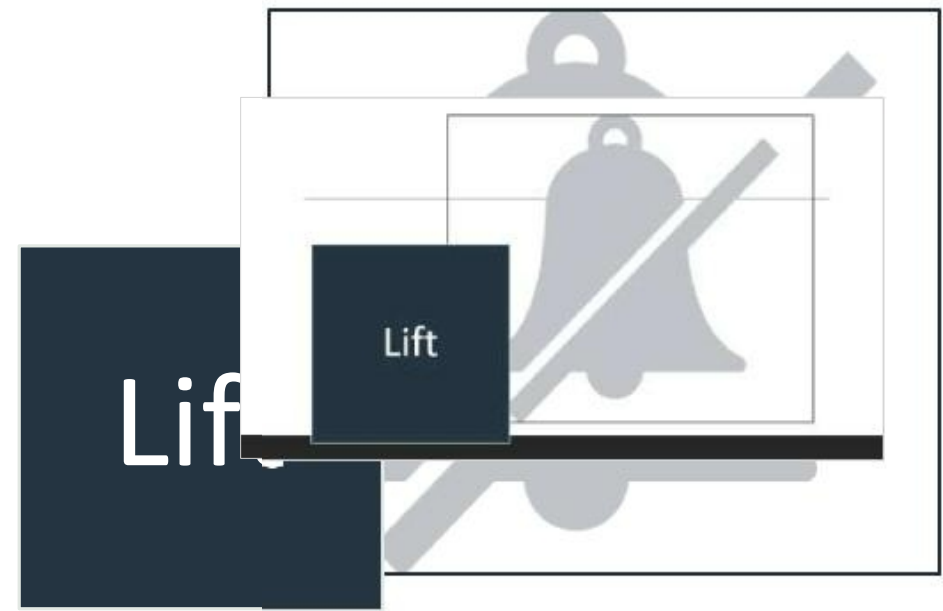
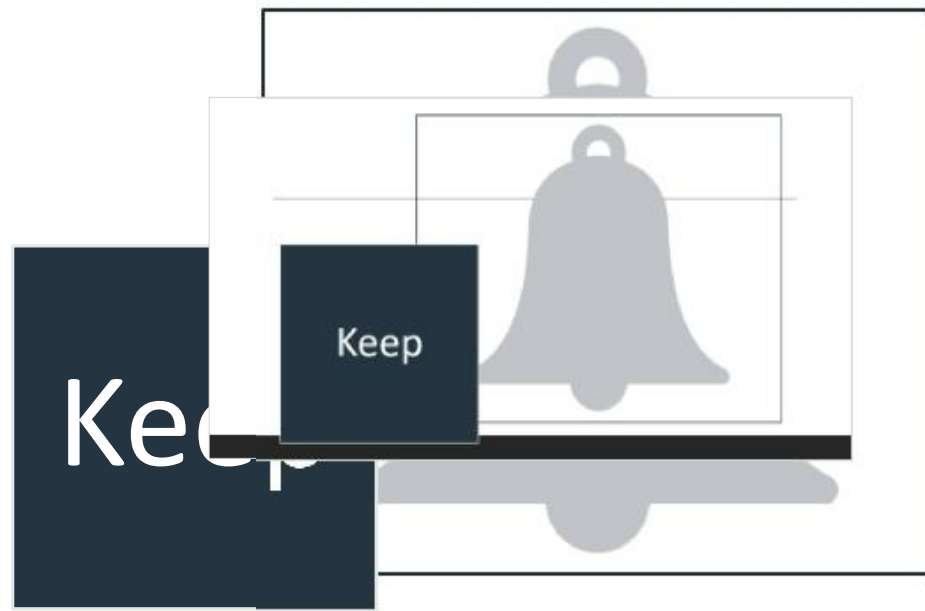
Key-Principles

- Progressive implementation
- No territoriality or nationality (non-discrimination)

Portability



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME



Keep



1. Keep/update

Keeping the contested social legislation unchanged yet settling individual claims

- *Kjartan Ásmundsson v. Iceland*

Temporary payments on an extra-statutory basis until changes of legislation

- *Cornwell and Leary group of cases v. United Kingdom*

Allocation of budgetary funds to enforce social policies

- *Zahirović v. Bosnia and Herzegovina*

Improvement of social housing programs without substantive annulment of social housing benefits

- *Shpakovskiy & Kuksa v. Russia*

Updating judicial practice rather than changing the social legislation

- *Panorama Ltd and Miličić v. Bosnia and Herzegovina*

Harmonization of legislation and unifying social security schemes

- *Karanović group of cases & Šekerović & Pašalić v. Bosnia and Herzegovina*

Lift



2. Lift/Reduce

Velikoda (legal certainty)

Withdrawing social privileges and housing rights

- *Olaru v. Moldova*

Review of the framework trade union agreements and social legislation reducing excessive salary rights

- *Kunić and others v. Bosnia and Herzegovina*

Lifting immunities or moratoria to public assets taken in conjunction with the use of special remedy mechanisms

- *Kiliç v. Turkey*

Legal certainty & Changes in social legislation

Changes in legislation cannot make futile a litigious claim, i.e. when the **case is pending before the courts** (*Zielinski et Pradal et Gonzalez et autres c. France* or *Topal v. the Republic of Moldova*).

The amendments of legislation can be accepted after a judicial decision became final providing that they **would not make the process of execution impractical** (*Stran Greek Refineries and Stratis Andreadis v. Greece*).

Such changes in legislation **should not be applied retroactively** to a final judicial decision (*Arras and others v. Italy*)

A final and enforceable court decision is not an absolute guarantee that the legislation on which it was issued would not change in the future. If there is a **general interest** at stake, such as amendment of social policies in view of new economic situation, the legislation can be reviewed despite of the current execution claims. However, the authorities must be diligent while operating the changes in the social legislation as they cannot reason on the lack of funds or austerity of the state budget and, thus, make the execution with no avail. (*Sukhobokov v. Russia*)

VELIKODA (dec.)

In the *Velikoda*, the very core of the right to receive pension was not affected, even if the new **legislation changed the way of calculation** established previously by the Ukrainian courts.

Moreover, the calculation operated for the future payments and, accordingly, the interference was considered proportional as the State is entitled to change its social security policies on the basis of the general interests and pressing need.

KANDYBA AND OTHERS (dec.)

... the failure to resume payments of pensions and social-security allocations following a direct award by the domestic courts in favour of claimants who currently reside in the territories outside of Government control.

“...the Court accepts the Government’s arguments **that the State could not be reasonably required to enforce a judgment by way of taking actions clearly not envisaged by the court during the adoption of that judgment**, and that the applicants could and should, **following the ultra vires ruling**, have initiated separate proceedings against the appropriate defendants to assert their rights.

“The judgment is not enforceable in the particular way claimed by the applicants. In particular, it does **not follow from the above judgment that any pecuniary awards were to be paid to the applicants**. If their complaints under Article 1 of Protocol No. 1 could be understood as complaints about the failure to resume their pensions and other social-security payments, the applicants should have lodged separate claims in this respect as advised by the domestic authorities. “

Misc



3. Miscellaneous

Improvement of the IT databases and the system of evidence of execution proceedings

- *Boucke v. Montenegro*
- *Khachatryan v. Armenia*

Determining priority in execution of social entitlements and debts of public entities

- *Luntre group of cases v. Moldova*

Privatization of socially-indebted companies

- *Kačapor group v. Serbia*

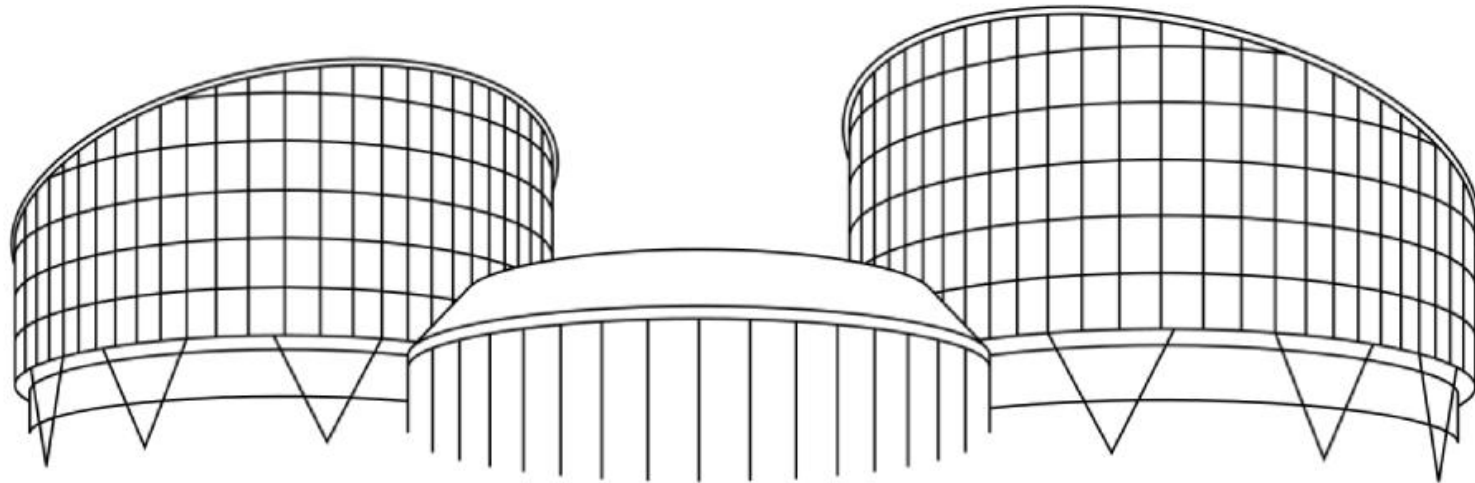
Review of the domestic mechanisms in view of giving factual recognition to the judicial orders issued by unrecognised entities

- *Grudić v. Serbia*

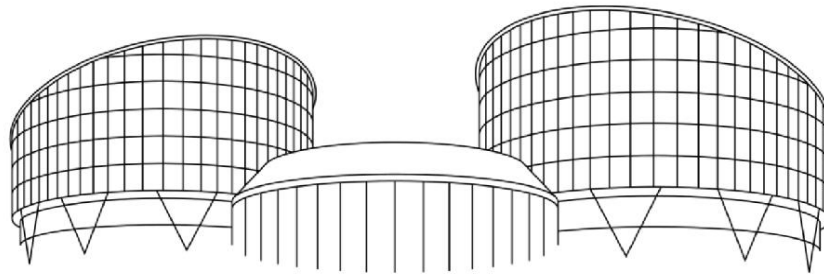
Improvement of the domestic remedies

- *Angelov v. Bulgaria*

Summary



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

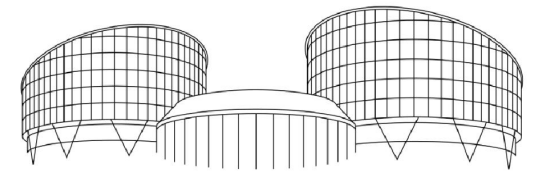
4th instance cases

Limited application to certain type of rights

- Peaceful possession
- Privacy

Non-discrimination

Large discretion left to States in defining their policies in the area of social security



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Clear legal basis

- *Van der Mussele, Kopecký*

Must not be manifestly discriminatory

- *Andrejeva*

No longer mandatory contributions

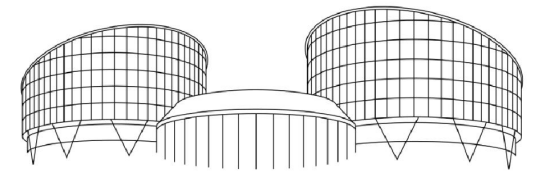
- *Stec et al.*

Fulfilment of statutory conditions, except those manifestly discriminatory

- *Bellet, Huertas and Vialatte (dec.)*

Social benefits are not absolute; they can be changed or revoked

- *Kjartan Ásmundsson, Grudić*



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Change or revoking social benefits

- only by law
- pressing general interest
- due respect of the proportionality
- legal certainty

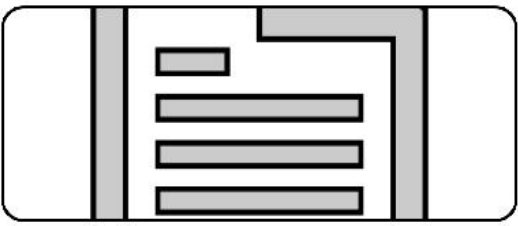
In summary

The Council of Europe General
Principles in the field of social
security

COUNCIL OF EUROPE

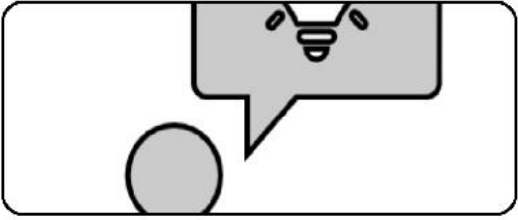


CONSEIL DE L'EUROPE

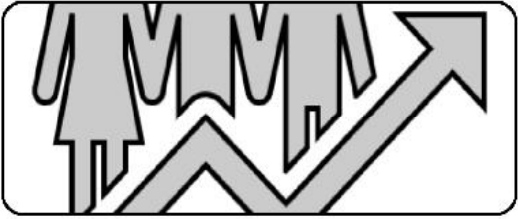


Interplay

- European Social Charter
- European Convention on Human Rights



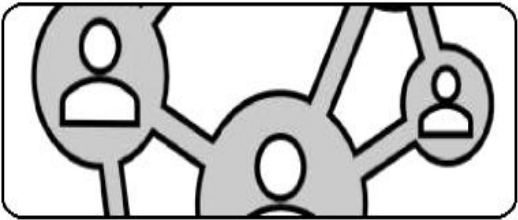
Large discretion



Progressive implementation



Equity / non-discrimination



Proportionality

- Balance between individual and public interests

Selected practices



EXPERIENCE MEMBER-STATES

States facing
territorial
secessions



Secession

States in
post-conflict
situations



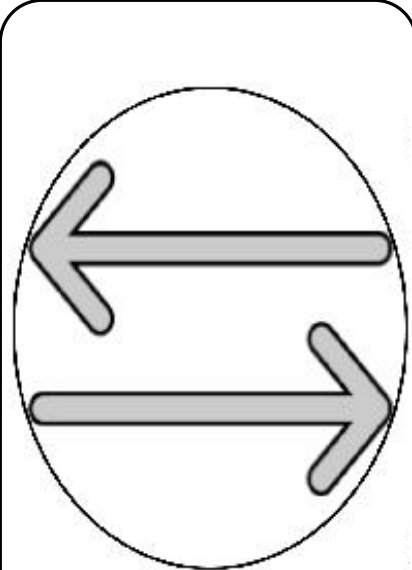
Postbellum

States facing
territorial
secessions

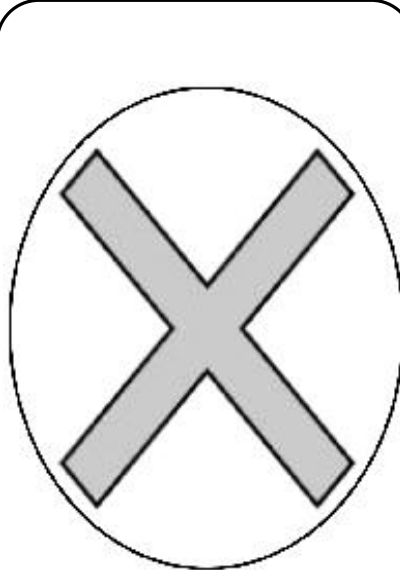


Cyprus



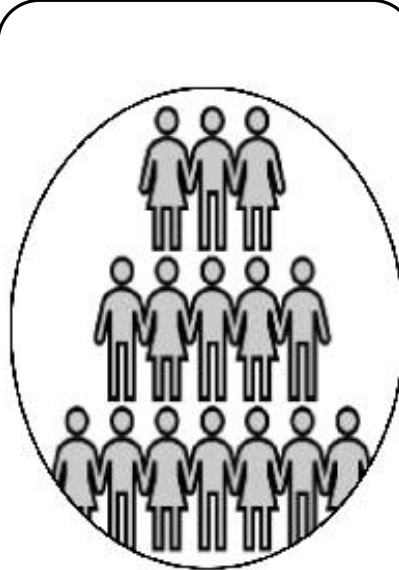


Inter-communal
frozen conflict



Formal Non-
recognition -
stumbling block

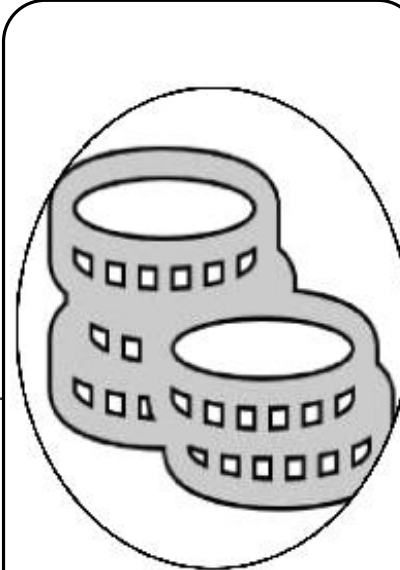
- Primary Civil Status (Marriage certificates) documents are still unrecognised
- Some minor occurrences (e.g. health care system build by territorial administrative division)



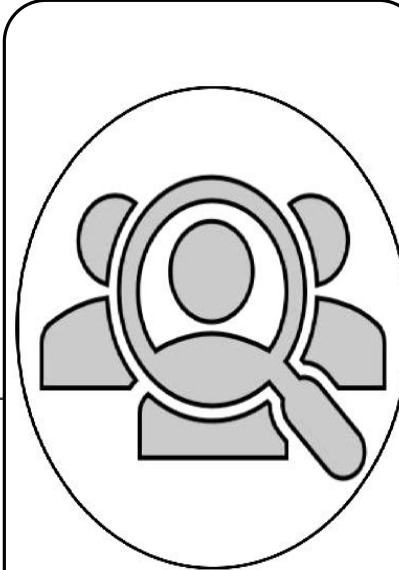
All-inclusiveness
policy



Attractiveness of
Cyprus Passport;
EU citizenship

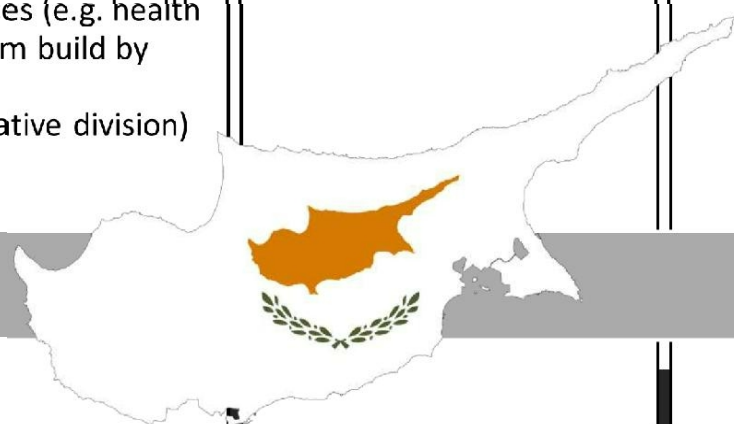


Contributory-based
social security
system



Yet, different
treatment based on
ethnic distinction
remains imbedded

Cyprus

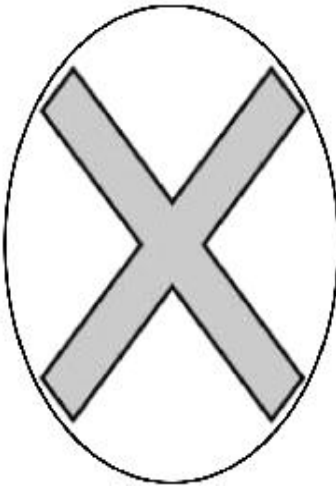


The Republic of Moldova



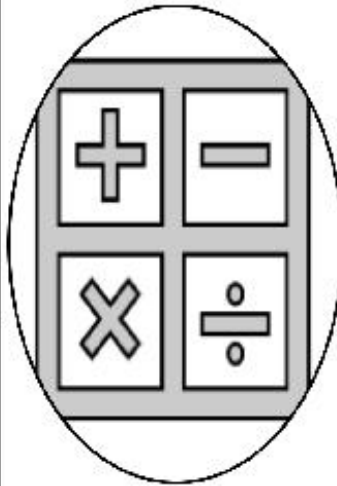


Geopolitical
frozen conflict

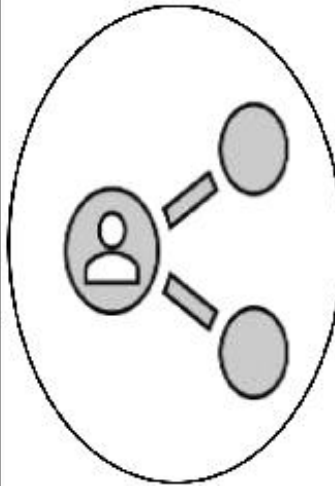


Formal Non-
recognition
(Namibia
Exception)

- Civil status documents
- Exchange of social security files



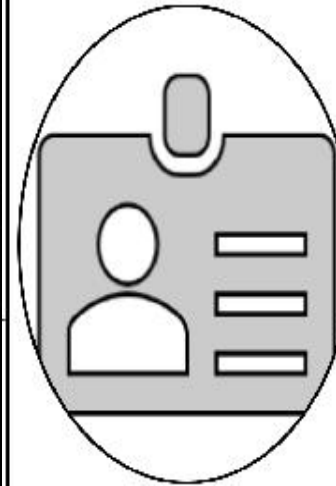
Dissenting
social schemes -
post-soviet &
modern
transitional



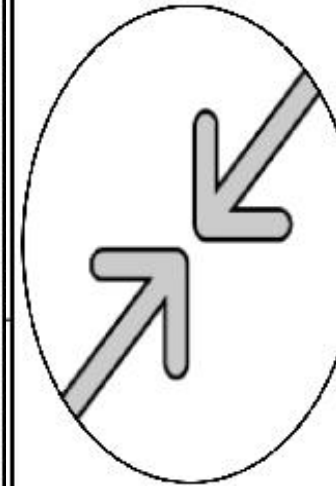
IDPs were
recognised as
citizens and
granted special
status and social
security
benefits



Special status of
people living in
the NGCA



Free-visa
regime and
attractiveness
of the
Moldovan
passport as a
travel document

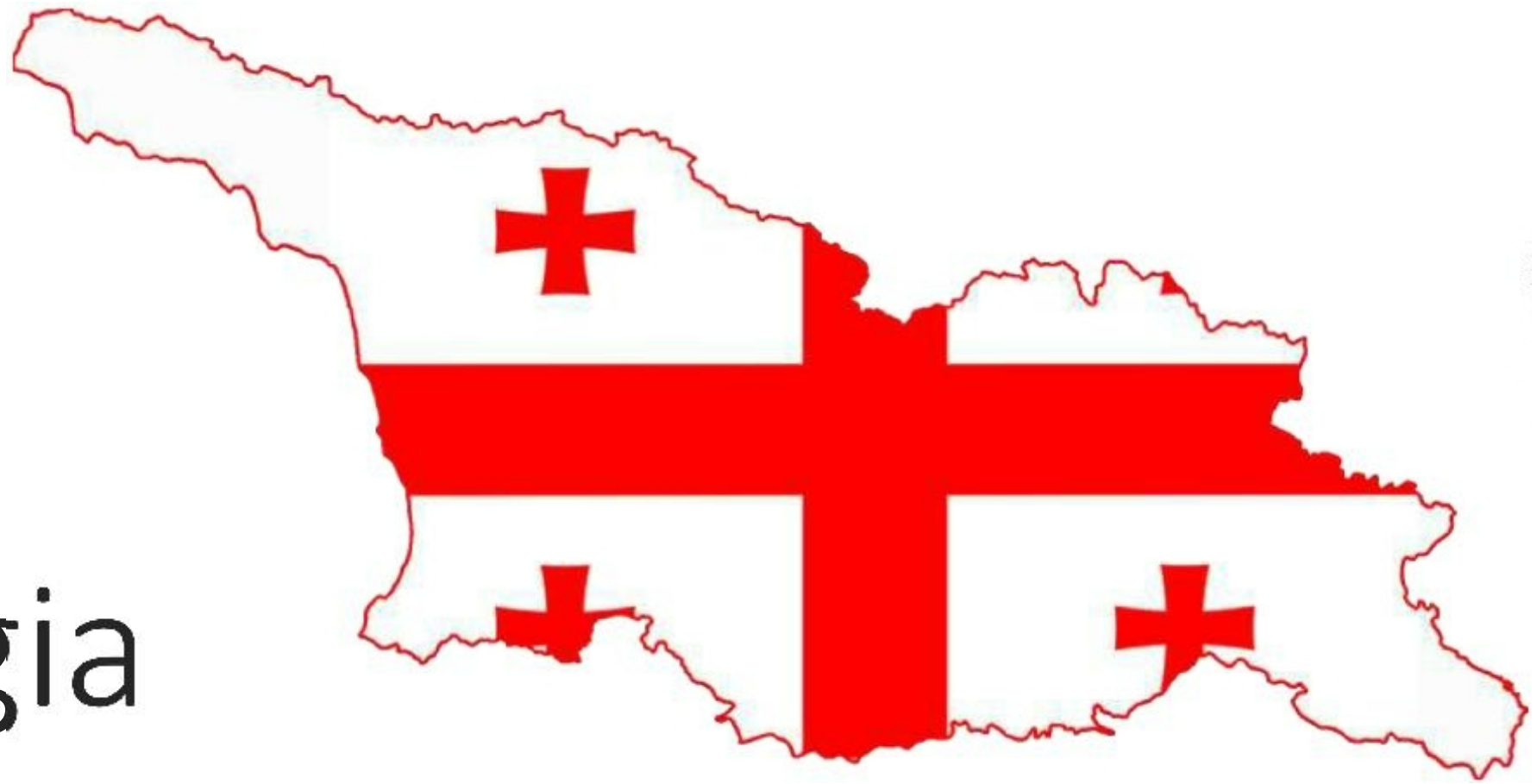


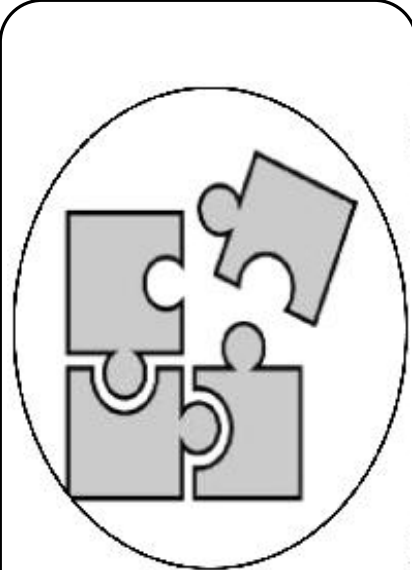
Difficulty –
Russian
counter-policies

- Acceptance of the Non-State documents
- Direct payment of pensions
- granting special status and citizenship

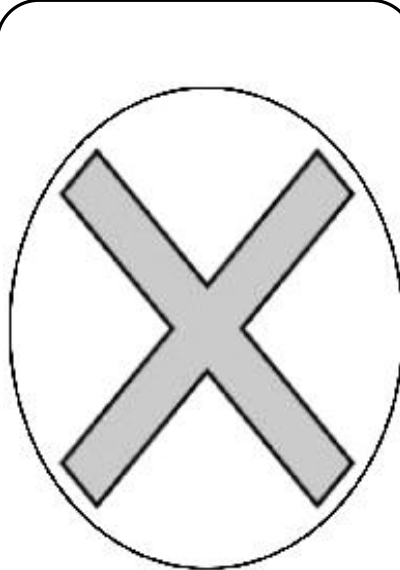
The Republic of Moldova

Georgia

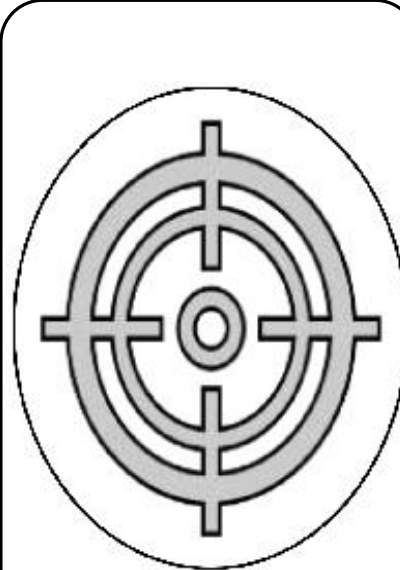




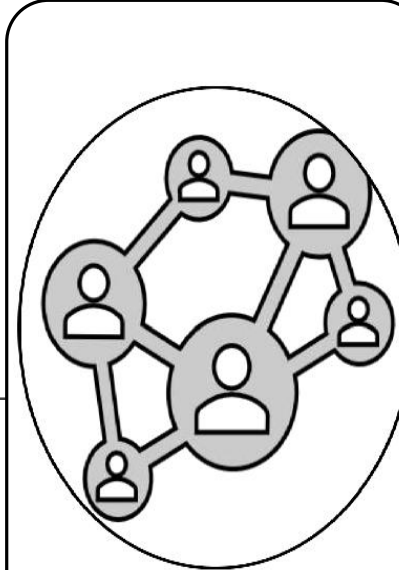
Inter-ethnic
context & 2
pending
“frozen
conflicts”



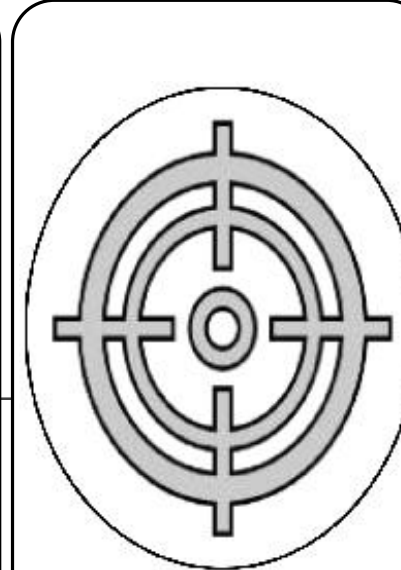
Absolute non-
recognition
policies



Social system
on the basis of
all-
inclusiveness
by nationality
and ethnicity



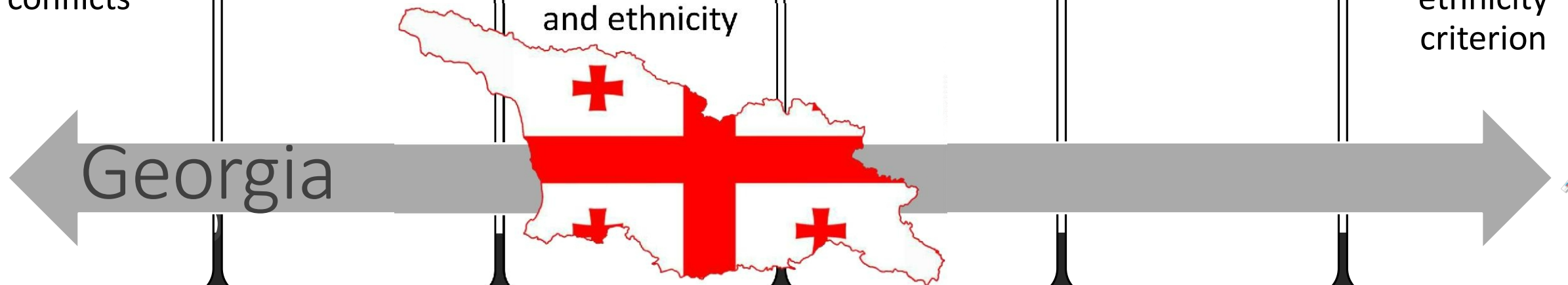
Citizen of the
State & special
status of the
IDPs



No double
citizenship &
absolute
allegiance



Targeted Social
Assistance of
the persons in
the GNCA is
based on
ethnicity
criterion



Azerbaijan

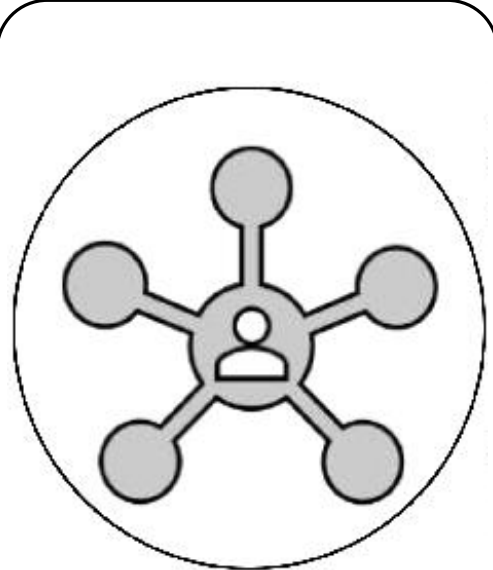




Inter-ethnic,
frozen conflict

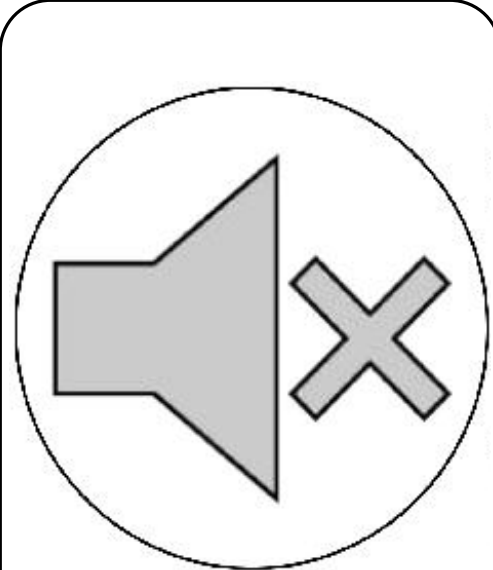


Absolute Non-
recognition

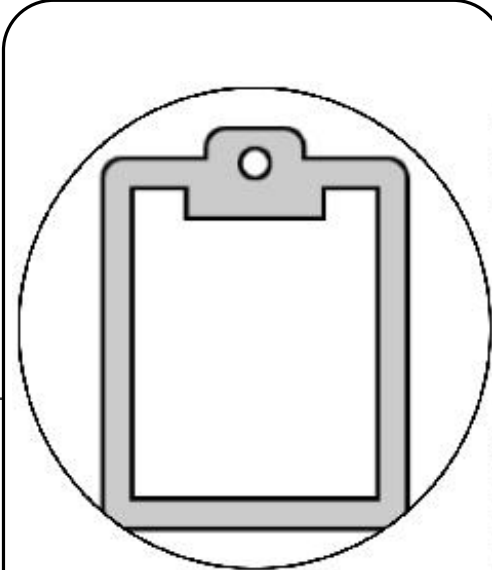


IPDs only Azeri

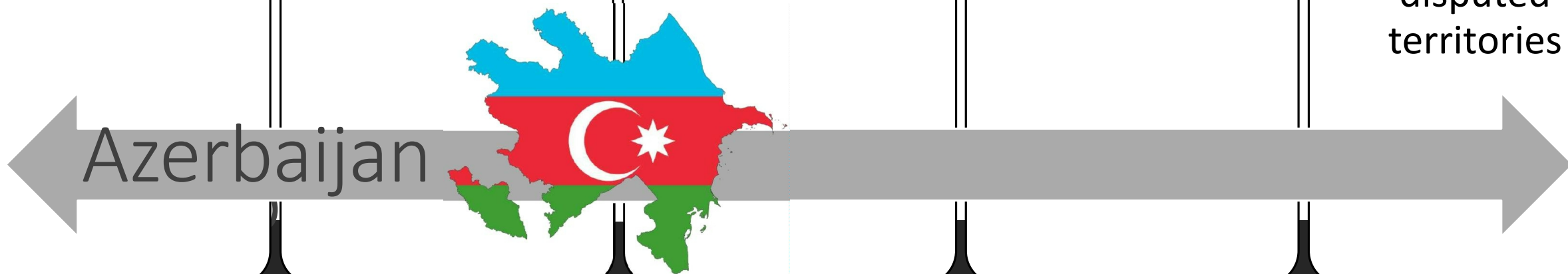
- Serious propriety
disputes on
housing rights



Animosity
towards the
NGCA settlers



either unwilling
or unable to
implement
social security
policies in the
disputed
territories



States in post-conflict situations



Croatia



Croatia



Validation Act to overpass unwillingness of Non-Recognition



Portability of social benefits was burdensome and declaratory



Legislation is unclear and inaccessible



No clear administrative mechanism and wide executive authorities' discretion



Unfair Judicial oversight and ineffective remedies

Bosnia and Herzegovina



Bosnia and Herzegovina



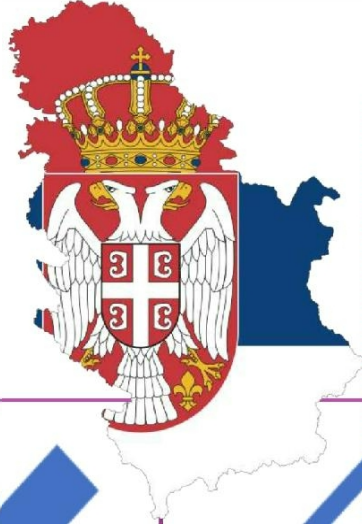
			
Federative division and systemic problems	Two social security systems of the federative entities	No portability on the legislative federal level	Judicial decisions unenforced



Serbia



Serbia



Classic non-
recognition



No portability



Refusal to pay
“Kosovo
pensions” as it
is still under
international
administration

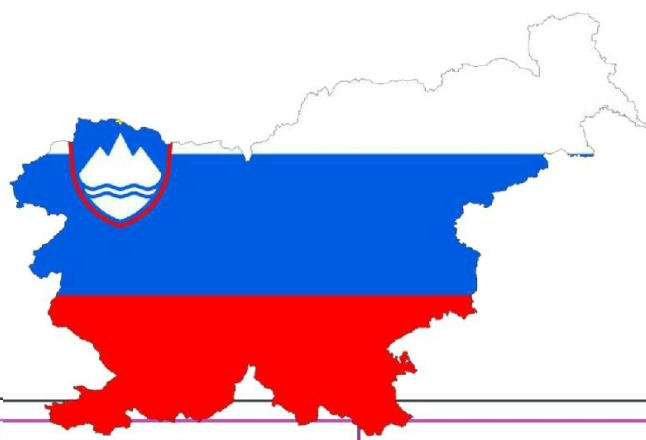


Domestic courts
compelled to
pay pensions
but decisions
remained
unenforced

Slovenia



Slovenia



Problem of
“erased”



No official
registration in
the Register
of Permanent
Residents



No
documents
and thus no
social security
benefits

Conclusions



