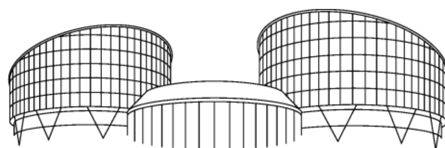

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

DECISION

Application no. 11209/09
Ali AZEMI
against Serbia

The European Court of Human Rights (Second Section), sitting on 5 November 2013 as a Chamber composed of:

Guido Raimondi, *President,*
Işıl Karakaş,
Peer Lorenzen,
Dragoljub Popović,
András Sajó,
Paulo Pinto de Albuquerque,
Helen Keller, *judges*
and Stanley Naismith, *Section Registrar,*

Having regard to the above application lodged on 18 February 2009,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Ali Azemi, is a national of Kosovo[1], who was born in 1946 and lives in Ferizaj, Kosovo. He was represented before the Court by Mr G. Nushi, a lawyer practising in Pristina, Kosovo.

2. The Serbian Government ("the Government") were represented by their Agent, Mr S. Carić of the Ministry of Justice.

1. All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. On 27 February 1990 the employment of the applicant as well as that of other persons was terminated.

5. It would appear that on 17 April 1990 he and the other persons challenged the termination of their employment before the Pristina District Court. Their request was never examined.

6. On 11 January 2002 the Municipal Court of Ferizaj ("the Municipal Court") ruled in favour of the applicant's and other persons' request concerning the unlawful termination of their employment. The court ordered their reinstatement. It further ordered the employer, a socially-owned enterprise, to restore all the entitlements for the period between 19 February 1990 and 1 May 2001. The decision became final on 11 March 2002, no appeal having been filed against it.

7. On 22 December 2005 and 16 January 2006 an enforcement writ was issued.

8. In the meantime, the applicant's employer was subject to privatisation, which had been entrusted to the Kosovo Trust Agency ("KTA"). The final act of privatisation was concluded on 21 November 2007.

9. Between 2006 and 2007 a number of Kosovo courts' decisions recognised the force of *res judicata* of the Municipal Court's decision of 11 January 2002. That decision was never enforced.

10. On 17 December 2010 Kosovo's Constitutional Court, following the applicant's request, ruled that there had been a breach of the applicant's right to a fair trial on account of the non-enforcement of the Municipal Court's decision. It ordered the Government of Kosovo and the Privatisation Agency of Kosovo ("PAK"), the legal successor of KTA, to enforce it.

11. On 12 May 2011 Kosovo's Constitutional Court, in response to a request for clarification by PAK, explained that the final decision to be enforced referred to the Municipal Court's decision of 11 January 2002. The Constitutional Court identified PAK as the body responsible for its execution.

B. Relevant international documents

12. The relevant background to the situation in Kosovo in 1999 has been described in detail in the Grand Chamber's decision in the case of *Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC], nos. 71412/01 and 78166/01, §§ 2-4, 2 May 2007. The air strikes that had begun on 24 March 1999 by the North Atlantic Treaty Organisation ("NATO") ended on 8 June 1999 when the Federal Republic of Yugoslavia

(“FRY”) troops agreed to withdraw from Kosovo, as a result of the conclusion of a “Military Technical Agreement” (“MTA”), which also foresaw the presence of an international security force following a United Nations (“UN”) Security Council (“SC”) Resolution.

1. UN acts

13. On 10 June 1999 the UN SC adopted Resolution 1244. The relevant extracts of the resolution were outlined in *Behrami and Saramati* (cited above, §§ 41-43). According to Resolution 1244, an international civil (“United Nations Mission in Kosovo – UNMIK”) and security (“Kosovo Force – KFOR”) presence would be deployed in Kosovo. A Special Representative (“SR”) would be appointed by the UN Secretary General (“SG”) to head UNMIK.

14. In the performance of duties entrusted to UNMIK, the SR issued legislative acts in the form of regulations with a view to establishing the governing framework in Kosovo. Section 1 of UNMIK Regulation No. 1999/1 (UNMIK/REG/1999/1) provided that all legislative and executive authority with respect to Kosovo, including the administration of the judiciary, was vested in UNMIK and was exercised by the SR.

15. On 15 May 2001 the SR adopted UNMIK Regulation No. 2001/9 (UNMIK/REG/2001/9) on the Constitutional Framework for Provisional Self-government in Kosovo. The Regulation aimed at transferring responsibilities from UNMIK to Kosovo’s newly created institutions of self-government: the assembly, the President, the Government, the courts and other bodies and institutions set forth in this Constitutional Framework (section 1).

2. European Union Rule of Law Mission in Kosovo (“EULEX Kosovo”)

16. On 4 February 2008 the Council of the European Union (“the Council”), relying, *inter alia*, on UNSC Resolution 1244 (1999), established EULEX Kosovo (Council Joint Action (“CJA”) 2008/124/CFSP). In accordance with the CJA, EULEX Kosovo’s aim is to assist and support the Kosovo authorities in the rule of law area, specifically as regards the police, the judiciary and customs. EULEX Kosovo’s mission will expire on 14 June 2014 in accordance with the Council’s decision of 5 June 2012 (Council Decision 2012/291/CFSP).

17. In his periodic reports to the UNSC, pursuant to Resolution 1244 (1999), the UNSG has repeatedly submitted, *inter alia*, that EULEX Kosovo continues to “operate under the overall authority and within the status-neutral framework of the United Nations” (see, for example, the UNSG reports on UNMIK, S/2012/603 of 3 August 2012; S/2012/275 of 27 April 2012; S/2012/72 of 31 January 2012; S/2011/514 of 12 August 2011, as well as the preceding Reports S/2011/281 of

3 May 2011, S/2011/43 of 28 January 2011, S/2010/562 of 29 October 2010, S/2010/401 of 29 July 2010, S/2010/169 of 6 April 2010 and S/2010/5 of 5 January 2010).

18. In its Opinion on the Existing Mechanism to review the compatibility with human rights standards of acts by UNMIK and EULEX in Kosovo (no. 545/2009, CDL-AD (2010) 051), the European Commission for Democracy through Law ("the Venice Commission") stated the following:

> "17. In accordance with the reconfiguration of the international presence, EULEX now carries out among others the operational tasks associated with the rule of law, which previously came under the responsibility of UNMIK. The mandate of the EULEX Mission is large: it assists the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and a multi-ethnic police and custom service, ensuring that these institutions are free from political interference and adhering to internationally recognized standards and European best practices. It also has some limited correctional powers in the broader field of the rule of law, in particular to investigate and prosecute serious and sensitive crimes. (...) EULEX operates under the local political guidance provided by the EUSR in Kosovo and reports to the Civilian Operations Commander in Brussels. The EU Political and Security Committee (PSC) exercises, under the responsibility of the Council of the EU, political control and strategic direction of the mission."

3. Events concerning the status of Kosovo

19. Following the rejection of the Comprehensive Proposal for the Kosovo Status Settlement by the UNSC in 2007 and the failure of negotiations facilitated by the "Troika", of the European Union, the United States of America and the Russian Federation, on 17 February 2008 the assembly of Kosovo adopted a declaration of independence.

20. On 15 June 2008 the Constitution of Kosovo, as enacted by its assembly, entered into force.

21. In response to the UN General Assembly request for an advisory opinion on the accordance with international law of Kosovo's declaration of independence, on 22 July 2010 the International Court of Justice found that the declaration of independence of 17 February 2008 did not violate any applicable rule of international law.

22. According to the UNSG's report of 12 August 2011 (S/2011/514), a total of 76 countries had recognised Kosovo's independence. As of 1 July 2012, 89 of the 192 UN Member States had recognized Kosovo as an independent state, including 22 out of the then 27 member States of the European Union. The report of 8 November 2012 (S/2012/818) stated, *inter alia*, that:

> "on 10 September, the Kosovo authorities and the International Steering Group, composed of States that recognize Kosovo, declared the end of the "supervised independence" of Kosovo and affirmed the Constitution of Kosovo as the "sole" legal

> framework. The decision also envisages the closure of the International Civilian Office that was established under the Comprehensive Proposal for the Kosovo Status Settlement."

23. The report of 26 July 2013 (S/2013/254) stated, *inter alia*, that the "first agreement on principles governing the normalization of relations" had been initialed by Pristina and Belgrade on 19 April 2013. It further mentioned that "UNMIK continued to monitor activities and exercise residual responsibilities in the area of rule of law."

24. On 21 May 2008 Kosovo's assembly enacted the Act on PAK, which succeeded the KTA (Ligji nr. 03 / L-067).

4. Venice Commission opinions

(a) The Venice Commission opinion no. 280/2004 of 11 October 2004

25. In its Opinion on Human Rights in Kosovo: Possible establishment of review mechanisms (no. 280/2004, CDL-AD (2004) 033), as to the existence of an obstacle to establishing a review mechanism in respect of UNMIK and KFOR, the Venice Commission stated the following:

> "62. Under Sections 2 and 3 of UNMIK Regulation no. 2000/47 of 18 August 2000, KFOR, KFOR personnel, UNMIK, and UNMIK personnel "shall be immune from any legal process". This rule is relevant for the present opinion for two reasons: it is a limit for reform proposals, but it is also itself a human rights concern.
>
> 63. The immunity of UNMIK and KFOR (and their personnel) is a limit for reform proposals. It is an expression of a rule which is generally agreed upon and according to which international organisations enjoy immunity from legal process by courts of member states and other international institutions. The purpose of this rule is to ensure that international organisations can perform their tasks without undue and uncoordinated interference by courts from individual states and other international institutions with their respective different legal systems. Therefore, it is with good reason that international organisations and their organs, such as the UN and UNMIK (and their personnel) or NATO and KFOR (and their personnel), are not subjected to legal processes in member states and before other international institutions.
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> ...
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> 75. There is no international mechanism of review with respect to acts of UNMIK and KFOR.
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> ...
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> 91. It is worth underlining at the outset that the main obstacle to setting up a mechanism of review of UNMIK and KFOR is their character as international organisations (...). Such character prevents ordinary courts in Kosovo from exercising such a review. Nevertheless, it must be recalled that in Kosovo UNMIK and KFOR carry out tasks which are certainly more similar to those of a State administration than those of an international organisation proper. It is unconceivable and incompatible with the principles of democracy, the rule of law and respect for human rights that they could act as State authorities and be exempted from any independent legal review. Yet, due consideration must be given to their legal nature."

26. The Venice Commission's proposals for the establishment of human rights mechanisms were the following:

> "(...) the Commission proposes the establishment of two human rights mechanisms for Kosovo, one as a most immediate solution and the other one to be realised in the medium-term. The short-term solution is limited to establishing an independent review mechanism which is internal to the respective international organisation (and also merely advisory). It therefore does not raise a problem with respect to immunity.
>
> 68. The medium-term solution presupposes that UN/UNMIK and NATO/KFOR possess a treaty-making power with respect to the setting up of a Human Rights Court for Kosovo. Such a treaty-making power can be presumed to exist, at least as far as it does not hinder the respective international organisation to effectively perform its functions. Since UNMIK and KFOR are administering a territory to an extent which is comparable to that of a state and since a state must, in principle, grant access to courts (see Article 6 ECHR) and provide effective remedies (see Article 13 ECHR), it is hard to see why the establishment of a mechanism which provides for an effective legal remedy should hinder the respective international organisations to perform their tasks.
>
> 69. On the contrary, it would seem to raise a human rights problem if an international organisation which administers a territory would not be able to set up an independent human rights mechanism, including by way of treaty. This is because, as the European Court of Human Rights has recognised in the case of Al-Adsani v.United Kingdom (paras. 52-67), (state) immunity is an implicit restriction of the right to access to a court (see Article 6 ECHR). Therefore, such a restriction is only acceptable as far as it is necessary to achieve the purpose of the rule of immunity. Indeed, it would not seem possible to say that the setting up of a Human Rights Court as such would hinder UNMIK or KFOR and their personnel to perform their respective tasks. This could only be true if the proposed human rights mechanism would not, in some of its specific aspects, sufficiently take the particular tasks of those international institutions into account.
>
> 70. It follows that the establishment of a human rights mechanism for Kosovo is not excluded *a limine* by the rule of immunity "from any legal process"."

27. As regards the exercise of jurisdiction by the then State of Serbia and Montenegro, it stated as follows:

> "77. According to UN SC Resolution 1244, all UN Member States are committed "to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia" and they regard Kosovo as being part of the Federal Republic of Yugoslavia, now the State Union of Serbia and Montenegro. Serbia and Montenegro has ratified the European Convention on 3 March 2004, without any territorial reservation in respect of Kosovo. Nevertheless, by virtue of Resolution 1244, Serbia and Montenegro does not, as a general rule, exercise "jurisdiction" within the meaning of Article 1 ECHR over Kosovo and cannot therefore be held accountable for human rights violations stemming from acts or omissions which are outside of its control. Serbia and Montenegro remains of course accountable for any possible such violations committed in Kosovo or in respect of Kosovo people by its own state organs."

(b) The Venice Commission opinion no. 545/2009 of 21 December 2010

28. In its Opinion on the Existing Mechanism to review the compatibility with human rights standards of acts by UNMIK and EULEX in Kosovo (no. 545/2009, CDL-AD (2010) 051), the Venice Commission

welcomed the establishment of the UNMIK Human Rights Advisory Panel ("the Panel") and urged the Panel and UNMIK to find a solution so that over 450 cases pending before the Panel might be processed before UNMIK leaves Kosovo. The Venice Commission also welcomed the establishment of the EULEX Human Rights Review Panel. The Panel was established pursuant to a decision of the European Union of 20 November 2009 and became operational on 9 June 2010. Its mandate is to review alleged human rights violations committed by EULEX in the exercise of its executive mandate. It submits its findings to EULEX and, where necessary, makes recommendations for remedial action.

C. Relevant domestic practice

29. On 1 April 2010 Serbia's Constitutional Court rejected two claims for compensation for damage sustained in Kosovo in 1999 (case no. 531/2008). It found that Serbia did not exercise jurisdiction over Kosovo at the material time so that no responsibility could be engaged.

30. On 23 May 2007 Serbia's Supreme Court upheld the lower courts' decisions, which had rejected the appellants' claim for non-pecuniary damage related to the murder of their relative in Kosovo on 17 March 2004 (case no. 1251/07). The domestic courts found that Serbia's liability could not be engaged in view of the lack of effective control over Kosovo at the material time.

COMPLAINT

31. The applicant complained under Article 6 § 1 of the Convention that the Municipal Court's decision of 11 January 2002 has not been enforced.

THE LAW

32. The applicant complained under Article 6 § 1 of the Convention about the non-enforcement of the Municipal Court's decision of 11 January 2002. Article 6 § 1 reads, in so far as relevant, as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. The parties' submissions

1. The Government

33. The Government submitted that the applicant did not come within the *de facto* jurisdiction of Serbia within the meaning of Article 1 of the Convention. In addition to relying on the Grand Chamber's decision in the case of *Berhami and Saramati* (cited above, §§ 3, 4, 69 and 70), the Government relied on the decision of Serbia's Constitutional Court to the same effect cited at paragraph 29 above.

34. In the Government's view, the impugned decision was not given by a Serbian court, but by courts which had been established and operated in Kosovo under the supervision of the international administration. The international administration, that is UNMIK, had been established pursuant to UNSC Resolution 1244, following the withdrawal of FRY forces from Kosovo's territory. Since UNMIK had been entrusted with executive, legislative and judiciary powers, it was their responsibility to observe and respect human rights in Kosovo.

35. They further submitted that the company in which the applicant had been employed was privatized in 2007 by the KTA, which had been established by UNMIK and was not a part of Serbia's legal system. This was further reinforced by the decision of Kosovo's Constitutional Court, which ordered the KTA to enforce the impugned decision.

36. The Government had neither the power nor the responsibility to secure the rights and freedoms defined in Article 1 since that responsibility was vested in UNMIK and the international community. Serbia was therefore not responsible for the non-enforcement of the Municipal Court's decision.

2. The applicant

37. The applicant submitted that the facts giving rise to his application principally referred to the period prior to the adoption of UNSC Resolution 1244, that is the period between 1990 and June 1999. The impugned decision, which was based on the respondent State's legislation as inherited by UNMIK, legally defined the consequences of actions or failure to act on the part of the respondent State, when its authorities effectively exercised control over the territory of Kosovo. Following the termination of employment, the applicant and other persons had challenged the decision before the Pristina District Court. However, their action was never examined. Against this background, his complaint should be attributed to Serbia in so far as it exercised full sovereignty and *de facto* control over Kosovo. It cannot be maintained that the alleged breach was committed by the international administration or any other institution of Kosovo, following its declaration of independence in 2008.

B. The Court's assessment

38. In the instant case, the applicant was given a final decision in his favour by the Municipal Court in Kosovo on 11 January 2002. The main issue that the Court must determine is whether the facts of the case can be said to come within Serbia's "jurisdiction" within the meaning of Article 1 of the Convention. In this connection, having regard to the parties' observations, the Court considers it appropriate to examine the applicant's complaint in respect of two periods of time as shown below: (i) as regards the period between 1990 and 10 June 1999 and (ii) as regards the period between 10 June 1999 and the present day.

1. As regards the period between 1990 and 10 June 1999

39. The Court notes that the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party (*Blečić v. Croatia* [GC], no. 59532/00, § 70, ECHR 2006-III). Jurisdiction *ratione temporis* covers only the period after the ratification of the Convention or the Protocols thereto by the respondent State. The Convention imposes no specific obligation on Contracting States to provide redress for wrongs or damage caused prior to that date (*Kopecký v. Slovakia* [GC], no. 44912/98, § 70, ECHR 2004-IX).

40. Turning to the present case, even if the respondent State exercised "jurisdiction", as regards Serbia's actions or failure to act between 1990 and 10 June 1999, these complaints would be incompatible *ratione temporis* in accordance with Article 35 §§ 3 (a) and 4 of the Convention, the Convention having entered into force in respect of Serbia on 3 March 2004.

2. As regards the period between 10 June 1999 and the present day

41. Throughout its case-law, the Court has emphasized that a State's jurisdictional competence under Article 1 is primary territorial and that jurisdiction is presumed to be exercised normally throughout the State's territory (see *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], § 59, no. 52207/99, ECHR 2001-XII; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 312, ECHR 2004-VII; and *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, § 104, ECHR 2012 (extracts)).

42. This presumption may be limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory (see *An and Others v. Cyprus*, no. 18270/91, Commission decision of 8 October 1991). In such cases, the Court must examine all the objective facts capable of limiting the effective exercise of a State's authority over its territory as well as the State's positive obligations under

the Convention to take all the appropriate measures which are still within its power to take to ensure respect for the Convention's rights and freedoms within its territory (see *Ilaşcu and Others*, cited above, §§ 313 and 331).

43. In the present case, the Court notes that, following the withdrawal of the FRY troops from Kosovo on 8 June 1999, Kosovo was placed under the international civil and military presence by virtue of UNSC Resolution 1244. As a result, UNMIK and KFOR were established and deployed. UNMIK assumed all executive, legislative and judicial powers and regularly reported to the UNSG, who, in turn, submitted periodic reports on the situation in Kosovo to the UNSC.

44. To the extent that the impugned non-enforcement may be attributed to the international civil administration acting under the UN, the Court notes that such complaint must be declared incompatible *ratione personae* within the meaning of Article 35 § 3 (a) of the Convention (see *Beric and Others v. Bosnia and Hercegovina* (dec.), nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05, 16 October 2007; and *Stephens v. Cyprus, Turkey and the United Nations* (dec.), no. 45267/06, 11 December 2008).

45. The Court reiterates its finding in paragraph 40 above that it cannot examine Serbia's actions or failure to act prior to 3 March 2004. Starting from that date, there is no evidence that Serbia exercised any control over UNMIK, Kosovo's judiciary or other institutions that had been established by virtue of UNMIK regulations. Neither can it be said that the Serbian authorities supported militarily, economically, financially or politically Kosovo's institutions (compare and contrast *Catan and Others*, cited above; *Ilaşcu and Others*, cited above and *Ivanţoc and Others v. Moldova and Russia*, no. 23687/05, 15 November 2011 where the Court concluded that Russia had so supported the Transdnistrian region of the Republic of Moldova).

46. On 17 February 2008 Kosovo proclaimed its independence, having been subsequently recognised as independent by at least 89 States. On 15 June 2008 the Constitution of Kosovo was adopted. On 10 September 2012, apart from the exercise of certain "residual responsibilities" by UNMIK, the end of "supervised independence" was declared. In these circumstances, the Court is satisfied that there existed objective limitations which prevented Serbia from securing the rights and freedoms in Kosovo.

47. Consequently, Serbia's domestic courts have confirmed that its authorities have not been exercising any effective control in Kosovo since 1999 (see paragraphs 29 and 30). Moreover, the applicant has not been able to point to a particular action or inaction of the respondent State or substantiated any breach of the respondent State's duty to take all the

appropriate measures with regard to his right which are still within its power to take. Having regard to the particular circumstances of this case, the Court cannot point to any positive obligations that the respondent State had towards the applicant (compare and contrast with Moldova's positive obligations in the case of *Ilaşcu and Others*, cited above).

48. Finally, even though the applicant never made any enquiries about the existence of an effective remedy in the Serbian legal system, the Court cannot speculate whether it was open to him to lodge a civil action with a Serbian court.

49. It follows that Serbia cannot be held responsible under Article 1 of the Convention for the non-enforcement of the Municipal Court's decision of 11 January 2002 of which the applicant complains. The Court concludes that the application is incompatible *ratione personae* and should be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court by a majority,

Declares the application inadmissible.

Stanley Naismith
Registrar

Guido Raimondi
President