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Thematic Report "Access to Justice"

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1. INTRODUCTION

1.1 ACCESS TO JUSTICE IN THE PISG LEGAL SYSTEM: MATERIAL ASPECTS

In the material and legal terms, the legal system of provisional institutions of self-government with headquarters in Priština (hereinafter referred to as: "PISG") is based on the direct enforcement of international agreements and instruments referred to in Article 22 of the Constitution of the PISG[1], as follows:

- Universal Declaration of Human Rights;
- European Convention on the Protection of Human Rights and Fundamental Freedoms with Protocols (hereinafter referred to as: "ECHRFFP");
- International Covenant on Civil and Political Rights with Protocols;
- Council of Europe Framework Convention on the Protection of National Minorities;
- Convention on the Elimination of All Forms of Racial Discrimination;
- Convention on the Elimination of All Forms of Discrimination Against Women;
- Convention on the Rights of the Child;
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

These deeds in accordance with the PISG Constitution have a primacy over the laws and other regulations of the PISG, and the rights and freedoms that are codified in them are protected by the PISG Constitution itself, which its Chapter 2 is dedicated to.

Regarding the corpus of rights and freedoms commonly encompassed with the concept of access to justice[2], such rights and freedoms are specified under Article 31 of the PISG Constitution (Right to a Fair and Impartial Trial), 32 (Right to Remedy) and 54 (Judicial Protection of Rights):

- *Article 31 [Right to Fair and Impartial Trial]*

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

3. Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.

[1] PISG Constitution is available at the website of the PISG Assembly: http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf.
[2] See, for example, how this term is defined by the relevant bodies or mechanisms of the UN and EU: https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/ or http://fra.europa.eu/en/theme/access-justice.

4. Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.

5. Everyone charged with a criminal offense is presumed innocent until proven guilty according to law.

6. Free legal assistance shall be provided to those without sufficient financial means if such assistance is necessary to ensure effective access to justice.

7. Judicial proceedings involving minors shall be regulated by law respecting special rules and procedures for juveniles.

- *Article 32 [Right to Legal Remedies]*

Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.

- *Article 54 [Judicial Protection of Rights]*

Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.

In a broader sense, certain rights guaranteed to the members of the so-called communities and their members, as defined in Chapter 3 of the PISG Constitution can also be considered as part of this corpus of rights, primarily in the part in which the protection of these rights, and/or persons by the PISG is guaranteed.

In that regard, special attention should be paid to the provisions of Article 58, Paragraph 3 and 4 of the PISG Constitution.

We believe that, in the event that access to international justice is not possible, these provisions can serve as a basis for a political request to establish a special judicial mechanism in the legal system of the PISG, resembling Specialized Councils and the Specialized Prosecutor's Office of the PISG. Such a mechanism would have the aim of allowing members of the so-called community reconsideration of their requests that were previously ruled upon by other court institutions of the PISG, as well as adequate compensation, in accordance with the ECHRFFP standards (which the mechanism would directly enforce).

Taking into account the analogy with the Specialized Councils and the Specialized Prosecutor's Office, the establishment of such a mechanism should be preceded by an appropriate international initiative, the outcome of which would be an appropriate Council of Europe deed, which would further consolidate the organic connection between such a mechanism and the ECHRFFP. The issue whether the establishment of such a mechanism would have to precede the amendment of the PISG Constitution in the part governing the judicial power is open, although at first glance it seems that this would not necessarily be the case, having regard to other cases such as the Special Chamber of the Supreme Court of the PISG.

1.2 PROCEDURAL ASPECTS: (IN) ABILITY TO USE LEGAL REMEDIES OUTSIDE THE PISG SYSTEM

In the procedural and legal sense, the PISG Constitution recognizes several forms of judicial protection, which is effectively enforced by the protection before ordinary courts of law (Chapter 7) as well as before the PISG Constitutional Court (Chapter 8).

As regards ordinary courts of law, the PISG Constitution recognizes the multi-level aspect of judicial protection, with the Supreme Court of the PISG as the highest instance (Article 103). On the other hand, in Article 113, Paragraph 7 the PISG Constitution recognizes the institute of constitutional appeal, which each person may file to the Constitutional Court of the PISG in case of violation of their rights and freedoms as guaranteed by the PISG Constitution by the PISG, provided that all the legal remedies prescribed by the law have been exhausted. In that regard, a person whose rights guaranteed by some of the international agreements or instruments referred to in Article 22 of the PISG Constitution, and/or the PISG Constitution itself are violated, can take an effective action to access justice within the PISG system before the Constitutional Court of the PISG.

The enforcement of legal remedies outside the PISG system, which can normally be enforced in such cases, such as for example, an appeal filed to the European Court of Human Rights (hereinafter referred to as: "the ECTHR") as a result of a violation of one of the rights guaranteed by the ECHRFFP, is currently not possible due to the fact that the PISG is not a member of the Council of Europe, nor the ECHRFFP contains an appropriate process mechanism that would allow this to non-members thereto. The only form of procedure that could have been conducted in certain cases in connection with such violations of rights, but which do not have elements of judicial protection, was the proceeding before the UNMIK Advisory Panel on Human Rights[3], which ended its mandate in July 2016. The similar case is with the EU Human Rights Review Commission, which follows the EULEX mandate [4] in the same way, whose mandate will therefore be terminated at the same time as the EULEX mandate.

As the ECTHR lawsuit is the most common way of protecting individual rights outside territorial legal systems [5], this report will focus on the possibility of its filing in relation to violation of the rights protected by the ECHRFFP and the PISG Constitution in the territory of the Autonomous Province of Kosovo and Metohija (hereinafter referred to as: "AP KiM") , especially since other international instruments that apply, such as the Council of Europe's Framework Convention on the Protection of National Minorities, do not recognize the appropriate procedural mechanisms that could be categorized under the concept of access to justice.

[3] UNMIK Human Rights Advisory Panel was a special UNMIK body that was not a court, but could be regarded as a quasi-judicial body. In essence, it was an attempt by UNMIK to clear its guilty conscience in cases of serious human rights violations where timely and adequate legal protection was not provided. Formally, it functioned by issuing opinions that the Special Representative of the Secretary-General of the UN, formally managing UNMIK, would receive for his information, and make certain recommendations. Although he did not make authoritative decisions, it had proper authority and legitimacy anyway.

[4] The Human Rights Review Panel is also a quasi-judicial body of the EU, which is a counterpart to the Human Rights Advisory Panel, and in that regards issues decisions that give appropriate recommendations to EULEX Head of Mission.

[5] Statistical data available at the ECTHR website: http://www.echr.coe.int/Pages/home.aspx?p=reports.

2. LEGAL THEORY AND PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS RELEVANT FOR THE CASES OF VIOLATION OF RIGHTS UNDER THE EUROPEAN CHARTER ON HUMAN RIGHTS IN the AO KOSOVO AND METOHIJA

2.1 BEHRAMI AND BEHRAMI v. FRANCE AND SARAMATI v. FRANCE, GERMANY AND NORWAY

These two associated cases concern situations in which the rights of Albanians from Kosovo and Metohija have been violated by international missions present at the AP KiM in accordance with UNSC Resolution 1244, and these persons filed lawsuits against the states whose units within those international missions were responsible in the zones in which these violations had occurred.

In the case of Behrami, there were two Albanian boys from the Behrami family, one of whom was killed and the other got blind during the detonation of a cluster bomb in Kosovska Mitrovica (that remained after the NATO aggression against FR Yugoslavia in 1999), which was the zone of responsibility of French units within KFOR.

In the Saramata case, it was about the Albanian who was detained due to the illegal possession of weapons in Prizren in 2001, which was the zone of responsibility of German units within KFOR, but the commander at that time was a Norwegian.

The essential argument of the court in this decision is that actions that have violated the rights of Behrami and Saramati can be attributed to the UN and NATO missions, UNMIK and KFOR, and that in this regard, due to the separate legal personality of these international organizations and their member states, the member states cannot be sued before the ECTHR for violations of the rights guaranteed by the ECHRFFP by international organizations whose members they are to:

149. In the present case, Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR.

Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim.

150. The applicants argued that the substantive and procedural protection of fundamental rights provided by KFOR was in any event not "equivalent" to that under the Convention within the meaning of the Court's Bosphorus judgment, with the consequence that the presumption of Convention compliance on the part of the respondent States was rebutted.

151. The Court, however, considers that the circumstances of the present cases are essentially different from those with which the Court was concerned in the Bosphorus case. In its judgment in that case, the Court noted that the impugned act (seizure of the applicant's leased aircraft) had been carried out by the respondent State authorities, on its territory and following a decision by one of its Ministers (§ 137 of that judgment). The Court did not therefore consider that any question arose as to its competence, notably ratione personae, vis-à-vis the respondent State despite the fact that the source of the impugned seizure was an EC Council Regulation which, in turn, applied a UNSC Resolution. In the present cases, the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities. The present cases are therefore clearly distinguishable from the Bosphorus case in terms both of the responsibility of the respondent States under Article 1 and of the Court's competence ratione personae.

There exists, in any event, a fundamental distinction between the nature of the international organisation and of the international cooperation with which the Court was there concerned and those in the present cases. As the Court has found above, UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the UNSC. As such, their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective.

152. In these circumstances, the Court concludes that the applicants' complaints must be declared incompatible ratione personae with the provisions of the Convention.

Such reasoning was subject to a great criticism in the legal theory[6]:

Overall, whether or not a jurisdictional link existed between the applicants and the respondent States was, as Aurel S a r i correctly notes, a preliminary matter that should have, both in logic and in principle, be addressed before the enquiry into the attributability of the conduct to these States.39 The Court, however, took a different route. It considered that the question raised by the cases was less whether the States concerned exercised extraterritorial jurisdiction in Kosovo but, more centrally, whether it was at all competent to examine those States' contribution to UNMIK and KFOR, as they exercised control over Kosovo. 40 Its reasoning which eventually led to an inadmissibility decision involved the operation of a con trick known as the Shell Game, in the course of which the pea disappears the quicker the shells are shuffled around. In this exercise, the Court was surrounded by a cheering throng of insiders – troop contributing nations as well as UNMIK. As in the real-life game, the ensuing decision in which responsibility for human rights violations vanished under the skilled hands of the judges gives rise to a heightened sense of anger and disappointment: it confirmed the unavailability of effective remedies against actions of international organizations in a situation in which they undoubtedly exercise effective control over territory and its people.

(...)

[6] Please refer to *Berhard Knoll, Rights Without Remedies: The European Court's Failure to Close the Human Rights Gap in Kosovo*, available at: http://www.zaoerv.de/68_2008/68_2008_2_a_431_452.pdf.

The threat that no operations of this kind could ever be mounted in the future if TCNs were told that they would be accountable for the violations of human rights they committed in the course of their military operations abroad was put to the Court in a vigorous manner. 78 It appears the Grand Chamber was swayed as it produced the criterion of effectiveness – troop support from member states – which it saw as vital for the implementation of a Chapter VII mandate. In what may permanently deter persons under international mandate from seeking redress, the Grand Chamber held that "the Convention cannot be interpreted in a manner which would subject the acts or omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field, including … with the effective conduct of its operations." With this statement of political expediency, the Grand Chamber not only achieved its aim of avoiding any further implication in issues of international peace and security. Considering the contemporaneous Opinion of the Lords of Appeal in Al-Skeini that affirmed that the 1998 Human Rights Act applied to acts of UK public authorities abroad as they brought persons within the jurisdiction of the UK for the purposes of Art. 1 ECHR, 80 the Behrami and Saramati decision yielded a remarkably asymmetric protection outcome: an Iraqi claimant falling under the effective control of an occupying power by virtue of his detention in a military prison may be more successful in seeking remedies than a Kosovar applicant who is held in custody under an order of a TCN.

All in all, regardless of whether there is a connection in terms of jurisdiction between the applicants and the respondent states, as Aurel Sari correctly observed, a preliminary issue that had to be resolved before questioning the attribution of the responsibility of the respondent states, both in logic and in principle.

However, the Court had a different approach. It considered that the issue raised in the cases was less important issue than the issue whether the state concerned had exercised extraterritorial jurisdiction in Kosovo, but the court was more inclined to whether it was at all competent to examine the contributions of these States to the conduct of UNMIK and KFOR, as these missions had been exercising control over Kosovo. 40 The court's ruling that ultimately resulted in the decision on the inadmissibility of the request included the operation such as the one in the game of "illusions" (Shell Game), during which, as the boxes move faster, a marble goes faster out of sight. In this situation, support to the court was given by a bunch of "loud voice" insiders with which the court was surrounded - both by the state that participated in disputable events, as well as by UNMIK itself. As with the real "game of illusions", the essential decision on the responsibility for human rights violations disappeared owing to skillful hands of the judges, leading to the increased feeling of anger and disappointment: the decision only confirmed the inaccessibility to effective remedies against actions of international organizations in the situation in which they undoubtedly exercised effective control over the territory and its people.

The threat that no operations of this kind could be carried out in the future if TCN were said to be responsible for human rights violations committed during their military operations abroad was set up in a robust way to the Court.

The Grand Chamber appears to have had a blurred view because it produced a criterion of efficiency - support to the military forces of the member states - which it deemed key to the implementation of the mandate under Chapter VII. Such a position may permanently prevent/discourage persons under international mandate from claiming compensation, and the Grand Chamber concluded that "the Convention cannot be interpreted in a manner that would endanger the actions or omissions of the contracting parties covered by the UNSC resolutions that occur before or during such mission, and enable the active monitoring of the Court. This would

mean the court's interference in fulfilling the key UN mission in this field, including the effective performance of its operations." With this statement of political justification, the Grand Chamber also achieved its goal of avoiding further interference/implications in the matters of international peace and security.

However, if we take into account the simultaneous opinion of the Court of Appeal in Al-Skeini case, which confirmed that the 1998 Law on Human Rights was applied in the United Kingdom and on the proceedings of public authorities abroad, as these proceedings resulted in bringing these persons under the jurisdiction of the United Kingdom in terms of Article 1 of the ECHRFFP, 80 Behrami and Saramati case decisions gave an extremely asymmetric result of protection: the Iraqi claimant falling under the effective control of the occupying forces based on his imprisonment in a military prison may be more successful in seeking legal remedies and protecting his rights than the Kosovo applicant held in detention based on the TCN order.

However, the ECHR based a series of subsequent decisions on this case, although the circumstances of the case were not always identical, for example, in cases involving aggression against Iraq, where there was no legal basis in UN Security Council resolutions equivalent to the Resolution 1244[7].

This practice of the ECTHR confirmed the jurisdictional vacuum that existed outside the PISG legal system, since on the other hand international missions and national courts had been protected from responsibility for their actions during the mandate of AP KiM. Another example, especially significant as regards the nature of the privatization carried out by PISG, is the court judgment in New York in the case of Wood Industries v. Kosovo Trust Agency [8], in relation to the illegal actions of the PISG regarding the privatization in which a company from the USA was damaged.

Despite this practice of the ECTHR, there is an understanding in the expert circles that the precedent established in the case of Behrami and Saramati has been overcome and that it is no longer considered to be a good practice[9]:

Despite the attempts by the ECtHR to pay lip-service to Behrami by distinguishing it on the facts, the practical result of Al-Jedda is that Behrami should no longer be considered 'good law' when it comes to attribution of conduct during UN-authorized peace support operations. This is a major development, given that Behrami was almost universally criticised by legal commentators for being wrong both as a matter of law and as a matter of policy.9

In addition to this view of the expert circles, there are numerous subsequent cases in which this was confirmed[10], but not in relation to the situation in the AP KiM. In this regard, it can be said that this precedent has yet to be overcome in relation to the cases of AP KiM by applying new arguments, which will be elaborated in detail in the next section.

[7] Please refer to in particular the cases *Al Skeini v United Kingdom*, available at: http://www.refworld.org/pdfid/4e2545502.pdf, and *Al Jedda v United Kingdom*, available at: https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/14.6_Al-Jedda%202011%20ECHR.pdf.

[8] Judgment is available at: http://blogs.kentlaw.iit.edu/perrittcivpro/files/2016/07/Wood-v.-UN-Complaint.pdf.

[9] Please refer to *Francesco Messineo, Things Could Only Get Better: Al-Jedda Beyond Behrami*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1960715.

[10] Please refer to in particular the cases *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, available at: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62005CJ0402, and *Nada v Switzerland*, available at: https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/14.7_CASE%20OF%20NADA%20v.%20SWITZERLAND.pdf.

The basic (counter) argument should be the concept of a dual responsibility of an international organization and a member state, with the difference in the existing jurisprudence in terms of the duration or other limitations of the mandate of the international mission, resulting in the effective control of the units assumed by the member state (e.g., cases related to the responsibility of the Dutch forces in Srebrenica[11]):

" ... the court adopts as 0 starting point that the possibility that more than one party has 'effective control' is generally accepted which means that it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party. For this reason the Court will only examine if the State exercised 'effective control' over the alleged conduct and will not answer the question whether the UN also had effective control".

This position was confirmed by the expert circles[12], and in that regard it can be regarded as valid theoretic construction:

The choice for the criterion of effective control, in the way construed by the Court, implies that, in the words of the Court 'it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party.'
(...)

The Court's observation that the possibility of dual attribution is 'generally accepted may be somewhat of an overstatement. Though the possibility of dual attribution has indeed been acknowledged in legal scholarship, and also the ILC recognized the possibility of dual attribution, the proper basis for such dual attribution is not well established. Indeed, the definition of effective control given by the ILC makes it unclear whether there can be dual attribution if one of the actors involved exercises effective control. The ILC emphasized 'the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal',46 and the question is whether and in what cases such factual control over specific conduct can be exercised simultaneously by two actors.

Observance of the Court that the possibility of double attribution of responsibility is "generally accepted" can still be too strong. Although the possibility of dual attribution of responsibility is indeed recognized in the legal science, and that ILC has also recognized the possibility of dual attribution of responsibility, it must be noted that the valid basis for such double attribution of responsibility is not widely distributed or accepted. Indeed, the definition of effective control provided by the ILC is unclear in terms of whether there can exist dual responsibility if one of the participants is affected by the exercise effective control. ILC pointed out that "the effective control is control over certain actions by the body or agent at the disposal of the organization", and the question is whether and in which cases it is regarded as an effective control over certain actions that can be carried out at the same time by two participants.

[11] Please refer to in particular the cases *Mothers of Srebrenica v Netherlands*, available at: http://www.internationalcrimesdatabase.org/case/769/mothers-of-srebrenica-v-the-netherlands-and-the-un/, *Mustafic-Mujic v Netherlands*, available at: https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-5494500-6902015&filename=Decision%20Mustafic-Mujic%20and%20Others%20v.%20the%20Netherlands%20-%20claim%20that%20Netherlands%20peacekeepers%20at%20Srebrenica%20should%20have%20been%20prosecuted.pdf, and *The State of the Netherlands v. Hasan Nuhanović*, available at: http://www.internationalcrimesdatabase.org/Case/1005/The-Netherlands-v-Nuhanovi%C4%87/.

[12] Please refer to Andre Nollkaemper, *Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1933719.

Moreover, practice has provided little support of a general acceptance of dual attribution. The case-law of the ECtHR, notably the Behrami, judgment, points in a different direction. The ECtHR may have come back somewhat from that decision in the Al-Jedda judgment, rendered two days after the Nuhanović decision, which may be interpreted as recognizing the possibility of dual attribution. In examining whether conduct of the Multi-National Force in Iraq could be attributed to the United Kingdom, the Court did not consider that 'as a result of the authorization contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or - more importantly, for the purposes of the case - ceased to be attributable to the troop-contributing nations'. The Court did not state that in case these acts were to be attributed to the UN, they would cease to be attributable to the troop-contributing states, and in that respect it may not have excluded the possibility of dual attribution, as it did quite explicitly in Behrami.
However, the fact that the Court eventually based (part of) its finding on attribution on both the criterion of effective control and that of 'ultimate authority and control' may speak against this interpretation. Whereas it may be possible that more than one actor has effective control over acts of someone else (effective control, certainly as interpreted by the Court of Appeals in the present decision, does not need to be exclusive control), it is more difficult to see that two different actors could both have 'ultimate' control.

The Court of Appeals thus deviated from the approach of the ECtHR, and held, based on its combined construction of normative and factual control, that it is well possible that one and the same act is attributed both to the UN and to the Netherlands. In view of its finding on the possibility of dual attribution, the Court of Appeal could leave aside the question whether the United Nations possessed effective control, 53 and proceeded to examine whether the Netherlands had exercised effective control over the disputed action. That it could do so follows from the individual nature of attribution. In such a case of possible dual attribution, the question whether an act can indeed be attributed to the UN would not affect its attribution to the Netherlands.

3. POSSIBILITY OF ACCESSING ECTHR IN THE CASES OF VIOLATION OF THE RIGHTS UNDER THE ECHRFFP IN KiM

Taking into account the circumstances of the Behrami and Saramati cases, the possibility of accessing the ECtHR has been limited at multiple level, and it is only possible in cases that meet certain requirements, which will be elaborated *ratione materiae*, *ratione personae* and *ratione temporis* (in terms of matter, person and time).

3.1 RATIONE MATERIAE/RATIONE PERSONAE (MATERIAL AND PERSONAL ASPECT)

In this regard, only the cases with the following circumstances shall be taken into account:

- Violation of a certain right guaranteed by the ECHRFFP and the PISG Constitution;

- Violation of this right by international missions present in Kosovo in accordance with the UN Security Council Resolution 1244, that is, by UNMIK or KFOR, by their acts or failures to act. It appears that the violations committed by EULEX could not be protected in this way, given how the EULEX mandate was formalized [13];
- A violation committed in the zone of responsibility of a member state of the Council of Europe in the composition of one of the relevant international missions, and/or under the responsibility regime of a competent person who is a national of a member state of the Council of Europe;
- The injured person has exhausted all legal remedies available in the legal system of the PISG, inclusive of a constitutional complaint if the requirements for its filing have been fulfilled.

Taking into account the significance of the concept of dual responsibility, which is particularly reflected in the extraordinary situations of human rights violations in which ordinary commanding chains are broken, it is desirable that it should be the case that occurred during the first days of the mandate of international missions (June-July 1999), either on 17-18th March 2004, when violence against the Serb population of AP KiM was widespread, and/or when the international missions did not exercise the complete field control.

Finally, given the practice of the Human Rights Advisory Panel, it is desirable, but not necessary, that in relation to the concrete violation of the rights by UNMIK there is also a decision passed by this Panel, which recognizes and confirms that UNMIK has made a failure in the exercise of its competencies.

[13] The EULEX's mandate was formalized by a series of decisions of the EU authorities, other than by the UN Security Council resolution, although the EULEX formally acts, as is stated in the above-mentioned acts, "in accordance with the Resolution 1244". The key difference is that in the relevant jurisprudence the responsibility of international missions is derived from the deeds of the UN bodies adopted on the basis of the UN Charter, by which the mandate of those missions is formulated. As far as we know, there are no cases where the EULEX, and/or the EU Member States were sued in the way that was the case with UNMIK and KFOR, and/or their member states, which may be the consequence of their mandate starting in 2008, when there was no cases of mass human rights violations anymore to the extent as during the period 1999-2004.

3.2 RATIONE TEMPORIS (TIME-FRAME)

In this respect, only cases from 1999 to 2008 shall be taken into account regarding UNMIK's liability, given the reduction of its competencies in the later period due to the emergence of EULEX, and/or regarding KFOR's responsibility to date. Additionally, it should be taken into account that the structure of UNMIK and KFOR has changed, including the member states participating in these missions, and that the same can apply to their zones of responsibility.

However, taking into account the logic of an extraordinary situation identical to the concept of dual responsibility described in the previous section, it seems that the focus should be made on the cases in the period June-July 1999 or 17-18th March 2004.

The cases in which the deadlines for A) taking actions before the PISG authorities and B) for filing a complaint before the European Court of Human Rights were missed should be taken into account here.

4. LEGAL ASSISTANCE AND ACCESS TO JUSTICE – CONCLUSIONS AND RECOMMENDATIONS

Taking into account what is stated this report, it can be concluded that access to the ECTHR in cases of protection of the rights guaranteed by the ECHRFFP and the PISG Constitution has not yet been tested, but it is not impossible to do so in the appropriate cases - first of all where there are adequate material and process assumptions, and where an injured person is willing to try something like that. Compilation of the lawsuit and representation before the ECTHR requires the appropriate type of professional engagement that can be provided to such persons through this project, and in that regard it is recommended that these steps should be considered during the term of this project.

The political and legal effects of such a successful case before the ECTHR are potentially unimaginable, given the human rights violation extent in 1999-2004 as well as the number of proceedings currently conducted before the PISG. Occurrence of such a precedent would mean a new step in all proceedings conducted before the PISG, and could completely reverse the current state of affairs. On the other hand, significant efforts will certainly be needed here, especially if the power by which the ECTHR relies on Behram and Saramati cases and the interest of the member states of the relevant international missions which were not sued, demonstrated in these cases aimed at restricting or eliminating their responsibility.

The effective revocation of the precedent established by these cases is a huge risk not only in political terms for all countries whose forces were present in the missions of the AP KiM, and in that regard one should be prepared for a serious legal battle and an ardent exchange of arguments.

The first step in this battle should be the analysis of both the subjects covered by the project and the published jurisprudence of the PISG Constitutional Court in order to find cases that meet the requirements set out in the previous section and organize a meeting with the injured persons to discuss the possibilities for representation before the ECTHR.

Alternatively, a political request can be formulated aimed at establishing a special mechanism in the legal system of the PISG, which was previously known as the “little Strasbourg” in the expert circles, which would be an alternative to the ECTHR, which would apply the same substantive law and provide a procedural opportunity for the relevant cases to be reconsidered and which would rule an adequate compensation.

Based on the analogy with the existing mechanisms, the first step would be to take an appropriate international initiative as well as the adoption of a Council of Europe document, which would be followed by the legislative (potential and constitutional) activity of the PISG.

Taken this into account, the PISG’s position, both political and formally-legal, will be the biggest obstacle, and one should be ready to conduct an appropriate procedure before the Constitutional Court of the PISG, which can be expected as in all previous cases that resemble this one (the community of Serb municipalities and the Specialized Council impose themselves as the two biggest examples).