

# Memo on Decani

## The rule of law, an urgent issue and Kosovo in the Council of Europe

*4 March 2024*

*Res judicata* (Latin): a matter that has been adjudicated by a competent court and therefore may not be pursued further by the same parties.

Last week, an ESI team travelled to Kosovo. Our goal was to examine how the only European democracy that is not yet a member of the Council of Europe might join it this year. And how to address an urgent issue, unresolved for far too long, that has become central to the debate on Kosovo and the Council of Europe.



*The monastery of Visoki Decani, Kosovo, March 2024*

This issue concerns a property dispute in the municipality of Decan, the most famous Serb Orthodox monastery in the Balkans (Visoki Decani) and questions about the future of the rule of law in Kosovo. Settling it now would be:

- a win for the rule of law and for *all* citizens of Kosovo, who would also benefit from the human rights protection system of the Council of Europe.
- a win for the monastery of Visoki Decani and the Serb minority in Kosovo.
- a win for the Council of Europe, in particular for its Parliamentary Assembly (PACE), whose rapporteurs have made this a central focus.



*Mysterious 14<sup>th</sup> century frescoes in Decani – map of the region*

In order to understand what is at stake, and what progress is possible, we look at four issues:

*The dispute:* why this legal battle about just 24 hectares of land matters so much.

*History and politics:* why this has proven so hard to resolve until now.

*The solution:* why there is only one way to resolve this.

*The lesson:* how this shows the importance of Kosovo becoming a member of the Council of Europe.

Dispassionate analysis of this emotional issue shows that this is the right time for a win-win-win for Pristina, Decani and Strasbourg.



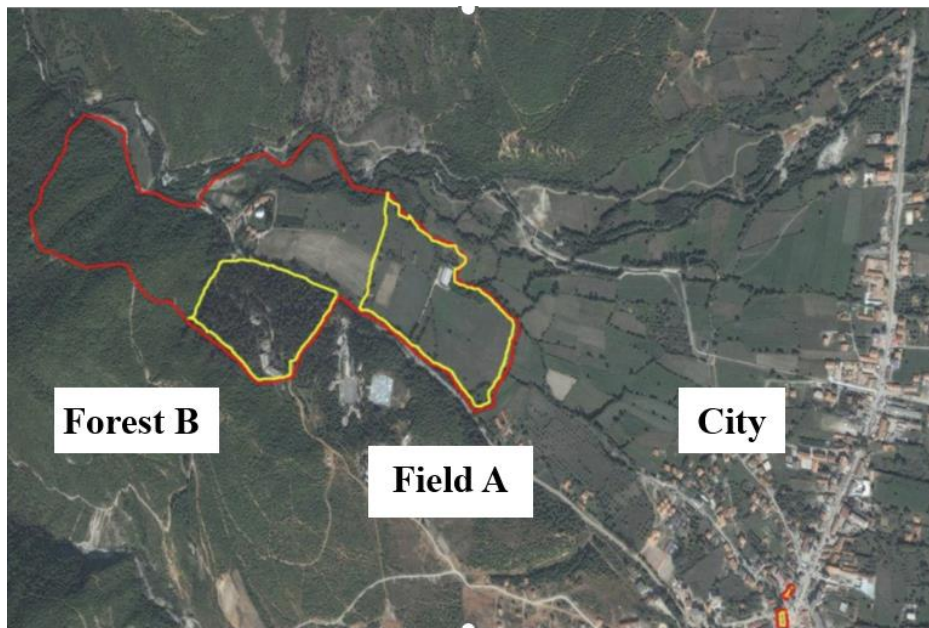
### **The dispute**

The monastery of Visoki Decani (*High Decani*) was built in the 14<sup>th</sup> century by one of the most important medieval Serbian kings, Stefan Decanski, who called on Franciscan builders from the Adriatic coast to build his church. It has since been, for more than seven centuries, one of the most important spiritual and cultural centers for Serbs, recognized officially in

2004 by UNESCO as part of world heritage. The [application to include it in the UNESCO world heritage list](#) referred to:

“its exceptional, well-preserved Byzantine paintings, which cover practically the entire interior of the church with over 1,000 individual depictions of saints ... The original marble floor is preserved, as is the interior furniture, and the main 14<sup>th</sup> century iconostasis ... The Monastery represents an exceptional synthesis of Byzantine and Western traditions.”

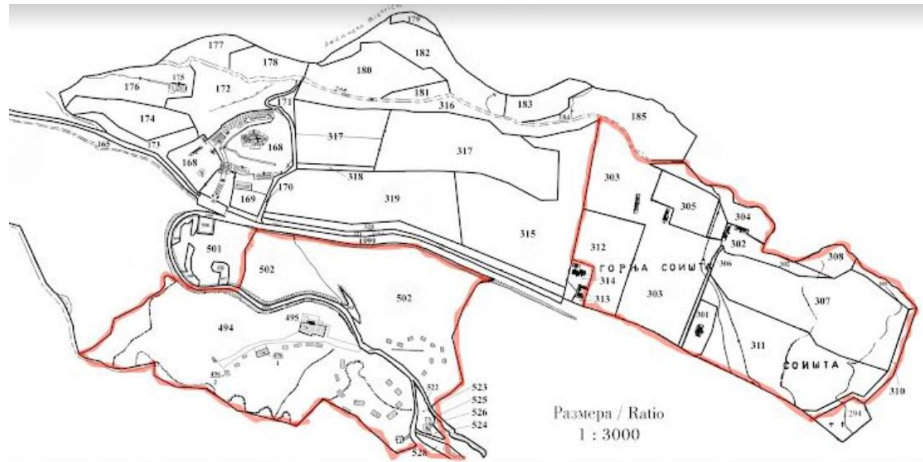
To understand how Decani monastery became embroiled in a decades-long dispute over land, and why this concerns Kosovo’s Council of Europe accession, let’s begin with a map.



The map shows the small city of Decan/Decani (Albanian/Serbian) to the right. West of Decan, high mountains separate Kosovo from Montenegro and Albania. Note the following:

- The red line shows land that the monastery considers its property, surrounding its church and main buildings. This land is all part of a special protective zone (SPZ), defined and established in Kosovo legislation to protect monuments and sites of special importance for minorities. The zone extends beyond the red line.
- Within the red line, yellow lines mark two pieces of land which are disputed. One is a field (A). The other is a forest (B). These add up to 24 ha.
- There are also small parcels of land (marked in red and yellow in the bottom right corner) in the middle of Decan city.

Much of this land has been registered for a long time in the cadaster as belonging to the Decani Monastery. But 24 parcels – those comprising field A and forest B, as well as four small parcels of land in the middle of Decan city – were only registered in the cadaster in the name of the monastery in early 1998, following their donation by the Serbian state in late 1997.



*Cadastral map of the land of Decani monastery (contested land marked red)*

These parcels had numbers. Together with the related cadastral map one can clearly see where they are. The numbers were:

- 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312 (Field A)
- 494, 495, 502, 503, 522, 523, 524, 528 (Forest B)
- 943, 1104, 1105, 1106 (Decani City)

Following the end of the war with NATO in June 1999, the Serbian state withdrew its police, military and most of its institutions from Kosovo. UNMIK, an international UN-administration, was established to govern Kosovo for an interim period.

In 2000, a legal dispute erupted in Decan over the 24 parcels that had been granted to the monastery in 1997. Workers and managers who claimed to represent two socially owned enterprises in Decan now argued that these parcels should be returned to them, as they had been in the cadaster as belonging to them. The claim: the period until 1999 had been one of severe repression in Kosovo by the state of Serbia and legal acts during this period should therefore be considered as discriminatory and invalid in all cases.

These claims were judged in the Decan municipal court. In June 2002, the municipal court ruled that the Serbian state's gift of 24 parcels to the monastery had been a violation of property rights. It ordered the re-registering these parcels in the cadaster in the name of the socially-owned enterprises. This was done.

It was the beginning of a long legal battle.

- Already in 2005, a district court in nearby Peja/Pec *quashed* the 2002 judgement of the municipal court on formal grounds. But nothing happened.
- In April 2008, the head of UNMIK issued an executive decision to restore the “status quo ante” before the 2002 judgement.
- In May 2008, another UNMIK executive decision stated that Decani monastery would continue to enjoy “undisturbed possession” of these 24 parcels and that the following parcels should be reentered into the cadaster in the name of the monastery:



301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312 (Field A)  
 494, 495, 502, 503, 522, 523, 524, 528 (Forest B)  
 943, 1104, 1105, 1106 (Decani City)

These executive decisions were ignored. The cadaster remained uncorrected.

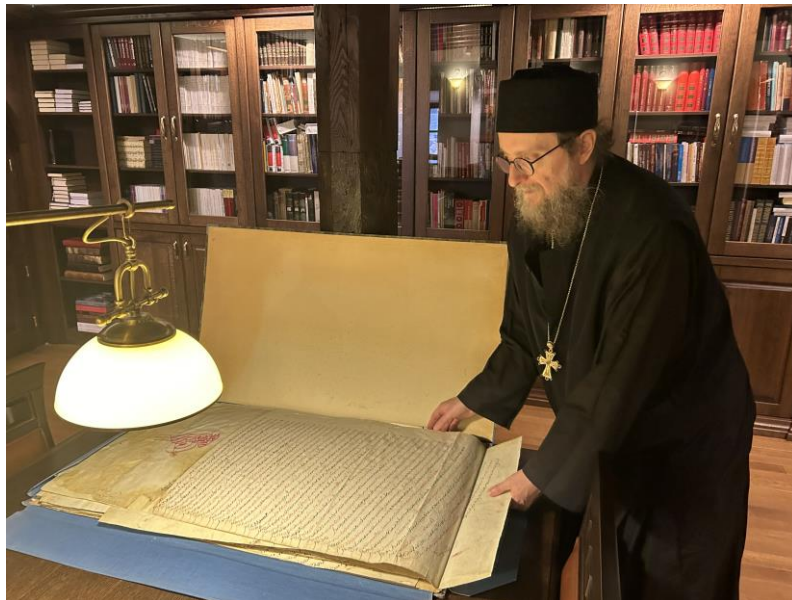
Then, in May 2009, UNMIK, represented by its Kosovo Trust Agency (KTA), in charge of all socially-owned enterprises and their property, proposed in the Kosovo Supreme Court a settlement to Decani monastery.

The idea: UNMIK/KTA would transfer, on behalf of the two socially-owned enterprises which it legally represented, 20 of these 24 contested parcels of land back to the monastery (field A and forest B). In return, the monastery would waive its rights to the four parcels in the city of Decan.

Signed minutes of this conversation at the Supreme Court capture this moment. The UNMIK/KTA representative explained:

“I would like the following words minuted: KTA hereby proposes to the monastery of Decan/Decani that it [*the KTA*] will not claim or assert any title rights for such properties that are located within the protective zone around the Decan/Decani monastery.

In exchange, KTA would expect the monastery to waive all claims and title rights to the following properties within the municipality of Decan/Decani: plot numbers 943, 1104, 1105, 1106. KTA would expect the monastery to give its consent to this proposal here now. Is the monastery prepared to do that now?”



*Father Sava with Ottoman legal documents in the monastery's library*

Father Sava Janic, the abbot of Decani monastery, responded:

“As representatives of the monastery we think this proposal is realistic, so in case that all the property, which has been disputed, and which is within the protective zone, if it remains the property of the monastery the monastery will have no claims for the parcels

in the town centre ... our priority has been and is the land within the protective zone which we consider essential for our economic and other sustainability.”

This was, however, not the end of the legal battle. During the following years, lawyers representing socially-owned companies, the Kosovo Privatisation Agency and Decani municipality challenged this. The main argument was that UNMIK/KTA did not have the right to conclude such a settlement.



*Kosovo Supreme Court, Pristina*

Between 2009 to 2012 this issue was adjudicated in the Supreme Court, with a clear result:

- Already in March 2009, the Kosovo Supreme Court ruled that UNMIK/KTA had “the sole right to represent the interests of the [*socially-owned*] enterprises.”
- In July 2010, the appeals panel of the Kosovo Supreme Court reaffirmed that UNMIK/KTA had “the sole legal standing” in this matter.
- In December 2011, the Supreme Court declared once more that the decision on the legal standing of UNMIK/KTA was “final and therefore binding and not questionable anymore.” It stressed that this should be considered *res judicata*, binding on all parties and on all courts.
- In October 2012, the text of the proposed settlement between the KTA and the monastery was read out aloud at the Supreme Court. The minutes were shared with both parties and signed in the presence of the presiding judge.
- On [27 December 2012](#), the Supreme Court ruled [once more](#) that this issue had now been settled and could no longer be challenged. Predictability and legal certainty required that final judgments were no longer challenged, no matter whether “*they are correct or not.*”

However, throughout the following twelve years, nothing was done to implement these decisions. On the contrary, despite a final and binding ruling, legal challenges continued, including another one before the Supreme Court in 2015, which *reopened* the case and in an

extraordinary twist overturned its own previous judgements. This is when the Decani case [reached the Constitutional Court, which was now called upon to finally settle the issue in 2016.](#)



*Kosovo Constitutional Court, Pristina*

Before the Constitutional Court, Decani monastery argued that non-implementation of the 2012 judgements constituted a violation of both the Kosovo constitution and the European Convention on Human Rights (ECHR):

“The right to legal certainty, as one of the fundamental guarantees which is provided by the principle of a fair trial, guarantees that the final court judgements cannot be subjected to reconsideration in the regular proceedings.”

The Kosovo Constitutional Court concluded that by now, in 2016, the *only* open question was “whether the reopening of a court decision that has become *res judicata* is compatible with the requirements of Article 31 of the [Kosovo] Constitution and Article 6, paragraph 1, of the ECHR.”

Its ruling was unambiguous:

“The right to a fair trial under Article 6 of the ECHR and Article 31 of the Constitution includes the principle of legal certainty, which encompasses the principle that final judicial decisions which have become *res judicata* must be respected and cannot be reopened or become subject to appeals.”

The Constitutional Court reaffirmed that the Supreme Court’s December 2012 decision was “final and binding and as such as *res judicata*.” There was no longer any possible judicial challenge to it. It simply had to be implemented.

This was eight years ago. The cadastral records remain unchanged.

## History and politics

Few other issues have been discussed in Kosovo's courts as often as the 24 parcels of land surrounding Decani monastery. And yet, while the 2002 municipal court judgement, which took parcels *from* the monastery, was quickly reflected in the cadastral records, UNMIK executive decisions in 2008, final and binding Supreme Court judgements in 2011 and 2012, the Constitutional Court judgement in 2016, and repeated calls and warnings from that court and from public prosecutors have all been ignored. As of today, it appears as if all these court cases and judgements might as well not have happened.

It is not surprising, therefore, that in 2023 *all* rapporteurs and legal experts asked by the Council of Europe to assess the preparedness of Kosovo to join the organization have focused on this matter, as it indicates a major problem with the rule of law. And all asked the same question: when will these judgements be implemented?

Alas, even recently ESI has encountered a number of concerns among politicians in Pristina that continue to block implementation. They include the following:

### *"Fear of a precedent"*

The argument: by re-registering these 20 parcels in the cadaster in the name of Decani monastery, a dangerous precedent might be created. Would this not mean that *all* decisions taken in the repressive Milosevic era from 1989 to 1999 might now be considered legally binding? Might such a "small restitution" of land to one monastery not force Kosovo governments to return thousands of hectares of land to other monasteries, churches, mosques across Kosovo?

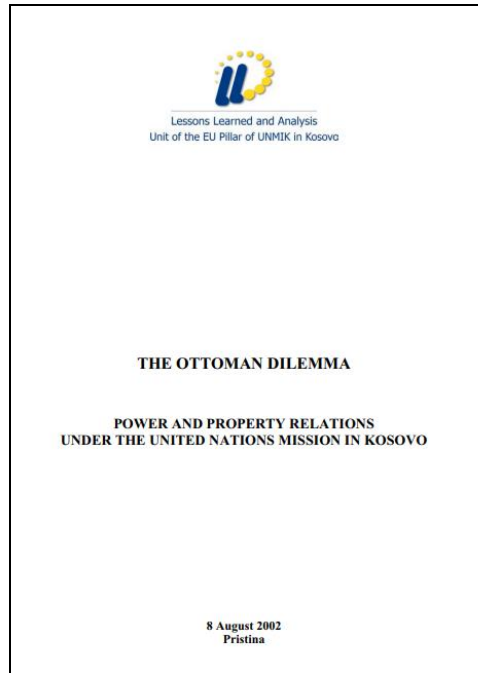
In fact, all judgements on this by both the Supreme and Constitutional Courts make clear that such fears are wholly misplaced. Kosovo's highest courts did *not rule* on the legality of the donation by the Serbian state in 1997. They ruled on the right of UNMIK/KTA in 2009-2012 to reach the kind of settlement on these 24 plots which it did. As this settlement is unique, so is this case. There is no legal precedent.

### *"The courts made a mistake"*

The argument: the judgements from 2012 to 2016 got the law wrong. *Did* the KTA really have the authority to act as it did? Some even whisper, though no evidence has been offered in public, that during these trials some judges and courts were put under pressure or even bribed to reach their conclusions.

Such concerns express, however, a radical challenge to the idea of *res judicata* and to the notion of the separation of powers and independent courts. In fact, it does not matter whether everyone agrees with these court judgements on their substance. Nor is it an illegitimate position to argue that things could have been decided differently. Judges and courts are imperfect human institutions, the same way ministries, agencies and international organisations are. It is certainly true that UNMIK and the KTA were peculiar institutions, created for an extraordinary situation, in which Kosovo made the gradual transition away from being a UN-protectorate. ESI has written several critical analyses of the KTA in particular and of international protectorate powers in general already two decades ago.





*On UNMIK and the KTA*  
*(when ESI was running an internal independent Lessons Learned and Analysis Unit within the EU Pillar of UNMIK)*

But such concerns or questions do not change the reality upon which Kosovo's highest courts insisted: that the rule of law requires respect for legal certainty. And that in any democracy, governments and executive agencies, including the Kosovo Cadastral Agency, cannot pick and chose *which* final judgements *they* would like to respect and which ones they chose to ignore.

*“Is this decision fair?”*

The argument: It is unfair to restitute property to one monastery only, but not to other religious communities who also lost property when communism was established after World War Two and a lot of land was seized.

Why single out Decani monastery? Why not return land to mosques and religious foundations? Should not every institution be treated equally?

This too is a legitimate question. However, resolving this wider issue would require a national law on restitution, something Kosovo has not passed.

At this stage, however, it does not matter *who* benefits from res judicata rulings by the highest courts in the country. The heart of *this* case is the issue of legal certainty, which is essential for all citizens in a democracy.

It is a matter of the rule of law itself. As the Constitutional Court reminded everyone in its 2016 judgement, the rule of law “would be illusory, if the Kosovo legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party.” It restated this in one of its regular review sessions on the implementation of judgements in September 2021:

“The Constitutional Court reiterates that the enforcement of its decisions is an obligation for all persons and institutions of the Republic of Kosovo pursuant to article 116 of the Constitution. Furthermore, the enforcement of final decisions is a fundamental principle of the rule of law ...”



*An institution that has failed – and so has the Central Cadastral Agency*

### **The only solution**

All of the above leaves only one way to address this issue: the government of Kosovo must ensure, with all the instruments and the authority at its disposal, that the judgements of 2012 and 2016 are immediately implemented so that the Kosovo Cadastral Agency (KCA) changes the entries in its records, with a few computer clicks, and grants the ownership of the 20 parcels of land to the monastery in line with the settlement with UNMIK:

301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312 (all in Field A)  
494, 495, 502, 503, 522, 523, 524, 528 (all in Forest B)

The KCA, like any public administration, is under the legal obligation to implement court decisions without delay in any case. It is an executive agency under the control of the government. *Not* implementing final and binding court judgements is unacceptable.

### **The lesson for the Council of Europe**

All of this is an internal matter for Kosovo. It is not part of any “dialogue” with Serbia. Decani is a monastery *in Kosovo*. The Supreme Court and the Constitutional Court are *Kosovo state institutions*. Implementing their judgements is a matter of principle for anyone who respects the *Kosovo constitution*. This should never be dependent on what any other actors do or do not do.

And yet, there is one additional reason for the Kosovo government to act on this today, and to resolve something all previous governments have failed to resolve. This issue has recently become a *conditio sine qua non* for Kosovo to advance on the path to Council of Europe membership.

Kosovo applied for Council of Europe membership in May 2022. ESI wrote about it at the time:

[47 again? Russia out, Kosovo in  
Support Kosovo’s membership in the Council of Europe](#)

Applications are addressed to the General Secretary, who forwards them to the Committee of Ministers in Strasbourg, where governments of Council of Europe member states are represented. The Committee of Ministers sat on Kosovo’s application for almost a year, without any good reason, but finally referred it to the Parliamentary Assembly of the Council of Europe (PACE) in April 2023. Since 1951, PACE has been tasked to assess the state of democracy and human rights of applicants, before the final decision is made by the Committee of Ministers by qualified majority vote. PACE also asks “eminent lawyers” to produce an in-depth report on the candidate, which in this case was published in November 2023:

[Report of the eminent lawyers on Kosovo](#)

This report notes that Kosovo has a “functioning parliamentary system”, its government is “determined to fight corruption” and there are “strong guarantees for independence of the judiciary.” It also stresses that the Decan land issue and the non-implementation of court decisions in this case is an issue of major concern, highlighting:

“While the [Constitutional] Court plays an important role as guardian of the Constitution, in one politically sensitive case the authorities have until now not implemented a judgment of the Court dating from 2016. The Court decided that 24 hectares of disputed land belonged to the Visoki Decani Monastery. This judgment was criticised by politicians and, despite repeated appeals by the International Community, not implemented. This is **a clear violation of the rule of law. The Kosovo authorities should implement without further delay the judgment of the Constitutional Court in the Visoki Decani case.**”

Similar messages have come from the three rapporteurs appointed by PACE, members of parliament from Greece, Sweden and Monaco. They have been repeated by leaders of the political groups in PACE. In fact, the consensus on this in PACE is overwhelming. Thus, the issue of the 24 hectares of land in the municipality of Decan risks turning into an insurmountable obstacle to a positive assessment by PACE.



*Dora Bakoyannis (Greece) Azadeh ROJHAN (Sweden) Béatrice Fresko-Rolfo (Monaco)  
Three PACE rapporteurs on Kosovo membership*

At the same time, it is an obstacle that could be overcome fast. The legal situation is clear. What needs to be done is clear. So is the political case for it. Kosovo wants to join an institution that relies on its members implementing judgements by independent courts, including the European Court of Human Rights. This should be done even when implementing judgements is complex, costly and might impact directly on large numbers of people. But in this case, none of this is true.

Let us revisit the 24 ha of land that this is all about. The plots that are part of the farmland (A) are not and have never been inhabited (as they were linked to a socially-owned enterprise before 1997). The farmland is already used by the monastery, and has been used for decades. What is needed here is the administrative recognition of a legal and practical reality.



*Land already farmed by Decani monastery*

The same is true for the plots in the forest (B). There are two ruins in the forest. As it lies within the Special Protective Zone it is closed to any development that puts at risk “the monastic way of life.”



*Abandoned ruins in the forest next to the monastery*



By resolving this issue now, the Kosovo government not only shows that it is ready to join the Council of Europe, but also why such an institution was created in the first place. Its task is to help democratic government do what they should do in any case, but do not always succeed in: respect the European Convention on Human Rights. It binds democracies together in a common system of mutual interference on the basis of this convention.

This would also remind everyone why *all* democracies benefit from systems of international human rights protection. And why Kosovo membership matters to its citizens.

To join the Council of Europe, members need to make a credible commitment:

“Every member of the Council of Europe must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council.”  
(Article 3, Statute of the Council of Europe adopted in 1949).

This is what Kosovo is asked to do here, too. And why now is the time to finally resolve the Decan land issue for good, while opening the door to the membership of an organization that will protect everyone’s human rights in Kosovo in the future.