Judicial Application of International Law in Kosovo

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1 Introduction

The Constitution of the Republic of Kosovo (hereinafter the 'Constitution' or the 'Kosovo Constitution') follows a 'strong regime of domestic incorporation' of international law.[1] Certain international human rights conventions are domesticated through the Constitution, and all ratified international agreements and legally binding norms of international law are granted supremacy over Kosovo laws.[2] The constitutional provisions related, *inter alia*, to the status of international law in the Kosovo legal order and the protection of minorities reflect largely verbatim the Comprehensive Proposal for the Status Settlement of Kosovo (the Ahtisaari Status Proposal), a framework document prepared by United Nations Special Envoy Mr. Martti Ahtisaari for the determination of the final political status of Kosovo.[3]

[1] Posner (2009), p. 111. For a categorisation of constitutions that permit the incorporation of international law, see particularly Cassese (1985), p. 394. The text of the Constitution and its amendments is available in the Official Gazette of the Republic of Kosovo at http://gazetazyrtare.rks-gov.net. Accessed 20 April 2013.

[2] On the process of constitution drafting, see Weller (2009), pp. 240–259; Tunheim (2009), p. 18.

[3] On the Ahtisaari Status Proposal, see http://www.unosek.org/unosek/en/statusproposal.html. Accessed 15 May 2013. For more on the Ahtisaari Status Proposal, see Weller (2009), pp. 244–249.

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While Kosovo is not yet a member of the United Nations (UN) or the Council of Europe, it has accorded constitutional rank to the provisions of eight international human rights instruments, including the Universal Declaration of Human Rights (UDHR) and the Council of Europe Framework Convention for the Protection of National Minorities (Framework Convention on Minorities). Furthermore, Article 53 of the Kosovo Constitution requires that all human rights be interpreted consistently with the case-law of the European Court of Human Rights (ECtHR). These peculiar features of the reception of international law in the Kosovo Constitution are scrutinised in the second part of this contribution.

The paper develops by examining the judicial application of international law by domestic and international judges embedded in Kosovo courts. The Kosovo Constitutional Court[4] has rendered some landmark decisions concerning the place of international law in the Kosovo legal order.[5] In its rather embryonic phase, domestic and international judges of the Constitutional Court have been challenged with cases that prompted the statehood of Kosovo and the mandate of the Assembly of Kosovo to adopt laws that invalidate international legal obligations, namely Regulations of the United Nations Interim Administration Mission in Kosovo (UNMIK).[6] In addition, the application of international human rights instruments and the ECtHR case-law is indispensable in the Constitutional Court's jurisprudence. These interactions with the UN and ECHR law, coupled with initial remarks on the Constitutional Court's mandate to deal with international law, are covered in the third section.

International judges have also been embedded in courts of general jurisdiction within the framework of the European Union Rule of Law Mission in Kosovo (EULEX), and whose decisions constitute part of the Kosovo domestic jurisprudence.[7] In inspecting the war crimes jurisprudence of EULEX international judges, fourth section analyses the challenges in adjudication of crimes emanating from the internal armed conflict and the challenges in utilising customary international law in the Kosovo legal order. The same section observes the judicial application of international agreements concerning state succession and the degree of application of the ECtHR case-law in the jurisprudence of EULEX international judges.[8]

[4] Article 112 of the Kosovo Constitution. For more on the Kosovo Constitutional Court, see Morina (2010), pp. 129–158; Hill and Linden-Retek (2010), p. 26; Hasani et al. (2012), pp. 49–69.

[5] All decisions of the Kosovo Constitutional Court are published in three languages: Albanian, Serbian and English and are available on the Constitutional Court's official web site http://www.gjk-ks.org. Accessed 11 May 2013.

[6] The Kosovo Constitutional Court is composed of six domestic and three international judges.

[7] On the establishment and the mandate of EULEX, see the European Union Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo, OJ 2008 L 42. For the jurisdiction of EULEX international judges as provided in Kosovo law, see the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX international judges and Prosecutors in Kosovo; Law on the Special Prosecution Office of the Republic of Kosovo.

[8] The vast majority of the decisions of EULEX international judges are published in English and at least one of the official languages in Kosovo, namely Albanian or Serbian. Decisions of EULEX

The fifth section examines the judicial application of international law by local judges of courts of general jurisdiction.[9] In elucidating the scarce application of ECtHR case-law, this part shows the challenges associated with resources and education of judges and suggests tools to strengthen the application of international law.[10]

Finally, the discussion is wrapped up with highlights and concluding remarks.

2 Reception of International Law in the Kosovo Constitution

As to the manner in which international law is incorporated in the Kosovo legal order, at least three models can be identified in the Kosovo Constitution.

Firstly, by means of *ratification* of international agreements by Kosovo institutions, international treaties become 'part of the internal legal system ... [and] are directly applied except for cases when they are not self-applicable and the application requires the promulgation of a law'.[11] In the process of accession to international agreements, the Kosovo institutions with ratifying powers may make reservations or withdraw from the international agreements.[12] The Constitution emphasises in Articles 16 and 19 that Kosovo shall respect international law and that ratified international agreements have supremacy over Kosovo laws.

Secondly, international law reaches the Kosovo legal system through Article 19 (2) of the Constitution, which accords priority over Kosovo laws to the legally

international judges (including mixed panels) are available on the EULEX official website http://www.eulex-kosovo.eu/en/judgments/. Accessed 11 May 2013.

[9] Upon the adoption of Law No. 03/L-199, as of January 2013, the Kosovo court system disbanded from the old Yugoslav court structure and significantly transformed the organisation of the courts. The Law on Courts provides that all first-instance cases are adjudicated in specialised Departments of the Basic Courts, and appealed second-instance cases are adjudicated in one single Court of Appeals located in Prishtina. In the first and second instance, the Kosovo Courts operate with the Department for Serious Crimes, General Department, Department for Administrative Matters, Department for Commercial Matters, and Department for Minors. The Supreme Court deals with third-instance cases, extraordinary legal remedies and renders opinions related to the uniformity of court practices in Kosovo. The Supreme Court also includes the Appeals Panel of the Kosovo Property Agency and the Special Chamber of the Supreme Court, the judges of which are part of the Supreme Court.

[10] The judgments of the Supreme Court of Kosovo are largely accessible on the official website of the Supreme Court of Kosovo, while the decisions of other Kosovo courts of general jurisdiction are hardly accessible.

[11] Article 19(1) of the Constitution. On the instrument of ratification by the Kosovo institutions, see Article 18 of the Constitution.

[12] Article 18(4) of the Constitution. See also Articles 19, 54 and 62 of the Vienna Convention on the Law of Treaties (VCLT).

'binding norms of international law'. Yet, the Constitution does not clarify this concept. Furthermore, since the *travaux préparatoires* on the constitution drafting are inaccessible, the scope of 'legally binding norms of international law' remains open for interpretation. One may view that the 'legally binding norms of international law' encompass norms of *jus cogens*, other recognised norms of customary international law, and potentially the obligations emanating from the Security Council resolutions adopted under Chapter VII of the UN Charter. A wider interpretation would allow considerations that all sources of international law listed in Article 38 of the Statute of the International Court of Justice (ICJ) could be covered by the 'legally binding norms of international law'.[13] These pending questions yet remain to be answered by the Constitutional Court. So far, the judicial practice of Kosovo courts reveals that at least norms of customary international law are applicable in the Kosovo domestic legal order.[14] In light of Kosovo's endeavours to join the European Union (EU), Article 19(2) of the Constitution presents a potential question if EU law, too, would be accommodated. Where the EU Member States used their constitutional provisions on international law in integrating EU law, one could argue that similarly Article 19(2) of the Constitution opens the door for EU law.[15]

The third model is peculiar to the Kosovo legal order in that it *reproduces* certain international instruments and jurisprudence. In particular, Article 22 of the Constitution provides that

> [h]uman rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:
>
> (1) Universal Declaration of Human Rights;
> (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
> (3) International Covenant on Civil and Political Rights and its Protocols;
> (4) Council of Europe Framework Convention for the Protection of National Minorities;
> (5) Convention on the Elimination of All Forms of Racial Discrimination;
> (6) Convention on the Elimination of All Forms of Discrimination Against Women;
> (7) Convention on the Rights of the Child;

[13] See, e.g., Joost Pauwelyn who employs the term 'legally binding norms' as a synonym for all sources of international law 'as they may be invoked before an international court or tribunal'. Pauwelyn (2006), pp. 7, 89–91.

[14] See, e.g., SC Case No 386/10, Decision of the mixed panel of EULEX international judges, Supreme Court of Kosovo, 7 September 2010, at p. 6.

[15] See, e.g., the Italian Constitution of 22 December 1947 as a classical model. In the application of EU law and international law, Italy applies Article 11 of the Constitution which provides that Italy agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed; it promotes and encourages international organisations furthering such ends. This provision is inspired by the UN system and by the obligations emanating from the UN Charter. However, Italy continued to utilise Article 11 of the Constitution to allow for the supremacy and direct effect of EU law.

(8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.

Further, Article 53 requires that '[h]uman rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistently with the court decisions of the European Court of Human Rights' (ECtHR). Article 22 of the Constitution, which domesticates international human rights instruments, is a verbatim rendering of the Ahtisaari Status Proposal.[16] This model particularly reveals the role of international actors in defining the place of international law in the Kosovo domestic legal order.[17] As the ECtHR Judge Lech Garlicki observes from experiences in constitution drafting in emerging democracies:

> [s]hort of military intervention and/or economic pressure, the most civilised way of imposing certain standards upon national processes of constitution drafting is to 'universalise' these standards by expressing them in the norms of international law. Such norms, if vested with sufficient binding authority, can pre-define the content of national constitutions leaving to the framers of a particular constitution no alternative but to reproduce them in the text of the constitution.[18]

A concern with regard to pure constitutional domestication of international law is the viability of its application. Notwithstanding the significance of Articles 22 and 53 of the Constitution, as Marc Weller remarks, some of the international conventions and instruments listed in these constitutional provisions 'may not in fact be suited to operating as self-executing provisions' in the Kosovo legal order.[19] While the Kosovo Constitution makes directly applicable the UDHR and the Framework Convention on Minorities, the former is a non-binding UN General Assembly resolution, and the latter was deliberately drafted as a 'framework' convention, as it was assumed that its provisions would not be directly enforceable.[20] Furthermore, since Kosovo has not yet joined the United Nations or the Council of Europe, citizens as well as other interested parties cannot benefit from the political or judicial mechanisms of the respective international organisations in terms of supervising or enforcing international human rights by Kosovo institutions.

As to the supremacy and direct effect of the UDHR, it would be interesting to observe what the response of the Kosovo courts and other institutions would be if, with Kosovo's economy as it is, claims were filed based on the right to social security as guaranteed under Article 22 of the UDHR, or the right to food, clothing, housing and medical care foreseen under Article 25 of the UDHR.

[16] Article 2, Annex I of the Comprehensive Proposal for the Kosovo Status Settlement.

[17] The Constitution did not incorporate social, economic and cultural rights (save for the provisions of the UDHR). For an overview see, e.g., Istrefi (2013), pp. 271–272.

[18] Garlicki (2005), p. 263.

[19] Weller (2009), p. 257.

[20] Ibid, p. 245.

3 Judicial Application of International Law by the Constitutional Court

3.1 Preliminary Remarks: Institutional Competencies to Provide Judicial Review on Issues Involving International Law

In 5 years of operation of the Kosovo Constitutional Court, significant jurisprudence has been developed with regard to the place of *domesticated* international instruments and the ECtHR in the Kosovo legal order. However, international instruments and the ECtHR case-law have been applied not as part of foreign (international) law but as a matter of domestic constitutional law. Furthermore, due to the lack of membership in the Council of Europe, the decisions of the Kosovo Constitutional Court are not subject to the jurisdiction of the ECtHR.

Once Kosovo accedes to more international agreements, it may be anticipated that the Constitutional Court will contribute to shaping the relationship between international and domestic law. In addition, since many provisions of the Constitution are not lucid with regard to the competences of the Constitutional Court, it will equally have to interpret domestic provisions concerning its jurisdiction to engage in legal matters related to international law. In this vein, although the Constitution is silent as to whether courts can review legislation for compatibility with international law, the Constitutional Court has not been reluctant to challenge the legality of the Statute of the Municipality of Prizren for its non-compliance with the Constitution and the Framework Convention on Minorities. In the *Kurtishi* case, the Constitutional Court highlighted that the review of the contested municipal statute must be carried out not only against the Constitution but also the Framework Convention, which enjoys supremacy over law.[21] This approach provides that at least as far as Article 22 of the Constitution is concerned, the Constitutional Court can review the compliance of laws and other legal acts with those domesticated international instruments.

Regarding the review of compatibility of the ratified international agreements with the Constitution, no explicit provision could be found in the Constitution. However, since international agreements are ratified by the Assembly of Kosovo in the form of an *enactment of a law*,[22] or are ratified by the President of the Republic in the form of a presidential *decree*, in both cases the deputies of the Assembly are

[21] CC, 18.03.2010, Case No. KO 01/09, *Qemailj Kurtisi v. Municipal Assembly of Prizren*. Judgment of the Constitutional Court of the Republic of Kosovo, para 42. The decision is available at the http://www.gjk-ks.org/. Accessed 12 April 2013.

[22] Article 10(2) of the Law on International Agreements (Law No. 2004/14) provides that International Agreements shall be ratified by a law by a two-thirds (2/3) vote of all deputies of the Assembly of the Republic of Kosovo. The Law is available in the Official Gazette at http://gazetazyrtare.rks-gov.net. Accessed 12 April 2013.

entitled to file a referral to the Constitutional Court to review the respective law or presidential decree before it enters into force.[23]

With regard to a review of the consistency of the constitutional amendments with international law, the Constitution in clear terms enables the Constitutional Court to review the 'compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution'.[24]

3.2 The Application of UN Law

As far as the law of the UN Charter is concerned, the Constitutional Court in case No. KI 25/10 addressed not just a legal, but also a political question, that of Kosovo's statehood and the ability of State institutions to exercise their constitutional public authority after the adoption of the Kosovo Declaration of Independence of 17 February 2008 (Declaration of Independence). The case was brought before the Constitutional Court after EULEX international judges of the Special Chamber of the Supreme Court of Kosovo (Special Chamber) refused to accept the validity of laws adopted by the Assembly of Kosovo insofar as they repealed the UNMIK Regulations.

The approach of the EULEX international judges of the Special Chamber raised two relevant issues. Firstly, whether in the case of inconsistency, the UNMIK Regulations adopted by the UNMIK Special Representative of the Secretary-General ('SRSG') pursuant to the SC Resolution 1244 prevailed over the Kosovo Constitution and the laws adopted by the Assembly of Kosovo after the Declaration of Independence. Secondly, whether the Assembly of Kosovo, by adopting national legislation after the Declaration of Independence, could *repeal* the UNMIK regulations adopted on the authority deriving from the UN Charter and thus possessing an international law character.

3.2.1 Relevant Facts and Previous Stages Before EULEX International Judges

Prior to the adoption of the Declaration of Independence, laws adopted by the Assembly of Kosovo could be promulgated only upon the final approval of the SRSG.[25] UNMIK Regulations and Administrative Instructions were adopted and

[23] Regarding the procedure for the possibility to file referrals by the deputies of the Assembly of Kosovo, see Article 113 of the Constitution.

[24] Articles 113(3) and 113(4) of the Constitution.

[25] Resolution 1244, UN Doc S/RES/1244; 54 UN SCOR, UN Security Council, 10 June 1999; UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo (12 December 1999) as amended by the UNMIK Regulation No. 2000/59 (27 October 2000) ('UNMIK Regulation 1999/24 as amended') and the UNMIK Regulation No. 2001/9 on a Constitutional Framework

promulgated exclusively by the SRSG. Since the adoption of the Declaration of Independence, the Assembly of Kosovo promulgated the Constitution and laws without requesting the consent of the SRSG as to their compatibility with UN SC Resolution 1244 or UNMIK Regulations.

Three months after Kosovo declared its independence, the Assembly of Kosovo passed the Law on the Privatisation Agency of Kosovo (Law on PAK).[26] The Law on PAK established the Privatisation Agency of Kosovo (PAK) as an 'independent public body [and as] the successor of the Kosovo Trust Agency' (KTA) previously regulated under UNMIK Regulation No. 2002/12 as amended.[27] Article 31(1) and Article 31(2) of the Law on PAK provides that this Law 'shall supersede any provisions in the Applicable Law which are inconsistent herewith [and that the] UNMIK Regulation 2002/12 as amended will cease to have legal effect after the Law on PAK enters into force'.

In the case concerning PAK's activities in the privatisation process in Kosovo, the Special Chamber of the Supreme Court of Kosovo (Special Chamber), composed of EULEX international judges, in the first and second instance refused to recognise the Law on PAK as applicable law. As a consequence, it did not recognise the PAK as a successor of the KTA, but instead considered UNMIK Regulation 2002/12 as amended to be still in force, and the Law on PAK as a non-law.[28]

On 23 April 2010, PAK filed a referral to the Constitutional Court of the Republic of Kosovo, asking the Court to review the constitutionality of Decision No. ASC-09-089 of the Special Chamber.

3.2.2 The Constitutional Court's Assessment

From a domestic constitutional perspective and in view of the Constitutional Court's jurisdiction, the Court had to elucidate whether the Assembly of Kosovo duly adopted the Law on PAK and whether, according to the Constitution, the Assembly had a mandate to repeal UNMIK Regulation No. 2002/12 as amended on the establishment of the KTA. On this matter, the Court referred to pertinent constitutional provisions and reasoned:

> [i]n accordance with Article 145 [of the Constitution,] ... [UNMIK] Regulations and Administrative Instructions as well as other legislation will only continue to apply to

for Provisional Self-Government in Kosovo (15 May 2001) ('UNMIK Constitutional Framework').

[26] Law No. 03/L-067 on the Privatisation Agency of Kosovo (21 May 2008), entered into force 15 June 2008.

[27] Article 5 of Law No. 03/L-067 on the Privatisation Agency of Kosovo (21 May 2008), entered into force 15 June 2008.

[28] SC, 16.10.2009, Decision No. SCEL-09-0003, Special Chamber of the Supreme Court of Kosovo, cited in Decision No. ASC-09-089 of the Appellate Panel of the Special Chamber of Supreme Court of Kosovo, 4 February 2010 Decision No. ASC-09-089 of the Appellate Panel of the Special Chamber of Supreme Court of Kosovo, 4 February 2010, p. 1.

> the extent they are in conformity with the Constitution until repealed, superseded or amended in accordance with the Constitution.
>
> Therefore, relevant UNMIK Regulations and Administrative Instructions only continue to be applicable as long as they are in conformity with Law [on PAK].
>
> In these circumstances, … the Special Chamber of the Supreme Court, in its Decision ASC-09-089, clearly did not 'ensure the uniform application of the law', as envisaged by the [Ahtisaari Status] Proposal, nor did it act in conformity with its duties under …. Article 102 [3] of the Constitution [which reads that courts shall adjudicate based on the Constitution and the law], since it did not apply Law [on PAK] … as a Law, duly adopted by the Assembly of Kosovo, but as valid and binding internal rules of organization for PAK.[29]

In the Court's view, this *problematique* emanated because the 'Special Chamber does not apply the laws lawfully adopted by the Assembly [and] simply continues to ignore the existence of Kosovo as an independent State and its legislation emanating from its Assembly'.[30]

The Court reminded EULEX international judges of their paradoxical approach with regard to the applicable law in Kosovo and viewed that:

> [it is] inconceivable that EULEX international judges – integrated in the Special Chamber of the Supreme Court of Kosovo in accordance with Law on [the Jurisdiction, Case Selection and Case allocation of EULEX international judges and Prosecutors in Kosovo], duly adopted by the Assembly of [the Republic of] Kosovo – refuse to apply laws duly adopted by the Assembly of the Republic of Kosovo.[31]

The Court also referred to the ICJ Advisory Opinion in the *Kosovo* case and held

> the establishment of the Republic of Kosovo as an independent and sovereign state, based on the declaration of independence and whose statehood was recognized, so far, by … countries, is, therefore, not contrary to Security Council Resolution 1244(1999) as well as international law.[32]

One might view that the discussion on the compatibility of the Declaration of Independence with SC Resolution 1244 is an attempt to establish judicial comity between the Constitutional Court and EULEX international judges. In its deductive reasoning, the Constitutional Court seems to have instructed EULEX international judges that because the Declaration of Independence is not contrary to SC Resolution 1244, the laws adopted by the Assembly of Kosovo are *also* compatible with SC Resolution 1244, even when they *repeal* UNMIK Regulations.

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[29] Article 102(3) stipulates: Courts shall adjudicate based on the Constitution and the law.

[30] Constitutional Review of the Decision of the Special Chamber of the Supreme Court of Kosovo ASC-09-089, Case No. KI 25/10, Judgment of the Kosovo Constitutional Court, ILDC 1606 (KO 2011), 31 March 2011, para 53.

[31] Constitutional Review of the Decision of the Special Chamber of the Supreme Court of Kosovo ASC-09-089, Case No. KI 25/10, Judgment of the Kosovo Constitutional Court, ILDC 1606 (KO 2011), 31 March 2011, para 61.

[32] Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion, ICJ Reports 2010, p. 403, 10 July 2010, para 54.

Based on the foregoing constitutional considerations, the Court invalidated decision No. ASC-09-089 of the EULEX international judges of the Special Chamber and remanded it to comply with the decision of the Constitution Court.

Following that decision of the Constitutional Court a mixed panel of EULEX international judges of the Special Chamber in the decision SCA-09-0042 of 29 November 2012 recognised that the reasoning of the Constitutional Court was binding only with respect to interpretation of the Kosovo Constitution but not of the UN law.[33] The Special Chamber further held

> [Declaration of Independence of Kosovo] did not have any influence on the validity and applicability of UN law [including UNMIK regulations] as the latter did not depend on the acceptance of the addressee. [34]

Accordingly, from the perspective of UN law, UNMIK regulations could not be affected or repealed by Kosovo law. However, in the view of the Special Chamber UNMIK Regulation No 2002/12 as amended was not anymore applicable because the interim administration had in fact ended.[35] The Special Chamber concluded

> [i]n view of the inability of the Security Council to resolve the status of Kosovo and the omission of UNMIK to administer Kosovo (which would require more than expressing concern and protesting) the acts of Kosovo legislature were valid even if they conflicted with UN regulations issued by UNMIK.[36]

The outcome reached by the mixed panel of EULEX international judges and by the Constitutional Court was the same. Both judicial bodies opined that the law applicable to privatisation matters was the Law on PAK and not UNMIK Regulation 2002/12. However, the paths of legal arguments employed in arriving at that conclusion, particularly as concerns UN law, differed greatly.

This tensed judicial dialogue showed not only a different understanding by the Constitutional Court and by EULEX international judges of the place of UN Charter in the Kosovo legal order, it also revealed political and legal challenges of the Constitutional Court in guarding the *primum verum*—the first truth of the newly established State Parliament's mandate to legislate. In doing so the Constitutional Court also guided EULEX international judges and other international authorities in Kosovo—who remained *neutral* on Kosovo's political status—in the enforcement of legal framework adopted by the Assembly of Kosovo subsequent to the Declaration of Independence.

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[33] Decision of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters SCA-09-0042, SOE XX, XX v. A.A., XX, 29 November 2012, at 4.

[34] Ibid.

[35] Ibid.

[36] Ibid, p. 5.

3.3 The Application of the ECHR and the ECtHR's Case-Law

The Constitutional Court's 2012 annual report indicates that more than 90 % of the constitutional referrals originated from individuals on matters involving human rights.[37] In scrutinising the Constitutional Court's case-law, it is evident that ECtHR jurisprudence has been indispensable in the Court's adjudication.

In the case concerning the deprivation of life of Ms. D.K., the parents of the deceased submitted a referral to the Constitutional Court against the Municipal Court of Prishtina for the failure of the latter to issue an emergency protection order to prevent continuous threats from the perpetrator.[38] The applicants argued that the Municipal Court of Prishtina, by its inaction to deal with the request for the emergency protection order, had violated, *inter alia*, the right to life of D.K., guaranteed under Article 25 of the Kosovo Constitution and Article 2 of the ECHR. It is noteworthy that the applicants requested that the Constitutional Court address this issue with the aim of preventing similar tragic cases in the future, as well as to increase public awareness of the functionality of the regular courts.

The Constitutional Court recalled that, 'in accordance with Article 53 of the Constitution, it is its constitutional obligation to conduct an interpretation of human rights and fundamental freedoms in accordance with the case-law of ECtHR'.[39] By referring to the ECtHR cases *L.C.B. v. the United Kingdom* and *Osman v. the United Kingdom,* the Constitutional Court held:

> it is the duty of the state authorities not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction... This involves ... in appropriate circumstances positive obligations on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.[40]

Relying on ECtHR case-law, the Constitutional Court held that the inaction of the Municipal Court of Prishtina represented a violation of Article 25 of the Constitution and Article 2 of the ECHR.[41]

The 'constitutional obligation' to conduct an interpretation in accordance with the case-law of the ECtHR is reflected in other cases pertaining to human rights and fundamental freedoms. In a case concerning labour rights,[42] the applicant requested an assessment of the constitutionality of the judgment of the Supreme Court,

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[37] 2012 Annual Report of the Kosovo Constitutional Court, pp. 29–30, available at http://gjk-ks.org/repository/docs/RAPORTI%20VJETOR%202012.pdf. Accessed 12 May 2013.

[38] CC, 26.02.2013, Case KI 41/12, *Gëzim dhe Makfire Kastrati v. Municipal Court in Prishtina and Kosovo Judicial Council*, Judgment of the Constitutional Court of the Republic of Kosovo.

[39] Ibid, para 58.

[40] Ibid, para 59.

[41] Ibid, para 63.

[42] SC, 5.12.2011, Case KI 108-2010, *Fadil Selmanaj v. Judgment A*. No. 170/2009 of the Supreme Court, Judgment of the Constitutional Court of the Republic of Kosovo.

because of an alleged 'lack of official communication between the Supreme Court and the respondent'.[43] The applicant argued that he was an interested party in the case lodged by his employer at the Kosovo Supreme Court and therefore, by not being informed of the ongoing case against him, this 'provided room for suspicions that we are dealing here with manipulations and that as a consequences of this, he as an interested party, has been materially and morally damaged'.[44]

The applicant considered that his right to a fair trial had been infringed 'because neither the employer nor the Supreme Court notified him of the appeal or its disposition'.[45]

Declaring invalid the decision of the Supreme Court, the Constitutional Court held that a failure of the Kosovo Supreme Court to duly inform the applicant of the judicial process and to enable the submission of evidence and facts in the judicial proceedings constituted a breach of Article 31 of the Constitution and Article 6 (1) of the ECHR.[46] The Constitutional Court went on to say that although the right to take part in a hearing was not expressly mentioned in Article 6(1) of the ECHR, the case-law of the ECtHR revealed that:

> the object and purpose of the Article taken as a whole show that a person charged with a criminal offence is entitled to take part in the hearing. . .. This right is implicit in the very notion of an adversarial procedure ... [and] applies to both civil and criminal proceedings.[47]

In a case concerning the participation of the public in an environmental decision-making process, the reference to ECtHR jurisprudence was pivotal in interpreting the scope of constitutional rights. In the case *Hoxha et al v. Municipal Assembly of Prizren,* the applicant claimed that the constitutional right to public participation was infringed when the Municipal Assembly of Prizren amended the Detailed Urban Plan (DUP), allowing the construction of high tower blocks.[48] The applicant argued that the DUP decision taken in the absence of public review and public participation violated Article 52(2) of the Constitution, which provides:

> everyone should be provided an opportunity to be heard by public participation and have their opinions considered on issues that impact the environment in which they live.

The Constitutional Court viewed that the adoption of the DUP decision by the Municipality of Prizren without any public consultation or any other type of participation had violated the applicant's rights guaranteed under Article 52(2) of

[43] Ibid, para 3.

[44] Ibid, para 3.

[45] Bulletin of Case-law No. 2 (2011) Publication of the Constitutional Court of Kosovo, p. 579.

[46] CC, 5.12.2011, Case KI 108-2010, Fadil Selmanaj v. Judgment A. no. 170/2009 of the Supreme Court, Judgment of the Constitutional Court of the Republic of Kosovo, para. 75.

[47] Ibid, paras 58–59.

[48] CC, 22.12.2010, Case No. KI 56/09, *Fadil Hoxha and 59 Others v. Municipal Assembly of Prizren*, Judgment of the Constitutional Court of the Republic of Kosovo, paras 27–30.

the Constitution.[49] Furthermore, the Constitutional Court viewed that the ECtHR 'has given clear guidance that both Article 2 (the right to life) and Article 8 (the right to respect for the home, private and family life) include environmental protection'.[50] On this argument, the Constitutional Court referred to the ECtHR cases *Hatton and Others v. the United Kingdom*, *Guerra and Others v. Italy* and *McGinley and Egan v. the United Kingdom* and indicated:

> [w]here a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests. . . The importance of public access to the conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question.[51]

The case reveals that the Constitutional Court not only advanced the standards of the participation processes in the environment-related decision-making process in line with the interpretation of the right to a healthy environment,[52] but also made an invaluable impact on shaping pertinent State policies.

The Constitutional Court has also relied on the principles of proportionality and continued violation, as developed by the Strasbourg Court.

In *Bislimi v. Ministry of Internal Affairs*, also known as the *Passport* case, the Constitutional Court followed the proportionality principle in order to assess whether measures undertaken by the Ministry of Interior, amounting to a restriction on the freedom of movement as provided by Article 35 of the Constitution in conjunction with Article 2(2) of Protocol No. 4 to the Convention, were proportionate. The Constitutional Court declared that depriving a person of a passport where he or she did not present a 'certificate that they are not under criminal investigation' violated the freedom of movement and concluded that 'the authorities have failed in their obligation under Article 2 of Protocol No. 4 to the [ECHR] to ensure that any interference with an individual's right to leave his or her country is, from the outset and throughout its duration, justified and proportionate in the light of the circumstances'.[53] In the case of *Ibrahimi and others v. Kosovo Supreme Court*, the applicants argued that a failure of their former employer, the Kosovo

[49] Ibid, paras 66 and 71.

[50] Ibid, para 65.

[51] Ibid.

[52] Ibid, paras 62–64. The Constitutional Court further took note of the right to a healthy environment by inserting pertinent provisions of the Aarhus Convention, the Rio Declaration on Environment and Development and Recommendation 1614 (2003) of the Parliamentary Assembly of the Council of Europe.

[53] CC, 30.10.2010, Case No. KI 06/10 *Valon Bislimi v. Ministry of Internal Affairs, Kosovo Judicial Council and Ministry of Justice*. Judgment of the Constitutional Court of the Republic of Kosovo, para 78.

Energy Corporation (KEK), to pay the agreed pension packages constituted a violation of the constitutional right to property.[54] The subject matter was initially dealt with by the Municipal Court, which approved the applicants' claims and ordered monetary compensation. Deciding on the appeal, the District Court in Prishtina rejected the appeals of KEK and found their submissions ungrounded. However, the Supreme Court accepted the revisions of KEK, and quashed the judgment of the District Court of Prishtina and rejected the applicants' claims as unfounded. The parties filed a complaint with the Constitutional Court, seeking relief for the alleged constitutional violation of the right to property and a fair trial. In assessing the admissibility requirements, the Constitutional Court was confronted with the question as to whether the complaint was admissible *ratione temporis* as provided by the Law on the Constitutional Court:

> [t]he referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced.

The Constitutional Court noted that the 4-month period for the submission of the referral was not observed by the applicants, but argued that

> the time limit as prescribed by the European Convention of Human Rights does not start to run if the Convention complaint stems from a continuing situation … According to the case-law, where the alleged violation is a continuing situation, the time limit starts to run only from the end of continuing situation.[55]

In declaring the complaint as admissible and constitutionally grounded, the Court recalled the doctrine of continuous violation, and argued that

> [i]n the present case the Applicants still suffer from the unilateral annulment of their Agreements signed by KEK. They argue that it is well established that the Pension and Invalidity Insurance Fund has not been established to date. Therefore, there is a continuing situation. As the circumstance of which the Applicants complain continued, the four months period as prescribed in Article 49 of the Law is inapplicable to these cases.[56]

In another case concerning continued violation, the Constitutional Court utilised the said principle but without referring to the ECtHR case-law.[57] In the *President Sejdiu* case,[58] 32 deputies of the Kosovo Assembly filed a referral to the Constitutional Court arguing that Mr. Sejdiu had violated Article 88 of the Constitution by holding simultaneously the position of President of the Republic of Kosovo and that

[54] CC, 23.06.2010, Case No. KI 40/09 *Imer Ibrahimi and 48 Other Former Employees of the Kosovo Energy Corporation v. 49 Individual Judgments of the Supreme Court of the Republic of Kosovo*, Judgment of the Constitutional Court of the Republic of Kosovo, paras 5–6.

[55] Ibid.

[56] Ibid, para 41.

[57] For a critical approach to the application of the principle of continued violation in the *President Sejdiu* case, see Istrefi (2013), pp. 275–277.

[58] CC, 28.09.2010, Case No. KI 47/10, *Naim Rrustemi and 31 other Deputies of the Assembly of the Republic of Kosovo v. His Excellency, Fatmir Sejdiu, President of the Republic of Kosovo*, Judgment of the Constitutional Court of the Republic of Kosovo.

of President of his political party, the Kosovo Democratic League (LDK).[59] It was considered that Mr. Sejdiu held the position of President of the LDK for more than 3 years from the date of the filing of the referral with the Constitutional Court. Therefore, the Constitutional Court had, *inter alia*, to assess whether the referral was lodged within the time limit as required by Article 45 of the Law on the Constitutional Court of the Republic of Kosovo, which provides that:

> the referral should be filed within a period of thirty (30) days starting from the day the alleged violation of the Constitution by the President has been made public.

In addressing the time limit for filing a claim before the Constitutional Court, the majority of the judges asserted:

> 32. [i]n the case of President Sejdiu it is necessary to look at the factual situation to see whether the holding of the office of President/Chairman of the LDK, 'but freezing that position', was a single event that occurred at one time or whether it amounts to a continuing day by day situation .... The President admits that he has continued to be the Chairman of LDK and President of Kosovo at all times since his election to the office of President in 2006.
> 33. If this is the case, the consequences of the freezing of the position continue and therefore there is a day by day ongoing situation. To conclude otherwise could result in a situation whereby the President of Kosovo could be barred from holding the Office of the President because of a constitutional violation, but be allowed to continue in office simply because a referral was not made to the Constitutional Court in a timely manner. Nowhere in the Constitution is there any authority for such an irrational result. Nor does Article 45 of the Law on the Constitutional Court envision such an irrational result.[60]

The Constitutional Court found that the violation in question was continuous and the time foreseen in Article 45 of the Law on the Constitutional Court could not apply to a serious violation that continued.[61] While the Constitutional Court applied the principle of a continued violation, it is to be expected that the reference to the ECtHR would have made the Constitutional Court's judgment in the *Sejdiu* case not only logical, but also persuasive in view of the principles of the ECtHR.[62]

In view of the foregoing, the degree of adherence to the ECHR by the Constitutional Court in the protection of constitutional rights and fundamental freedoms has at least two significant impacts. The first is an explicit manifestation of the direct application of the ECHR and the ECtHR jurisprudence by virtue of Articles 22 and 53 of the Constitution. In this vein, the Constitutional Court seized the momentum to influence the courts of general jurisdiction and encouraged them to

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[59] Article 88 of the Kosovo Constitution provides: 1. The President shall not exercise any other public function. 2. After election, the President cannot exercise any political party functions.

[60] CC, 28.09.2010, Case No. KI 47/10, *Naim Rrustemi and 31 other Deputies of the Assembly of the Republic of Kosovo v. His Excellency, Fatmir Sejdiu*, President of the Republic of Kosovo, Judgment of the Constitutional Court of the Republic of Kosovo, paras 32–33.

[61] Ibid, para 34.

[62] In support of its view, the Constitutional Court could have made reference to *Papamichalopoulos and Others v. Greece*, ECHR, Judgment of the Court (Chamber) of 24 June 1993, at paras 40 and 46; *Agrotexim and Others v. Greece*, ECHR, Judgment of the Court (Chamber) of 26 September 1995, at paras 56–58; *Loizidou v. Turkey*, ECHR, Judgment of the Court (Chamber) of 18 December 1996, at paras 26–64.

follow the practice of the direct application of the ECHR and its Court's case-law. The second important dimension relies on the fact that the Constitutional Court's reception of the ECHR has gradually increased the awareness of individuals and others about the ECHR and its requirements. In light of Kosovo's endeavours to join the Council of Europe, the educational role of the Constitutional Court is of invaluable pertinence in preparing litigants to utilise the ECHR system.

4 Judicial Application of International Law by Mixed Panels of EULEX International Judges

4.1 The Application of International Criminal Law

In international criminal adjudication, the challenges often rest in the applicable law. In responding to questions of retroactivity, elements of crimes, standards that apply to internal and international armed conflicts, judges of international criminal tribunals in their judicial creativity utilise customary international law 'with an immense flexible technique . . . to mould and develop the law'.[63] However, international judges in Kosovo, being fully integrated in the domestic judicial system, do not have that privilege of making use of their own statutory sources of law in the process of adjudication. Instead, they may generally resort to those sources of international law which have been made applicable in the domestic legal order. With regard to war crimes in the 1998–1999 Kosovo conflict, the point of consideration is the international law part of the national legal order at that time.[64] With that task not being easy, controversies may be revealed when unwrapping the war crimes jurisprudence of EULEX international judges, and further in comparison with the jurisprudence of their predecessors, UNMIK international judges.

Before further discussion on jurisprudence, it is first appropriate to outline the legal provisions governing the law applicable in Kosovo. In particular, the UNMIK Regulation provides that the law applicable in Kosovo shall include the UNMIK Regulations and

> . . . [t]he law in force in Kosovo on 22 March 1989. . .

[63] Schabas (2009), p. 78. See also Case No. IT-01-47-PT, *Prosecutor v. Hadžihasanović, Alagić and Kubura*, Trial Chamber, Decision on Joint Challenge to Jurisdiction, 12 November 2002; Case No. IT-01-47-AR72, *Prosecutor v. Hadžihasanović, Alagić and Kubura,* Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, paras 22, 26–29 and 31; Mettraux (2009), pp. 96–97.

[64] Both the EU and Kosovo law on the mandate of EULEX international judges provide for obligations to apply Kosovo law. See Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo, OJ 2008 L 42, Article 3 (d); the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX International Judges and Prosecutors in Kosovo, Article 3; the Law on the Special Prosecution Office of the Republic of Kosovo, Article 16.

> 1.2 If a court of competent jurisdiction or a body or person required to implement a provision of the law, determines that a subject matter or situation is not covered by the laws set out in section 1.1 of the present regulation but is covered by another law in force in Kosovo after 22 March 1989 which is not discriminatory and which complies with section 1.3 of the present regulation, the court, body or person shall, as an exception, apply that law.[65]

The aforementioned provision has proved to be of fundamental importance in the discussion on the relevant legal framework, particularly in the process of identifying the applicable constitution between the Constitution of the Federal Republic of Yugoslavia of 27 April 1992 (1992 FRY Constitution) and the Constitution of the Socialist Federal Republic of Yugoslavia of 21 February 1974 (1974 SFRY Constitution). The consequence of that decision has a significant impact upon the adjudication of war crimes in that the former permits the application of customary international law and the latter does not.

On this question, an important response came in 2003 from the District Court of Prishtina in the panel composed of UNMIK international judges. In the war crimes case known as *Gashi and others*, the trial panel applied the 1992 FRY Constitution in order to employ customary international law with respect to charges of war crimes in the 1998–1999 Kosovo conflict.[66] In that manner, the trial panel resorted to norms of customary international law with regard, *inter alia*, to unlawful internment and command responsibility.[67] This decision, however, was reversed upon appeal. In 2005, the Supreme Court of Kosovo, in a panel composed of UNMIK international judges, held that according to the UNMIK Regulation 1999/24 it was not the 1992 FRY Constitution but the 1974 Constitution that applied in Kosovo.[68] The appeals panel found that Articles 181 and 210 of the 1974 SFRY Constitution did not make customary international law applicable and thus the trial panel had erred in law in its findings on unlawful internment and command responsibility in the Kosovo internal armed conflict.[69] The appeals panel ruled that through the 1974 Constitution only the four ratified Geneva Conventions and the Additional Protocols I and II were applicable at the material time.[70] As a result, the appeals panel ordered the re-trial of *Gashi and others*.

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[65] UNMIK Regulation No. 1999/24 as amended by the UNMIK Regulation No. 2000/59 on the Law Applicable in Kosovo.

[66] DC, 16.07.2003, Case No. 425/2001 *Latif Gashi and others*, Decision of the District Court of Prishtina, pp. 22–26.

[67] Ibid, pp. 20–26; See also McCormack and McDonald (2003), pp. 594–601. For considerations related to the District Court of Prishtina's progressive approach to customary international law, see Baker (2010), pp. 201–203.

[68] SC, 21.07.2005, AP-KZ No. 139/2004 *Latif Gashi and others*, Decision of the Supreme Court, panel of UNMIK judges, p. 6.

[69] Ibid, pp. 6, 8.

[70] Ibid, p. 6.

EULEX international judges continued from where UNMIK international judges had left off, including the *Gashi and others* case.[71] Yet, a different approach from that of their predecessors surfaced. While in 2005 the appeals panel of UNMIK international judges had firmly rejected the application of customary international law, EULEX international judges considered otherwise. Namely, the Supreme Court of Kosovo, in a mixed panel of EULEX international judges, in the further proceedings in *Gashi and others* appeared to read the aforementioned pronouncement of the appeals panel of UNMIK international judges rendered in 2005 in a somewhat varied manner:

> . . . the question of command responsibility in internal armed conflicts and the applicability of customary international law in Kosovo has been elaborated in detail in the judgment of the District Court of Prishtine/Pristina dated 16 July 2003 (P 425/2001) and that this part of the decision was confirmed by the Supreme Court in its decision Ap.-KZ. 139/2004, which the first instance re-trial court has referred to . . .[72]

It may be observed that the foregoing observation runs counter to the language of the 2005 decision of the appeals panel of UNMIK international judges in that it ruled out the application of customary international law. While UNMIK international judges in *Gashi and others* endeavoured to untangle the complexities of the law applicable in the course of the 1998–1999 Kosovo conflict from the perspective of the domestic legal order, panels of EULEX international judges on the other hand make direct recourse to customary international law, also as spelled out in the ICTY jurisprudence, without clarifying the legal basis for such application and deviation from the 2005 decision in *Gashi and others*. By way of example, in the *Kleçka* case, the mixed panel of EULEX international judges of the District Court of Prishtina considered that customary international law made the doctrine of command responsibility applicable also to a non-international armed conflict.[73] EULEX international judges constantly apply the criteria and definitions provided in the ICTY case-law when defining, *inter alia*, what constitutes an internal armed conflict,[74] the

[71] See chronologically the decisions of the mixed panel of EULEX international judges in *Gashi and others*:

- DC, 02.10.2009, Case P No 526/05, Decision of the District Court of Prishtina;
- SC, 26.01.2011, Case Ap-KZ No 89/2010 Decision of the Supreme Court of Kosovo.
  On 7 June 2013, a mixed panel of EULEX international judges of the Supreme Court of Kosovo took a new decision in *Gashi and others*. While the judgment is not yet available, an official press release and a video confirm that the panel of judges upheld the 2011 judgment of the Supreme Court of Kosovo. Available at http://www.eulex-kosovo.eu/en/pressreleases/0452.php. Accessed 4 September 2013.

[72] SC, 26.01.2011, Case Ap-KZ No 89/2010 Decision of the Supreme Court of Kosovo, para 111.

[73] DC, 02.05.2012, Case No 425/11, Decision of the District Court of Prishtina, paras 146–147.

[74] DC, 23.11.2011, Case P No. 371/10, Decision of the District Court of Prishtina, para 96.

existence and the timing of an internal armed conflict in Kosovo,[75] the definition of inhumane treatment,[76] what the essential criteria for crimes of torture are, etc.[77]

The remark in the direction of EULEX international judges on the lack of elaboration in their recourse to customary international law is not to say that it should not be incorporated. Instead, it would be paradoxical if EULEX international judges or Kosovo judges were not in a position to adjudicate a full range of war crimes allegedly committed in the 1998–1999 Kosovo conflict, while the ICTY judges are able to do so by use of customary international law. Further, having in mind the ICTY's significant contribution in spelling out the elements of crimes, the impossibility for the EULEX international judges to use that case-law would negatively reflect upon their adjudication capacity.

Yet the operation as part of domestic judiciary makes it appropriate to justify the application of customary international law in the national legal system. If EULEX international judges wished to depart from the 2005 UNMIK decision in *Gashi and others* and other similar jurisprudence with regard to the application of customary international law, an explanation to this effect should have been given.

In this regard, a different reading of the UNMIK Regulation 1999/24 as amended may be proposed. While the application of certain post-1989 laws has been barred due to their discriminatory nature, at the same time the UNMIK Regulation 1999/24 Section 1.2 permits the exceptional application of post-1989 law if a subject matter or situation is not covered by the laws that were in force before 1989.[78] In that manner, one indeed may observe that the 1992 FRY Constitution contained discriminatory provisions with regard to Kosovo's autonomy and its population. At the same time, it can also be argued that Article 16(3) of the 1992 FRY Constitution incorporating in the domestic legal order the 'generally accepted rules of international law' was not designed to target the Kosovo population. One might rightly argue that it was just for the opposite effect regarding the application of generally accepted rules of international law in Kosovo. On those grounds, its application would sit well with the UNMIK Regulation 1999/24 as amended. The authors are aware that this approach advocates selecting individual provisions of a legal act and thus may be perceived as further fragmenting the Kosovo legislative framework and adding to its uncertainty. Such difficulties on the other hand fall short of a legitimate reason to leave out the whole source of international law, preventing the prosecution and adjudication of a whole set of war crimes entrusted to international prosecutors and judges in Kosovo.

[75] DC, 23.11.2011, Case P No. 371/10, Decision of the District Court of Prishtina, para 99; DC, 9.11.2010, Case P No. 285/10, District Court of Peje, p. 13.

[76] DC, 29.07.2011, Case P No. 45/10, Decision of the District Court of Mitrovica, para 218.

[77] DC, 02.05.2012, Case No 425/11, Decision of the District Court of Prishtina, para 33.

[78] UNMIK Regulation No. 1999/24 as amended by UNMIK Regulation No. 2000/59 on the Law Applicable in Kosovo.

Further, to wipe out any possible concerns in the context of Article 7 ECHR, previously[79] and now[80] made directly applicable in the Kosovo legal order, it is relevant to observe the ECtHR's findings in *Šimšić v. Bosnia*. In this case, the applicant argued before the Strasbourg Court that he had been convicted of crimes which had not constituted criminal offences at the material time, and thus his punishment in the courts of Bosnia and Herzegovina had violated Article 7 ECHR, namely the principle of *nullum crimen, nulla poena sine lege*. The ECtHR rejected this argument and held:

> [w]hile the impugned acts had not constituted a crime against humanity under domestic law until the entry into force of the 2003 Criminal Code, it is evident from the documents cited in paragraph 8–13 above that the impugned acts constituted, at the time when they were committed, a crime against humanity under international law.[81]

It is relevant to observe that the ECtHR did not rule out the application of the 2003 Criminal Code with respect to the crimes allegedly committed during the 1990s. The Strasbourg Court rather deemed it essential that the acts in question had constituted crimes under international law at the material time. In this context, it may be noted that a mixed trial panel of EULEX international judges in the *Kleçka* case in utilising international criminal law deemed it appropriate to incorporate the ECtHR's finding in *Kononov v Latvia*. In particular:

> [i]n assessing the superior responsibility, the Trial Panel has considered the elements of the mode of responsibility as established in customary international law and discussed above. In this regard, the Trial Panel observes that it has been held by the European Court of Human Rights (ECtHR) in *Kononov v. Latvia*, that there is no violation of *nullum crimen, nulla poena sine lege* (Article 7(1) ECHR), when at the time of the charged acts, they constituted offences defined with sufficient accessibility and foreseeability by the laws and customs of war.[82]

This may be taken to signal that judges, mindful of their duty to ensure the ECHR standards in the course of adjudication, found it necessary to erase concerns for the application of customary international law even though they remained silent on how that source of law constituted part of the applicable law. At the same time, no similar reference could be found in other decisions rendered by mixed panels of EULEX international judges. Accordingly, their jurisprudence does not provide a sufficient basis to draw conclusions as to the grounds for departure from the previous jurisprudence that in clear language excluded customary international law from the scope of the applicable law.

[79] Ibid, Section 1.3.

[80] Articles 22 and 52 of the Kosovo Constitution.

[81] *Boban Šimšić v. Bosnia and Herzegovina*, ECHR, Judgment of the Court (Chamber) of 10 April 2012, at para 23.

[82] DC, 02.05.2012, Case No. 425/11, Decision of the District Court of Prishtina, para 162.

4.2 The Application of International Agreements Concerning State Succession

In a case related to terrorism, a mixed panel of EULEX international judges responded to a burning issue concerning Kosovo's succession to an international agreement that was signed by Serbia before Kosovo declared its independence.[83]

The case reached Kosovo courts, after the United States Secretary of State submitted a request to the Kosovo Ministry of Foreign Affairs for the arrest and extradition of B.A., a resident and citizen of Kosovo, to the United States. The request for extradition was based on the allegations of the US State Department that B.A., while in Kosovo, had committed the criminal offences foreseen by the US law of providing material support to terrorists and conspiracy to kill, kidnap, maim or injure persons or damage property in a foreign country.[84]

The US claimed that the legal basis for the extradition was made pursuant to the Extradition Treaty signed on 25 October 1901 between the US and the Kingdom of Serbia (hereinafter '1901 Extradition Treaty'), which continues to apply in Kosovo by means of state succession.

By exchange of diplomatic notes between the US and Kosovo, at the executive level, Kosovo implicitly recognised the validity and application of the 1901 Extradition Treaty by agreeing to undertake practical arrangements for the transfer of B.A. to the US.[85]

When Kosovo courts received the request for the extradition of B.A., a mixed panel of EULEX international judges in the first and second instance examined the following considerations.

Firstly, what is the Kosovo constitutional and legal framework with regard to extradition of its own citizens? *Secondly*, does the 1901 Extradition Treaty constitute an international agreement recognised by international law? *Thirdly*, is the treaty in question signed by Serbia valid and applicable in Kosovo by means of state succession to international agreements? *Finally*, since B.A. was accused of breaching US law while residing in Kosovo, does the scope of the 1901 Extradition Treaty permit the extradition of B.A. in connection to the alleged criminal acts for which his transfer to the US has been sought?

Concerning the applicable law regarding the extradition of own citizens, EULEX international judges recalled that according to Article 35(4) of the Kosovo Constitution, as well as Article 533 of the KCCP, 'citizens of the Republic of Kosovo shall not be extradited unless it has been foreseen differently by

[83] For another analysis of this case, see Zane Ratniece, PN KR No. 386/2010, ILDC 1964 (XK 2010). International Law in Domestic Courts Reports, Oxford University Press, 18 February 2013.

[84] SC, 7.09.2010, Case No 386/10, Decision of the Supreme Court of Kosovo, p. 1.

[85] Ibid, p. 2.

international law or agreement'.[86] Although the word *treaty* is not mentioned in the Kosovo law, EULEX international judges elucidated that 'the term international agreement must be understood as an agreement, more commonly known in the international plane as a treaty, concluded between States, or States and international organizations, which is and is intended to be legally binding under international law'.[87] Thus, in the view of EULEX international judges, the 1901 Extradition Treaty qualifies as a binding international agreement for the purpose of Article 35 (4) of the Constitution.

Since, in the exchange of diplomatic notes, Kosovo already expressed its willingness to extradite B.A., the panel of EULEX international judges observed that the exchange of diplomatic notes between the US and Kosovo 'does not constitute an international agreement as required by law ... [but it constitutes] an agreement on practical arrangements concerning the sought transfer of [B.A.]'.[88]

As a next step, it remained to be determined whether Kosovo had succeeded in respect of the 1901 Extradition Treaty. To respond to this legal and political question, the panel of EULEX international judges employed Article 24 of the Vienna Convention on Succession to Treaties of 1978 (VSCT) and considered that 'a legally binding succession to the 1901 Extradition Treaty may have taken place ... [*inter alia*] if it is established that the treaty was in force at the date of succession in respect of the territory of Kosovo'.[89] The Court was cognisant that Kosovo was not party to the VSCT, although its provisions were applicable in Kosovo as they constituted norms of customary international law.

The EULEX prosecutor argued that the treaty '[was] applicable to Kosovo as a former part of the SFRY and of the Federal Republic of Yugoslavia (Serbia and Montenegro)'.[90] While EULEX international judges viewed that Kosovo, by means of its expression in the Declaration of Independence, was bound by international obligations emanating from SFRY, they did not consider the allegation of the EULEX prosecutor that the 1901 Extradition Treaty applied in Kosovo as a former constituent part of the SFRY.

As SFRY remained the only *nexus* for succession the panel of EULEX international judges ruled that while the SFRY could be considered a successor to the 1901 Extradition Treaty, it had ceased to exist at the time Kosovo declared independence. Hence, for EULEX international judges, it was doubtful whether the 1901

[86] Ibid, p. 4. The English version of the Kosovo Constitution, in Article 35(4) reads 'Citizens of the Republic of Kosovo shall not be extradited from Kosovo against their will except for cases when otherwise required by international law and agreements'. The authors are referring to the language of Article 35(4) of the Constitution as formulated by the OSPK and confirmed by the Kosovo Supreme Court. The Supreme Court of Kosovo considered that the authentic Albanian version of the Kosovo Constitution provides for a different language and it must apply in the present case.

[87] SC, 7.09.2010, Case No 386/10, Decision of the Supreme Court of Kosovo, p. 5. See also SC, 30.01.2006, Case PN-KR 333/05, pp. 5–8 of the English version.

[88] SC, 7.09.2010, Case No. 386/10, Decision of the Supreme Court of Kosovo, p. 5.

[89] SC, 7.09.2010, Case No. 386/10, Decision of the Supreme Court of Kosovo, p. 6.

[90] Ibid.

Extradition Treaty could be considered applicable in Kosovo by means of state succession.[91] In this examination, EULEX international judges did not consider whether the 1974 SFRY Constitution was still in force by virtue of UNMIK Regulation 1999/24 as amended and give life to international agreements that were valid at a time. Nevertheless, by employing UNMIK Regulation 1999/24, the EULEX international judges would jeopardise the Kosovo Constitution by re-enforcing the UNMIK regulations and disregarding the newly established legal reality. Hence, the panel of EULEX international judges eloquently omitted a firm legal answer on the legal and political aspects of Kosovo's succession to international agreements. Instead, they left a pending answer on the validity of the treaty and emphasised that they would now move to consider the *scope* of the 1901 Extradition Treaty in order to see if pertinent Articles of the treaty itself permitted the extradition of B.A., *even if* the treaty were to be considered valid and currently in force in the relation between the United States and Kosovo.

As to the content of the 1901 Extradition Treaty, the panel of EULEX international judges ruled that since the alleged criminal acts for which B.A. is accused were committed in the territory of Kosovo, the case falls within the jurisdiction of the courts of Kosovo and outside the scope of the 1901 Extradition Treaty. The panel of EULEX international judges of the Supreme Court also confirmed that 'the 1901 Extradition Treaty applies exclusively to situations where the person, whose transfer has been sought, is found in a country other than the one where the suspected criminal offence was committed'.[92] The Supreme Court held that 'the purpose of the treaty is clearly to prevent persons from evading justice by remaining within a territory which does not have any interest or even the legal basis to conduct criminal proceedings against the sought person upon the suspected criminal offence'.[93]

In conclusion, a mixed panel of EULEX international judges rejected the request for the extradition of B.A. to the US, by considering that 'it has not been established that the 1901 Extradition Treaty would permit the extradition of B.A. in connection to the alleged criminal acts for which transfer to the US has been sought, even if the treaty were to be considered valid and currently in force in the relation between the US and Kosovo'.[94]

In the authors' view, the present case is significant for at least three legal and political considerations.

Firstly, from the legal point of view, the Supreme Court confirmed that customary international law is binding in the Kosovo legal order. In addressing the criteria for succession to treaties, the Supreme Court held that parts of the VCST that reflect customary international law are applicable in Kosovo. Yet, while taking this position, the mixed panel of EULEX international judges did not outline which

[91] Ibid, p. 7.

[92] Ibid, p. 8.

[93] Ibid.

[94] Ibid, p. 9.

constitutional prerogative provides for the application of customary international law. One might anticipate that the EULEX international judges implied that Article 19(2) of the Constitution permitting the application of legally binding norms of international law includes also customary international law.

Secondly, the Supreme Court, by clarifying on the one hand the equivalence between international agreements and treaties, as well as the status of diplomatic notes, clarified what constitutes a binding international agreement in the Kosovo legal order.

Thirdly, while the Kosovo Government in an exchange of diplomatic notes with the US had agreed to extradite B.A. to the US, the Kosovo Government's understanding of the validity of the Treaty in issue was challenged by EULEX international judges. That is particularly relevant as the issue of State succession in respect of international agreements is not decided in a judicial vacuum but often depend on political considerations of executive branch.[95] Whereas, in the present case the refusal of EULEX international judges to extradite B.A. to the US resulted in Kosovo's refusal to comply with the US Secretary of State's request to cooperate on issues of terrorism. Having in mind the US significant political contribution in Kosovo and the importance of the fight against terrorism, it may not be certain that a panel of local judges would have reached the same conclusion had the case been before them.

4.3 The Application of the ECHR and the ECtHR's Case-Law

In the decisions rendered by the mixed panels of the EULEX international judges, the ECHR and Strasbourg case-law are frequently observed when interpreting the provisions of domestic law. The ECHR and its case-law are particularly employed in response to some systematic challenges that the Kosovo judiciary is facing in criminal as well as civil adjudication. This includes human rights standards in cases of internments and other coercive measures to ensure the presence of defendants, the (in)admissibility of evidence of unchallenged out-of-court statements, the publicity of the court, access to judgments and long judicial proceedings.[96]

In the *Kleçka* case, the mixed panel of EULEX international judges of the (then) Prishtina District Court issued a ruling on admissibility of evidence, the circumstances of which, according to the panel, were 'highly unusual, exceptional and possibly even unique'.[97] The defence considered that the statements and diaries of

[95] See e.g. Slovenia in the chapter by Janja Hojnik, Judicial Application of International and EU Law in Slovenia

[96] Some of these concerns are addressed in the EULEX Manual on selected topics of criminal procedure. See EULEX International Judges Peeck et al. (2012). For the reference to the ECHR and ECtHR, see particularly pp. 101–105, 127–129 and 134–149.

[97] DC, 21.03.2012, Case P No. 425/11, case against Arben Krasniqi et al., Ruling on admissibility of Agim Zogaj's statements and diaries (also known as witness X), District Court of Prishtina, para 2.

witness X should not be taken into account, since the defence was unable to challenge the reliability and credibility of the testimony after witness X had committed suicide while the trial was uncompleted. In a situation where defence has *only partially* participated during the testimony of witness X, the panel of judges had to observe the requirements of the Kosovo Code of Criminal Procedure (KCCP) with regard to the admissibility of such evidence and the scope of the right of defence to challenge a witness in light of the ECHR.

The pertinent Article 156(2) of the KCCP states that:

> [a] statement of a witness given to the police or the public prosecutor **may** be admissible evidence in court only when the defendant or defence counsel has been given the opportunity to challenge it by questioning that witness during ***some stage of the criminal proceedings***.

Since the defence was given an opportunity to question witness X during *some stage of the criminal proceedings*,[98] and having in mind that Article 156(2) creates an ***exception*** that evidence taken out of court may be admissible,[99] the court had latitude to use its margin of appreciation in the present case. However, the EULEX panel considered that, pursuant to Article 22 and 53 of the Constitution, the scope of Article 156(2) of the KCCP on the right to challenge a witness should be interpreted consistently with Article 6(3)(d) of the ECHR and its case-law.[100] The Panel further viewed

> [although the ECtHR in *Doorson v. the Netherlands* and in *Al-Khawaja and Tahery v. the United Kingdom*] has reiterated that the admissibility of evidence is primarily governed by the rules of domestic law, and that, as a rule, it is for the national courts to assess the evidence before them, it has emphasized that the right of defence must be respected and the defendant must be given an ***adequate and proper*** opportunity to challenge and question a witness against him.[101]

Thus, according to ECtHR jurisprudence, the opportunity to challenge a witness as foreseen in Article 156(2) of the KCCP must be 'adequate and proper'.[102] While the Supreme Court agreed with the assessment of the District Court to the extent that the *opportunity to challenge* as used in Article 156(2) of the KCCP must be *adequate and proper* as required by the ECtHR, it nevertheless considered that the defence councils had the opportunity to examine witness X and thus no violation of Article 6 of the ECHR can be established here.[103] Consequently, the Supreme Court in the *Kleçka* case ruled that the statements and diaries of witness X were admissible and requested the lower court in a retrial to scrutinise only the reliability and

[98] Ibid, paras 31–33.

[99] Ibid, para 26.

[100] Ibid, para 27.

[101] Ibid, para 34.

[102] Ibid, para 35.

[103] SC, 20.11.2012, Case Ap.-Kz. No. 453/12, Ruling of the Supreme Court of Kosovo, paras 36–40; see also SC, 11.12.2012, Ap.-Kz. No. 527/12, Ruling of the Supreme Court of Kosovo, paras 31–50.

credibility of the evidence of witness X. While the oscillation of the EULEX international judges as to admissibility of evidence provides for diverging views on the interpretation of domestic law, the case is of invaluable importance for incorporating the ECHR and ECtHR case-law in interpreting the scope of domestic law in a serious war crimes case. In other cases, EULEX international judges have interpreted the scope of certain provisions of domestic law in light of ECtHR case-law.[104]

Another important contribution of the EULEX international judges in the utilisation of the ECHR system of human rights could be found in the case concerning the reasonable time guarantee principle.[105] The District Court of Prishtina, upon the intervention of the defence, found that the 'First Instance Court ... determined a material fact incorrectly, i.e., the date of the offense'.[106] While, according to Kosovo law, if there is an erroneous determination of the factual situation, the case, in principle, is returned for retrial, the EULEX international judges viewed that 'ordering a retrial to correct an obvious mistake would create a legal absurdity which must be avoided'.[107] The panel further referred to the ECtHR jurisprudence to underline the importance of rendering justice without delays and the importance of this principle for the interest of the person in question as well as of legal certainty.[108] Based on the argument of a reasonable time guarantee, the mixed panel of EULEX international judges of the District Court of Prishtina modified the mistake in the date of the crime without returning the case for retrial.[109] Hence, the thoughtfulness of the mixed panel of EULEX international judges on the reasonable time guarantee principles shows itself to be not only a coherent interpretation of domestic law with the ECHR and the ECtHR, but also a creative tool to successfully respond to concerns related to the backlog of cases faced by the Kosovo courts.

While the application of international human rights law and its jurisprudence is seen through a positive lens, EULEX case-law shows occasions of confusion with regard to the place of certain foreign legal standards in the Kosovo legal order. For instance, in a Supreme Court case PKL-KZZ-137/11, concerning the protection of legality, the prosecution challenged the decision of the first and second instance on rendering a decision on conviction without taking into account the standard *beyond any reasonable doubt*.[110] While the standard *beyond any reasonable doubt* is not indicated in Kosovo law, the prosecution relied on the ECHR and comparative law.

[104] See, e.g., supra note 15, at 3; Case KA No. 417/11, Blerim Devolli et al., Ruling upon appeals against a ruling on confirmation of indictment and admissibility of evidence, mixed panel of EULEX international judges of the District Court Prishtina, 22 March 2012, at paras. 9–10.

[105] DC, 3.12.2012, Case Ap.-Kz. No. 116/12, Judgment of the District Court of Prishtina.

[106] Ibid, para 30.

[107] Ibid, para 32.

[108] Ibid, para 33.

[109] Ibid, para 34.

[110] SC, 13.04.1012, Case PKL-KZZ-137/11, Judgment of the Supreme Court of Kosovo, p. 2.

The mixed panel of EULEX international judges viewed that while the standard *beyond any reasonable doubt* is present in the common law and some other legal systems, it is not a legal standard in Kosovo and that 'to state that the principle is implicit in the ECHR is not correct'.[111] In referencing the ECHR, ICCPR and the work of legal scholars, the Supreme Court viewed that 'as to the standard of proof, there is no clear statement that there is a requirement of proof of guilt beyond any reasonable doubt'.[112] The present case provides that a long list of international instruments and case-law contained in the Kosovo Constitution provides an opportunity for litigants to introduce confusing standards and principles. In these cases, if the panel of judges fails to understand the international jurisprudence, the consequences for accepting a standard that might not necessarily have legal support could occur. In the present case, the panel viewed that the prosecution was using a 'common legal expression that has become familiar in the legal jargon but not in the legal system of Kosovo'.[113]

5 (Non-) Application of International Law by Domestic Judges of the Courts of General Jurisdiction

Article 102(3) of the Kosovo Constitution stipulates that all '[c]ourts shall adjudicate based on the Constitution and the law'. Due to the integrated character of certain domesticated international human rights instruments and jurisprudence, it is expected that courts of general jurisdiction will comply with the requirements of Article 22 and 53 of the Constitution.

However, although the decisions of UNMIK international judges as of 2002 asserted that the ECHR 'constitute[s] an integral part of the Kosovo legal system',[114] the domestic judges of Kosovo courts of general jurisdiction before and after the entry into force of the Kosovo Constitution have occasionally failed to comply with requirements of the ECHR or other international conventions. This has particularly been observed in several reports of international organisations engaged in monitoring the judiciary in Kosovo.[115]

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[111] Ibid, p. 3.

[112] Ibid.

[113] Ibid, p. 3.

[114] SC, 9.10.2002, Case AP—KZ No. 76/2002 against Ruzhdi Saramati, Decision of the panel of UNMIK judges of the Supreme Court of Kosovo, para 39. On the application of the ECHR and ECtHR case-law, see also Case AP No. 209/2002 against Xhavit Hasani, Verdict of the panel of UNMIK judges of the Supreme Court of Kosovo, 13 August 2002, p. 7; Case AP—KZ No. 263/2002 against Milorad Blagojevic, Decision of the panel of UNMIK judges of the Supreme Court of Kosovo, 2 April 2003, p. 6.

[115] With regard to the non-compliance of Kosovo courts of general jurisdiction with the ECHR, see, e.g., OSCE (2012) Report on execution of judgments. http://www.osce.org/kosovo/87004. Accessed 19 September 2012; OSCE Report on evidentiary procedure in civil cases in Kosovo

Significant efforts were put in place to identify decisions rendered by local judges which would contain reference to international law, or at least to international human rights instruments and case-law anchored in Articles 22 and 53 of the Constitution. Such reference has generally been absent, and only in a few decisions of local judges could the application of the ECtHR case-law be identified. In case PKR.N.14/13 of 29 January 2013, a panel of local judges of the Basic Court of Ferizaj, by referring to Article 53 of the Constitution, argued: 'human rights provisions shall be interpreted in harmony with decisions [of the ECtHR]'.[116] In case PKR.N.14/13, as well as in other cases of the Basic Court of Ferizaj, local judges in their progressive approach were keen to utilise interpretations of the ECtHR when construing concepts of reasonable suspicion, appropriate measures to ensure a defendant's presence, the principle *in dubio pro reo* and the presumption of innocence.[117] The application of the ECtHR's jurisprudence is made with invaluable relevance to substantiate their reasoning in interpreting domestic law.

While a few local judges are cognisant of the Constitutional obligation to observe the application of domestic law in compliance with international human rights, the vast majority of local judges do not share this concern.

In observing the reluctance to apply international conventions on the protection of human rights, the reasons lie in the maturity of the judiciary, including the place which human rights has in the minds of judges in the process of adjudication, expertise in work with international human rights instruments and case-law, as well as the accessibility of the sources in official languages. These challenges are not unique, particularly for Kosovo, but have been present to varying degrees in other legal orders at the beginning of the application of international law in national legal orders.

Stefan Oeter, in surveying the period of non-application of international human rights conventions in German courts, observed that '[i]f state authorities, the legislator or judicial organs violate international human rights, they usually do not do so with the conscience of disregarding international human rights. They are simply not accustomed to keeping international human rights foremost in mind'.[118]

(2011). http://www.osce.org/kosovo/83301. Accessed 19 September 2012, pp. 10–16; OSCE Report on confirmation of indictment concerns (2012) Issue 8. http://www.osce.org/kosovo/73711. Accessed 19 September 2012, pp. 1–4.

[116] Basic Court, 29.01.2013, Case PKR.N.14/13, Basic Court of Ferizaj—Serious Crimes Department, p. 12.

[117] Judge Bashkim Hyseni, President of Ferizaj Basic Court (former Ferizaj Municipal Court) has made references to ECtHR case-law in his court decisions. In cases KP no. 33/11 and KP no. 100/12, Judge Hyseni explains the ECtHR's interpretation of the concept of 'reasonable suspicion' by making reference to the case *Fox, Campbell and Hartley v. The United Kingdom*, ECHR, Judgment of the Court of 30 August 1990, at para 32. In the third case, P no. 355/12 related to measures to ensure a defendant's presence, Judge Hyseni made reference to the case *I.A v. France*, ECHR, Judgment of the Court of 23 September 1998. For references to the ECtHR case-law concerning the interpretation of measures to ensure a defendant's presence, the principle *in dubio pro reo* and presumption of innocence, see also the decisions of Judge Agim Maliqi from the Basic Court of Ferizaj, PKR N. 38/13; PKR N.9/2013-P94/12 PR1.

[118] Oeter (2001), pp. 871, 880.

In scrutinising the reasons for the rare application of international human rights in German courts, Judge Bruno Simma in 1997 wrote that the following practical reasons explained the reluctance of German judges:

1. International human rights norms are not part of the core curricula in the legal education and practical training of lawyers and judges.
2. Some courts may have difficulties in obtaining . . . translations.
3. Access to the texts of international norms sometimes proves to be difficult.[119]

From the foregoing observations, one can draw the conclusion that the non-application particularly of international human rights by domestic judges of the courts of general jurisdiction most likely has its roots in the education and training of judges, including knowledge of foreign languages, understanding of the law of treaties, international jurisprudence, and so forth. These concerns, coupled with recommendations, are addressed in the following section.

5.1 Legal Education of Judges

The legacies of the past have had a strong impact on the quality of legal education in Kosovo. Firstly, Kosovo, having been a constitutive part of the SFRY, has inherited a legal tradition that was not quite gracious towards the judicial application of international law. Secondly, and most importantly, after the abolishment of Kosovo's autonomy by the Serbian regime, from 1990 until 10 June 1999, the judicial and educational system in Kosovo was removed.[120]

Hence, for more than a decade, Kosovar Albanian judges did not have the opportunity to practise their profession, let alone to educate a new generation or to appoint new ones.

Thus, the current judicial system is to a large extent composed of a generation of senior judges who were appointed before 1990 and who were unfortunate to be expelled from the courts for 10 years. Just after the war, in an emerging situation of establishing the courts, new judges were trained and appointed in an accelerated procedure. The last generation of judges, appointed in the last few years, has been educated in the training offered mainly by senior judges and professors. The vicious circle of legal education has only recently found light at the end of the tunnel.

Notwithstanding the unique inherited problems, the UN administration after 1999 adopted a legislative framework that called upon judges to uphold internationally recognised human rights in the course of judicial proceedings.[121] Such

[119] Simma et al. (1997), p. 107.

[120] See generally Malcolm (1998).

[121] On the establishment of the UN Mission in Kosovo and its role in the construction of the post-conflict judiciary in Kosovo, see Chesterman (2001), pp. 143–158; Irmsher (2001), pp. 353–395; Stahn (2001), pp. 105–183.

development marked a new beginning in terms of investing in the judge's legal education in Kosovo after a decade of institutional discontinuity. The sanctioning of international human rights acts in the Kosovo legal system rendered it necessary for the international community to invest in the legal education of judges by focusing on the application of human rights treaties, with particular emphasis on the application of the ECHR and its case-law.[122] International organisations, as well as local institutions such as the Kosovo Judicial Institute (KJI) and the Kosovo Judicial Council (KJC), have undertaken a number of training sessions on the applicability of the ECHR in order to increase the awareness of judges of the relevance of adhering to ECHR standards.[123] In addition, international judges in UNMIK and recently EULEX who adjudicate in mixed panels with local judges have contributed to raising the awareness of domestic judges of the importance of observing international law in domestic adjudication.

Concerning legal education at the university level, law studies are organised in 4-year studies. International law, European law and human rights law are offered in the first 3 years of education, and in the last academic semester students have an opportunity to specialise in courses of international law. Masters programmes in international law are intended to provide thorough understanding of various branches of public and private international law.[124]

In judicial education, international law is also part of the bar exam in Kosovo, which is a professional legal exam developed under the aegis of the Ministry of Justice in order for law graduates to be able to provide certain types of legal services or engage in the litigation process.[125] The current legislation in Kosovo provides that candidates for the post of judges and prosecutors who are selected based on a public and open competition after having passed the preparatory exam for judges

[122] Many international organisations have offered assistance to support the reforms undertaken in the field of legal education in Kosovo by supporting initiatives for the revision of educational curricula, advancing legal skills, organising legal clinics, legal commentaries, etc., such as the USAID, European Commission, DFID, GIZ, etc.

[123] Interview with the Director of the Kosovo Judicial Institute, Mr Lavdim Kransiqi, January 2013. See also the OSCE second review of the criminal justice system (1 September 2000 to 28 February 2001) which recommended that the KJI should provide more comprehensive training on the application of international human rights law in the criminal justice context to both local and international judges and prosecutors. The report is available at http://www.osce.org/kosovo/13043. Accessed 12 May 2013.

[124] Interview on 18 April 2013 with Prof. Dr. Qerim Qerimi, Vice-Dean for Academic Affairs of the Law Faculty of the University of Prishtina.

[125] The Bar examination consists of a written and verbal part. In the written part of the examination, practical assignments are given from criminal and civil law. The oral part of the examination consists of these subjects: (a) Principles, constitutional structures and judiciary organisation; (b) Criminal law (material and procedural); (c) Civil law (material, procedural, family, hereditary and obligatory); (d) Trade law (economic); (e) Labor law; (f) Administrative law, and (g) International law and European Union law on human rights. See Law No. 02/L-40 on the Bar Exam.

and prosecutors are required to attend the Initial Legal Education Programme (ILEP).[126] This programme, organised by the KJI, also covers International Law, European Law and Human Rights Law.[127] Although the existing legislation does not provide for compulsory attendance of continuous legal education by judges, the Code of Ethics and Professional Conduct of Judges requires that judges maintain and improve the highest standards of professionalism and legal expertise and engage in the Continuous Legal Education Programme and training as provided by the Kosovo Judicial Council.[128] Given the constitutional requirements to observe the internationally recognised human rights conventions, it is viewed that the KJC and KJI, mandated to administer the judiciary and train judges and prosecutors, are under the obligation to develop strategies and provide intensive training in order to increase the degree of familiarity for the judicial application of international law.

In order to comply with these constitutional demands, the authors suggest that Kosovo authorities should consider taking immediate short-term actions and engaging in planning a sustainable judiciary that is competent to cope with international law. A short-term plan could include the establishment of legal research departments at higher courts of Kosovo, and organising regular training and providing materials for judges, at least on pertinent human rights issues. Depending on the court, the legal research departments should attract young lawyers with expertise in specialised areas of international law. In addition, the institutions mandated to provide training for judges should offer mandatory courses for current judges on the application of, *inter alia*, general international law, international human rights instruments and jurisprudence, as well as on areas of customary international law. The KJC should ensure that translations into official languages of the eight international instruments in Article 22 of the Constitution, and the most important practice of the ECtHR, are provided for Kosovo courts. While these actions could help judges become accustomed to international law (with an emphasis on international human rights), a sustainable plan must reflect on the education of future generations of lawyers. International law, with particular focus on human rights instruments and case-law, should be an indispensable component of the

[126] The Initial Legal Education Programme (ILEP) is a training programme dedicated to potential candidates for future judges and prosecutors. The ILEP programme consists of an intensive 15 month training programme with a number of training modules. Upon completion of this programme, candidates are professionally prepared and ready for the function of judge or prosecutor.

[127] Law on the Establishment of the Kosovo Judicial Institute, Law No. 02/L-25. The KJI is responsible for (a) the training of office holders and potential office holders in the judiciary (judges and prosecutors); (b) the assessment and organisation of the preparatory exam for judges and prosecutors; (c) special training courses for the promotion of judges and prosecutors; (d) basic training courses for lay judges; and (e) training courses for other professionals in the area of the judiciary as identified by the KJI. For more, see Art. 2.

[128] The Code of Ethics and Professional Conduct of Judges was adopted on 25 April 2006 and is available at the official site of the Kosovo Judicial Council: http://www.kgjk-ks.org/. Accessed: 27 May 2013. See Section 3 para. 3 of the Code.

programmes designed for future attorneys, judges, prosecutors, and those who apply the law generally.

The experience of the Supreme Administrative Court in the Czech Republic and other European countries could serve as a reference in identifying the tools that could be used in the transition from isolation to interaction with international law.[129] In addition, the practice of the Kosovo Constitutional Court and EULEX international judges could assist in understanding the relationship between domestic and international human rights.

6 Conclusions

The 'internationally oriented character' of the Kosovo Constitution allows for the direct application and supremacy of international law over Kosovo laws.[130] Furthermore, Articles 22 and 53 of the Constitution provide for an invaluable catalogue of international human rights instruments and case-law that constitute an integral part of the Kosovo legal order.

In observing the embryonic jurisprudence of the newly established Kosovo legal order, the judicial application of international law is not yet equally embraced at all levels of Kosovo courts, and the intensity of interaction with international human rights law and other branches of international law differs.

The jurisprudence of the Constitutional Court and the EULEX international judges reveals a rich and vivid interaction with the ECHR and ECtHR case-law. Firstly, this interaction manifests compliance with the constitutional requirement of adequate judicial protection of human rights and, secondly, it raises local awareness of the indispensability of ECtHR case-law in the Kosovo legal order. The latter influence is of significant importance in view of Kosovo's ambition to join the Council of Europe and accept the ECtHR's jurisdiction.

While the vast majority of the Constitutional Court's case-law is related to human rights, the role of the Court in shaping the relationship with international law is evident. The Constitutional Court's reasoning in the *PAK* case, provide for the challenges in safeguarding the Constitution *vis à vis* the international authorities which remain neutral towards the political status of Kosovo. The status of international law in the Kosovo legal order remains to be elucidated once the Constitutional Court defines the substance of 'legally binding norms of international law',

[129] After the accession of the Czech Republic to the European Union (EU), the Supreme Administrative Court in the Czech Republic established its Research and Documentation Unit composed of young legal researchers to assist judges on issues related to EU law, international law and comparative law. See http://www.nssoud.cz/The-Activities-of-the-Service/art/499?menu=191. Accessed 12 May 2013.

[130] For a categorisation of constitutions that permit the incorporation of international law, see Cassese (1985), p. 394.

the self-executing effect of the UDHR, and the place of customary international law, to name just a few issues.

In the adjudication of war crimes cases, the fashion in which EULEX international judges amalgamated customary international law in the Kosovo legal order does not align with an already established UNMIK jurisprudence and the orthodox understanding of law. While the authors recognise the difficulties of international criminal adjudication in domestic courts, this contribution echoes that international judges operating in hybrid courts should not shrink away from complex legal issues. Instead, by means of judicial creativity, EULEX international judges should aim to establish jurisprudence that builds principles and provides guidance for future adjudication for local judges and not to see its mission merely as temporary machinery for the adjudication of serious crimes.

Regarding the state succession to international agreements, EULEX international judges were reluctant to rule on the succession of Kosovo to international agreements signed by Serbia. In the *B.A.* case concerning succession to the 1901 Extradition Treaty signed between the US and Serbia, EULEX international judges contributed to defining what constitutes an international agreement and what place customary international law has in the Kosovo legal order. In addition, by rejecting the claim on the extradition of a suspected terrorist, EULEX international judges relied on a strict legal interpretation and did not hesitate to contradict the understanding of the Kosovo government and the US Secretary of State with regard to the application and scope of the 1901 Extradition Agreement. As indicated in the analysis, in view of the legal and political implications of the case, it is hardly conceivable that domestic judges would have taken the same approach in the present case.

In contrast to the jurisprudence of the Constitutional Court and EULEX international judges, the scarce application of international human rights by courts of general jurisdiction reflects a set of inherited problems and ineffective new policies related to the education of judges. Furthermore, if the Kosovo judiciary fails to promptly reduce the backlog of cases, it is hard to imagine that international norms will find a place in the routine work of local judges.

Considering the temporary nature of the presence of international EULEX and Constitutional Court judges, the fate of the judicial application of domesticated international agreements on human rights, and international law more generally, rests on the capacity and professionalism of local judges.

In view of Kosovo's aspirations to join the UN, the Council of Europe, the EU and other treaty regimes, the Kosovo judiciary must be able not only to comply with domesticated international instruments in Articles 22 and 53 of the Constitution, but also to honour new international agreements undertaken by means of ratification. Hence, Kosovo judges should be equipped to engage in the complexities of international agreements and case-law in the context of the national legal order. Understanding the conventional systems and international jurisprudence (e.g. ECtHR) is only the starting point for a competent local judiciary. The peculiarities of the relationship between national and international law require that judges in their *double function* engage not only in the mechanical application

of international law, but also quest for techniques of legal interpretation and legal reasoning that lead to judicial comity when addressing different and sometimes conflicting legal obligations.

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