

# The New Kosovo Constitution and Its Relationship with the European Convention on Human Rights: Constitutionalization “Without” Ratification in Post-Conflict Societies

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## Abstract

This article<sup>1</sup> analyzes the constitutionalization of the European Convention for the Protection on Human Rights and Fundamental Freedoms (ECHR) and European Court of Human Rights (ECtHR) case-law within the framework of the new Constitution of Kosovo, deconstructing the Constitution’s novel approach to the integration of international instruments into a domestic system of human rights protection. The authors trace the development of the links between the international and domestic sys-

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tems of protection, demonstrating that the special consideration which Kosovo initially ascribed to the ECHR became a legacy embedded in the constitutional drafting process. They examine in detail the mechanics of the legal system integrating the ECHR and ECtHR case-law into domestic law, considering issues concerning rank, applicability, effect and function of the Convention and the ECtHR case-law arising in a system based on constitutionalization without ratification. Whilst this is a fascinating theme – as the interaction between international and domestic instruments is closely linked to the success of the reconstruction of the institutions of the fledgling Kosovan state and a unique concept of the use and combination of international and domestic systems of protection is put to a test – it is a matter that remains scarcely considered in legal or academic literature.

## I. Introduction

The international community has often intervened in failing polities to uphold the basic principles of human rights and to maintain a guarantee of specific freedoms. Protection of human rights in post-conflict societies has consistently been one of the defining themes of such interventions. This has also been the case in Kosovo. Since the 1999 international humanitarian intervention, the issue of the protection of human rights and freedoms has figured as one of the main concerns of the international community.<sup>2</sup> Accordingly, the status of human rights protection can be considered an indicator of the success of the presence of the international community in Kosovo, and of its missions.<sup>3</sup> In light of this significance, international missions in Kosovo have, since their inception, been dealing primarily with establishing a governing system that would protect citizens' rights and freedoms. The integration into the domestic Constitution of international instruments of human rights protection, most importantly the ECHR, constitutes a key element in attempts to produce an effective system of domestic human rights protection. The legal analysis of the functioning and development of this structure, as well as examining the efficacy of the interaction between

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<sup>2</sup> I. King/W. Mason, *Peace at Any Price: How the World Failed Kosovo*, 2006. See, also, J. Friedrich, UNMIK in Kosovo: Struggling with Uncertainty, in: A. von Bogdandy/R. Wolfrum (eds.), *Max Planck UNYB*, Vol. 9, 2005, 225 et seq.; and O. Tansey, *Democratization Without a State: Democratic Regime Building in Kosovo*, *Democratization* 14 (2007), 129 et seq.

<sup>3</sup> V. Morina/F. Korenica/D. Doli, *The Relationship Between International Law and National Law in the Case of Kosovo: A Constitutional Perspective*, *I.CON* 9 (2011), 274 et seq. See also M. Weller, *Contested Statehood: Kosovo's Struggle for Independence*, 2009.

the domestic and international systems, are thus a significant indicator of the success of the reconstruction of Kosovan society more generally.

The case of Kosovo is legally fascinating due to the unique context and manner in which international instruments have been merged with the domestic constitutional apparatus in order to form a single system of protection. As Kosovo's statehood is not yet universally recognized, Kosovo is not still in the capacity to be a signatory to international instruments of consensual character (including the ECHR). As a consequence, Kosovo is not an entity which was originally foreseen by such international instruments or their corresponding obligations. The merger of the national and international, without the presumed prerequisites of universally recognized statehood and ratification, raises unique questions as to rank, applicability and function of these instruments and the system into which they are integrated in domestic legal order. These same issues take on added relevance in the consideration of the ECHR (the case study of this piece) – as one of the most complete supra-national human rights systems and certainly the one with most relevance in Europe – and particularly the case-law of the ECtHR. They are not simply questions arising from the integration of a single static instrument, but also those arising from the comprehensive and perpetually evolving legal system which has been built on the basis of the ECHR.

Despite the wealth of literature devoted to Kosovo as an example of a post-conflict society and to the human rights situation in the country in particular, comparatively little attention has been devoted in the literature to analyzing the construction of the constitutional protection of human rights from a legal perspective.

In Section II., this article provides a brief general outline of the system of human rights protection established by the Kosovo Constitution which serves as a background to later sections.

This is followed by a consideration of the background and history to the design of the constitutional system of human rights, considering that, from the outset, international standards and instruments played a key role in the development of Kosovan constitutional protection (Section III).

The position and significance of the ECHR and ECtHR case-law in the constitutional system of protection are discussed in Section IV. The authors first consider the legal mechanics of how international instruments have technically been constitutionalized. The significance and position of the ECHR is then considered in more detail, with special emphasis on the significance of its “constitutionalization without ratification”, and on its rank and applicability within the constitutional system. Finally, the place and

role of ECtHR case-law is examined. The sections consider whether the constitutionalization of the ECHR also entails the constitutionalization of the ECtHR's jurisprudence. The authors conclude that although this is not the case in the strict sense, other constitutional obligations and the jurisprudence of the Constitutional Court have established a system whereby ECtHR case-law occupies a special position in the domestic protection of human rights. Drawing on this, the authors analyze questions concerning how potential conflicts between ECtHR case-law and constitutional provisions protecting human rights may be resolved, and comment on the potentially significant effect that this form of integration may have for the future development and internationalization of constitutional protection.<sup>4</sup>

## II. Overview of the Constitutional System of Human Rights in Kosovo

In its preamble, the 2008 Constitution of Kosovo provides, *inter alia*, that the people are "committed to the creation of a state of free citizens that will guarantee the rights of every citizen, civil freedoms and equality of all citizens before the law".<sup>5</sup> Considering the preamble as a guide to the reasoning underlying the constitutional structures, it is clear that human rights are embedded as a foundational keystone.<sup>6</sup> The 2008 Constitution promotes human rights in almost every chapter, but it dedicates Arts. 21 to 62 exclusively to human rights. Based solely on the number of words, concepts and standards established and promoted in these sections, the Human Rights chapter constitutes the largest part of the Constitution.

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<sup>4</sup> In the analysis of this fascinating theme, the authors follow a mixed methodology. In the first section, analysis of human rights in the Constitution follows a positive and descriptive legal methodology. This is followed in the second section by a socio-legal and historical approach, which is applied in order to place the development of the Kosovan Constitution in context and to set the scene for a more specific analysis of international instruments within this framework. In consideration of the status and interaction of the ECHR and ECtHR jurisprudence in the Constitution, the authors take the Constitution as the starting point of the analysis, answering the initial research questions by drawing on the case-law and jurisprudence of the Constitutional Court. While the authors' analysis is based on consideration of the entirety of the Court's case-law, the cases most relevant to the research questions identified and illustrative of the developing jurisprudence in the area have been isolated and used as sources for specific analysis.

<sup>5</sup> Preamble, para. III, 2008 Constitution of the Republic of Kosovo.

<sup>6</sup> See this determination in the Kosovan Declaration of Independence also, proclaimed 17.2.2008, reproduced at <<http://www.assembly-kosova.org>>.

The catalogue of human rights in Kosovo's Constitution offers – from a general point of view – a normatively loaded prescription for human rights. It addresses the prescriptions for the scope and substance of human rights in detail.<sup>7</sup> The Constitution guarantees two categories of human rights: individual and collective rights.

Chapter II (Arts. 21 to 54) regulates and guarantees *individual* human rights, such as the right to life, human dignity, the right to a fair and impartial trial, the right to privacy, the freedom of expression, and others. After reviewing this chapter, one may conclude that no distinction is made on the basis of an individual's ethnic background. The human rights provided for in Chapter II are guaranteed to all citizens of Kosovo on the basis of equality and impartiality, regardless of their ethnic background. Every natural or legal person in Kosovo qualifies for every right listed in the Constitution. In contrast to Chapter II, Chapter III (Arts. 57 to 62) contains several *collective* rights. By assigning those rights to communities holding ethnic minority status, this chapter protects the position of ethnic minorities within Kosovo. Collective rights include the right of ethnic minorities to overrepresentation in public administration and parliament, the rights to use their languages on official grounds and to maintain autonomous cultural institutions, educational programs, media institutions and cultural centers that promote and sustain their cultural identity, and so forth. The collective rights guaranteed by the Constitution contain an element of "special protection" since they offer safeguards to ethnic communities that do not benefit the majority of population.<sup>8</sup> This supports the argument that Kosovo's constitutional system of human rights is one of affirmative action for ethnic minorities as a means to surpass their marginalized status in society. The "extra-rights" granted to ethnic minorities promote the kind of "consocia-

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<sup>7</sup> The European Commission has appreciated the standard of the constitutional system of human rights in Kosovo. See Commission Staff Working Document, Kosovo under UN-SCR1244/99 2008 Progress Report, Commission of the European Communities, SEC (2008), 2697.

<sup>8</sup> From a comparative perspective, it is logical to assume that constitutional construction drew on a number of historical antecedents – there appear, at first sight, for example, to be parallels with the linguistic safeguards set up in the Autonomous Regime of South Tirol. However, in our research into the process of construction, we did not encounter specific references to specific examples as the source of these ideas. Further, the situation regarding minorities in Kosovo is unique. As constitutional construction is heavily tied to context, this makes a direct comparison with constitutional development in other areas illegitimate without further research.

tional” division of powers envisaged by the *Ahtisaari* Plan (see also below) and enshrined in the Constitution itself.<sup>9</sup>

### III. The Drafting of the Constitution of Kosovo and the International Concern for Human Rights

Although *Weller* described it as “contested statehood”,<sup>10</sup> the proclamation of Kosovo’s independence propelled a number of state-building processes forward,<sup>11</sup> with the drafting of the Constitution of Kosovo serving as the main achievement in the new polity’s establishment. The drafting of a Constitution represents the peak of state-building efforts – in legal terms at least – because it provides the legal foundation for the organization and the functioning of the polity. Because of the significant role played by the inter-

<sup>9</sup> For ethnic minorities’ collective rights and privileges in Kosovo, and the consociational nature of the Kosovan polity, see *F. Korenica/D. Doli*, *The Politics of Constitutional Design in Divided Societies: The Case of Kosovo*, *Croatian Yearbook of European Law and Policy* 5 (2010), 265 et seq. See also, *O. Tansey*, *Kosovo: Independence and Tutelage*, *Journal of Democracy* 20 (2009), 153 et seq. This stands in harmony with almost all cases of divided societies in the region. See, for example, *F. Bieber*, *Power-Sharing as Ethnic Representation in Postconflict Societies: The Case of Bosnia, Macedonia and Kosovo*, in: A. Mungiu-Pippidi/I. Krastev (eds.), *Nationalism After Communism: Lessons Learned*, 2004, 229 et seq. This development has also been evaluated by the European Commission: see Commission Staff Working Document, *Kosovo under UNSCR1244/99 2008 Progress Report*, Commission of the European Communities, SEC (2008), 2697. Despite this elevated constitutional protection mechanism and affirmative action for ethnic minorities in Kosovo *de iure*, it is possible to make the argument that the *de facto* situation remains rather weak in terms of the standard of respect for minority rights. This opinion is clearly outlined in a European Commission report which also relied on the data and statements of other international organizations; “[the] institutional framework and the financial commitment of Kosovo are inappropriate for implementing the human rights legislation of ethnic minorities”. See Commission Staff Working Document, *Kosovo 2010 Progress Report*, 9.11.2010, SEC(2010)1329, at 14, reproduced at <<http://ec.europa.eu>>. Although this is a European Union document, it is based on the data and statements of many international organizations dealing with this issue. This is explicitly explained in the document.

<sup>10</sup> See, further, *M. Weller* (note 3); See, also, UN Security Council, Letter from the Secretary-General of the United Nations Addressed to the Security Council, S/2007/168, 26.3.2007. In 2010, the International Court of Justice delivered an opinion to the UN General Assembly on whether the independence of Kosovo was in conformity with international law. The ICJ ruled that, using a *Lotus* fashion, the independence of Kosovo was not against general international law, United Nations Security Council Resolutions, or the Constitutional Framework governing Kosovo under Resolution 1244. (See Advisory Opinion on the Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, 22.7.2010, ICJ 141); reproduced at <<http://www.icj-cij.org>> (last visited 20.1.2011).

<sup>11</sup> See, for example, *Kosovo’s Fragile Transition*, International Crisis Group, Europe Report No. 196, 25.9.2008.

national community in the establishment of Kosovo as a state, the drafting of the Constitution of Kosovo reflects not only international influence over Kosovo, but also the international constraints imposed on its statehood.<sup>12</sup> The presence and significance of the international dimension in the drafting and development process manifests itself in the form of human rights protection elaborated in the Constitution, as exemplified by the presence and significance of international instruments of protection as key elements in the constitutional system.

## 1. UNMIK and the Constitutional Framework of Kosovo

To better understand this national/international duality as a strand in Kosovan constitutional development, one should first examine the human rights background to Kosovo's post-conflict international administration. Beginning in 1999 the United Nations Interim Administration Mission in Kosovo (UNMIK) – the mission that governed Kosovo based upon United Nations Security Council (UNSC) Resolution 1244 – established a strong connection with international human rights instruments.<sup>13</sup> One of the first UNMIK regulations prescribed that “in exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards” contained in some ten international human rights instruments, including the ECHR and its Protocols.<sup>14</sup> Hence, since 1999, UNMIK has operated with special attention for the human rights law context in Kosovo, thereby establishing a foundational link between public institutions and major international human rights instruments.<sup>15</sup>

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<sup>12</sup> See for example, *D. Doli/F. Korenica*, Calling Kosovo's Constitution: A Legal Review, Denning L. J. 22 (2010) 51 et seq.; See also *V. Morina*, The Newly Established Constitutional Court in Post-Status Kosovo: Selected Institutional and Procedural Concerns, Rev. Cent. & E. Eur. L. 35 (2010), 129 et seq.

<sup>13</sup> For more on UNMIK's governance in Kosovo, see *C. Stahn*, Constitution Without a State? Kosovo Under the United Nations Constitutional Framework for Self-Government, LJIL 14 (2001), 531 et seq.

<sup>14</sup> UNMIK Regulation No.1999/24.

<sup>15</sup> For the UNMIK human rights policy in Kosovo, see *D. Marshall/S. Inglis*, The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo, Harvard Human Rights Journal 16 (2003), 96 et seq. See also *M. Brand*, Institution-Building and Human Rights Protection in Kosovo in the Light of UNMIK Legislation, Nord. J. Int'l L. 70 (2002), 461 et seq.; and *L. v. Carlowitz*, Crossing the Boundary from the International to the Domestic Legal Realm: UNMIK Law-Making and Property Rights in Kosovo, Global Governance 10 (2004), 307 et seq.

In 2001, UNMIK and the Kosovan authorities adopted the Constitutional Framework for Kosovo (referred to as an informal “constitution” of Kosovo, even though Kosovo was not yet a state). This Constitutional Framework established a strong link to the international instruments upon which UNMIK had already been relying as a tool of domestic governance, and further enhanced the obligation to follow them by binding Kosovo’s self-governing institutions to these instruments, giving them direct applicability and recognizing them as part of the Constitutional Framework for Kosovo.<sup>16</sup> The Constitutional Framework mandated that the authorities – and, most importantly, the courts – apply international human rights instruments in the legal order of Kosovo.<sup>17</sup> UNMIK and Kosovo’s authorities recognized, in the post-conflict phase, the duty to respect, *inter alia*, the ECHR and its Protocols, and relied on these international human rights instruments as benchmarks for the structuring of the new polity.

## 2. The *Ahtisaari* Plan, Diplomatic Missions in Kosovo and the Constitutional Drafting Process

Following the 2001 Constitutional Framework for Kosovo, the *Ahtisaari* Commission<sup>18</sup> reached an international proposal for resolving the status of Kosovo in 2007, also referred to as the *Ahtisaari* Settlement Proposal.<sup>19</sup> This Proposal specified that the design of the new polity, including the main pillars of the future Constitution of Kosovo, are required to follow the principles established in the *Ahtisaari* Plan.<sup>20</sup> The design of Kosovo as a state was

<sup>16</sup> Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9, 15.5.2001, (Chapter III).

<sup>17</sup> This is a unique situation as, at the time of this development Kosovo was not a state, but rather an internationally administered territory. The UNMIK decisions in this area thus defined the direction that the constitutional apparatus should take and the speed with which it would progress.

<sup>18</sup> The *Ahtisaari* Commission was mandated by the United Nations Security Council to negotiate and find a solution for Kosovo’s final legal status. The *Ahtisaari* Commission, chaired by the former Finnish president *Marti Ahtisaari*, proposed the so-called *Ahtisaari* Plan for Kosovo as the document that designs and establishes the new state and the special minority rights’ protection mechanisms.

<sup>19</sup> *M. Weller*, The Vienna Negotiations on the Final Status of Kosovo, *Int’l Aff.* 84 (2008), 659 et seq.

<sup>20</sup> Comprehensive Proposal for the Kosovo Status Settlement of 27.3.2007 proposed by the United Nations Office of the Special Envoy for Kosovo (Annex 1, Art. 1.1). See, also, Art. 143(3), 2008 Constitution of Kosovo and *R. Mubarremi*, Kosovo’s Declaration of Independence: Self-Determination and Sovereignty Revisited, *Rev. Cent. & E. Eur. L.* 33 (2008), 401 et seq.



thus aligned to the parameters set out in this internationally drafted plan. Consequently, the drafting of the Constitution also was required to adhere to the Plan; a situation which in essence gave the Plan primacy over aspects of the direction and construction of the Constitution.<sup>21</sup> The human rights system and the mechanism to protect ethnic minority rights established in the *Ahtisaari* Plan became part of the 2008 Constitution of Kosovo dedicated to human rights and freedoms. As such, the drafting of Kosovo's Constitution represented, at least for the most part,<sup>22</sup> an international imposition of the *Ahtisaari* Plan.<sup>23</sup> The legacy of this international imposition in terms of the constitutional protection system for human rights and the constitutionalization of international instruments of protection is demonstrated by the fact that the *Ahtisaari* Plan (and the political desire to Europeanize the constitutional process) conditioned the drafters of the 2008 Constitution to make a special reference to the ECHR. It seems that the *Ahtisaari* Commission had a particular motivation for tying Kosovo to the ECHR, specifying that Kosovo must "take all necessary measures towards ratifying the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols".<sup>24</sup> With this obligation, the *Ahtisaari* Commission considered, *inter alia*, that binding Kosovo to the ECHR would serve as one of the most important international safeguards for domestic human rights protection.<sup>25</sup>

In retrospective, the international missions in Kosovo and the Kosovan provisional self-governing authorities both accepted and placed high significance on the direction of a link with several international human rights instruments, including the ECHR. In this context, the importance which Kosovo initially placed on international instruments became a legacy later em-

<sup>21</sup> Art. 143(3), 2008 Constitution of Kosovo (note 5).

<sup>22</sup> See Constitutional Commission of Kosovo, Minutes from Second Phase of the Public Discussions for the Draft Constitution of Kosovo, Decan, 27.2.2008, reproduced at <<http://www.kushtetutakosoves.info>>. See, also, Press Release of the Constitutional Commission of Kosovo, regarding *Peter Faith's* decision on the certification of the Kosovan Constitution, 2.4.2008, reproduced at <<http://www.kushtetutakosoves.info>> (accessed 25.3.2010). See, further, the Press Statement "Second Meeting of the International Steering Group (ISG) for Kosovo", 17.4.2008, para. 4, Vienna, reproduced at <<http://www.ico-kos.org>>.

<sup>23</sup> See also *V. Morina/F. Korenica/D. Doli* (note 3).

<sup>24</sup> Comprehensive Proposal for the Kosovo Status Settlement (note 20). It is surprising to consider that, whilst the process of development in Kosovo has received significant academic and media attention, there are in fact very few papers written on the *Ahtisaarian* constitutional prescriptions and none specifically on the scheme of human rights which it constructed. This paper seeks to begin to fill in this gap.

<sup>25</sup> Interview by *Fisnik Korenica* with Professor *Visar Morina* (26.10.2010). Dr. *Morina*, Professor of Law at the University of Prishtina, was an expert with the Drafting Commission for the Constitution of Kosovo.

bedded into the constitutional drafting process. Hence, the international support of the Kosovan state in terms of the respect for human rights is the founding motive for the formation of a rigid and constant affiliation with the ECHR. In constitutionalizing international instruments, the drafters were willing to ensure that the constitutionalized instruments become *ex proprio vigore* part of the Kosovan legal order, be directly applicable, and prevail over the laws of the country.<sup>26</sup>

## IV. The 2008 Kosovo Constitution, the ECHR and the ECtHR Case-Law

### 1. The Constitutionalization of International Instruments by the 2008 Constitution

The 2008 Constitution elevates a number of international legal instruments in Art. 22 to constitutional rank. The Constitution specifies that “human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution [...]”<sup>27</sup> The international human rights instruments which have been constitutionalized include the Universal Declaration of Human Rights, the ECHR and its Protocols, the International Covenant on Civil and Political Rights and its Protocols, the Council of Europe Framework Convention for the Protection of National Minorities, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.<sup>28</sup>

Three statements follow from the constitutionalization of these instruments. *First*, the instruments have legal authority of constitutional rank. *Second*, the instruments directly apply to, and form part of, the domestic

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<sup>26</sup> This is different to the situation in a monist state in which international treaties at the moment of their ratification gain direct effect at the rank defined by the national norms decreeing monist status. In the Kosovan case, the international instruments have been integrated into the drafting of the Constitution as part of the Constitution itself. Whilst this may appear to have the same *de facto* result in many situations, the form of integration is different and leads to a range of peculiar questions as to rank and applicability (as considered in detail in section 3).

<sup>27</sup> Art. 22, 2008 Constitution of Kosovo (note 5).

<sup>28</sup> Art. 22(1)-(8), 2008 Constitution of Kosovo (note 5). See also Comprehensive Proposal for the Kosovo Status Settlement, UN Doc. S/2007/168/Add. 1, Annex 1, Art. 2, para. 1.

constitutional system. *Third*, these instruments constitute both as source and binding documents for issues of human rights within the jurisdiction of Kosovo. To note, the constitutionalization of these conventions has no meaning in the external plane unless Kosovo becomes a signatory to them.

However, the mechanism of constitutionalization of these instruments leaves a series of “hierarchy of norms” questions unanswered. Consider, first, the possibility of conflict between a right contained in the Constitution and a right proclaimed by a constitutionalized international instrument on the basis of Art. 22. The Constitution does not provide a clear answer, although one might contend that it is the responsibility of the Constitutional Court to solve the problem as to whether the rights specified in the constitutionalized instruments and in the Constitution could be appreciated on the basis of parity. It is normal to consider that such interpretation is a function exercised by the courts and that such function includes the resolution of issues arising from the collision of human rights. In such cases, it would be for the courts to establish the balance between conflicting rights in order to ensure a fair administration of justice. Consider, *second*, the possibility of a conflict between international instruments themselves enshrined through Art. 22. The Constitution provides no solution on such a conflict, although one might assume that a potential answer would be based on the rank of said instruments in the international legal order.<sup>29</sup>

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<sup>29</sup> It is also interesting to note that, in addition to incorporating fundamental treaties on human rights and freedoms that form part of the *written* international human rights law, the Constitution of Kosovo also shows its approval of *customary* international human rights law. The Constitution establishes that:

“The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by all Communities and their members.” See Art. 3(2), 2008 Constitution of Kosovo (note 5).

Art. 3.2 of the Constitution, therefore, makes clear reference to customary international human rights law by referring to “internationally recognized fundamental human rights and freedoms”. By recognizing a special respect for internationally recognized fundamental human rights and freedoms, the Constitution of Kosovo has acknowledged the connection between domestic law and customary international human rights law. Such a connection, however, remains to be explored and established technically through rulings of the Constitutional Court.

## 2. The Status of the ECHR Within the 2008 Kosovo Constitution

Art. 22 constitutionalizes eight international human rights instruments, including the ECHR and its Protocols. It follows that one should also consider the ECHR and its Protocols to be of constitutional value. As one may observe, Art. 22 constitutionalizes all Protocols attached to the ECHR (going even beyond many EU member states). Given this as a base for further analysis, what form of applicability/effect, rank, and form of application these instruments are given at the domestic level must be considered in more detail.

Perhaps, *first*, one should keep in mind that Kosovo is not a party to the ECHR and, therefore, is not internationally liable for its implementation. At the time of the Constitution's drafting, Kosovo did not – and still does not – have the full international legal capacity necessary to become a party to international conventions of consensual nature (since it has yet to become member of the United Nations (UN) or other international organizations as 111 states have recognized its independence to date).<sup>30</sup> While this questions the probability of Kosovo to accede to the ECHR, the Drafting Commission considered the domestic route of constitutionalization to be the only avenue through which to bind Kosovo to the ECHR in at least a short to mid-term period.<sup>31</sup> One should add here that the fundamental rights enumerated in the ECHR are already part of the Constitution of Kosovo, but binding Kosovo to ECHR had the additional effect of tying Kosovo's human rights regime to the human rights patterns of the Strasbourg regime of human rights. If this had no greater impact than at least the intention was to use the ECHR as a legitimizing document to support the argument that Kosovo adheres to the higher European human rights norms; this in itself is sufficient to produce positive political effects for the new state's international image (which surely was one of the intentions of the Drafting Commission).

However, one could question if this was in fact the only route to binding Kosovo to the ECHR, and whether there were external avenues in place.

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<sup>30</sup> Although with a limited capacity to accede to universal international organizations, as of today, Kosovo has gained membership in the International Monetary Fund, the World Bank, European Bank for Reconstruction and Development (EBRD), Venice Commission, and several Balkan regional organizations such as Regional Cooperation Council (RCC).

<sup>31</sup> See *F. Korenica/D. Doli*, Taking Care of Strasbourg: The Status of the European Convention on Human Rights and the Case-Law of the European Court of Human Rights in Kosovo's Domestic Legal System, *Liverpool L. Rev.* 32 (2011), 209 et seq. See also Constitutional Commission of Kosovo, Minutes from Second Phase ... (note 22).

From a broader perspective, one could argue that the international presence of the EU in Kosovo was mandated by UNSC Resolution 1244, meaning that it was a UN mandated mission in Kosovo. From this point of view, the EU Mission in Kosovo could have sought a special form of agreement with the Council of Europe (CoE) in the name of the UN to open the way to allow Kosovo, as a party with a “restrained” status, to accede to the ECHR. This proposition has been officially proposed by former member of the Venice Commission (now member of ILC) Professor *Nolte* who had stated that, as an international organization, the UN would have legal capacity to enter into contractual relationships with the CoE while trying to find a route for Kosovo’s international accession to the ECHR and ECtHR jurisdiction.<sup>32</sup> If this was possible, the “limited” accession of Kosovo to the ECHR, with exceptional status, could have been concluded on behalf of, and on the basis of, the UN Mission in Kosovo. Of course, however, it would have been against Kosovo’s constitutional sovereignty if *Nolte*’s proposition would have been followed after the declaration of independence of Kosovo. It was merely a theoretical model fully rejected as an option by Kosovo’s Government.

More important, *second*, is the question on the ranking of the ECHR and its Protocols within the Kosovan constitutional system. We argue that by constitutionalizing the ECHR and its Protocols (all protocols), Art. 22 of the Constitution has given these instruments constitutional status.<sup>33</sup> As a result, the ECHR and its Protocols stand above ordinary laws and international treaties in Kosovo’s hierarchy of legal norms. This differs from the situation which would have existed under traditional ratification procedures. In the case of normal ratification, the ECHR would not have possessed the constitutional rank it enjoys under the current constitutional pre-

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<sup>32</sup> This argument derives from the analysis of *G. Nolte*, Opinion No. 280/2004: Preliminary Comments on the Possible Establishment of a Human Rights Supervisory Mechanism for Kosovo”, CDL-DI (2004) 002, European Commission for Democracy Through Law (Venice Commission), Strasbourg, 10.6.2004.

<sup>33</sup> On how this is regulated by the CoE member states’ domestic law, *A. Z. Drzemczewski*, European Human Rights Convention in Domestic Law: A Comparative Study, 1997. See also a discussion of the way in which the Convention and the ECtHR case-law have influenced/standardized member states’ human rights law practices: *D. Harris/M. O’Boyle/E. Bates/C. Buckley* (eds.), *Law of the European Convention on Human Rights* 2<sup>nd</sup> ed. 2009. One can imagine a case where political influence explicitly proposes that a Constitution contain a provision mandating compliance with the ECHR. The Venice Commission, in addition to that, has most explicitly required the revision of a national constitution to comply with the ECHR (the case of Armenia). See European Commission Democracy Through Law (Venice Commission), Opinion on the Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms under the Constitution of the Republic of Armenia of 1995, CDL-INF (2001) 25, Strasbourg, 15.12.2001.

scription.<sup>34</sup> We argue that,<sup>35</sup> given such a constitutional rank, every domestic law must be in harmony with the ECHR and if not, it should be ruled out as unconstitutional. This said, every domestic law must be in conformity with the ECHR, although practically every right guaranteed by the latter is protected by the Constitution as well. This in itself produces the legitimizing effect that “domestic laws in Kosovo” – on a constitutional ground – should be in harmony with a European human rights instrument, namely the ECHR.<sup>36</sup>

*Third*, one must question whether the ECHR and its Protocols are directly applicable<sup>37</sup> and effective. It is argued that, because the ECHR is enshrined in the Constitution, natural and legal persons can directly rely on the rights set forth therein and can thus rely on them as a constitutional source of protection. Such direct reliance on the ECHR and its Protocols by natural and legal persons in Kosovo makes the ECHR directly applicable, whereas every public institution – and, most importantly, the courts –

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<sup>34</sup> Kosovo follows the example of a monist system of relationship between the ratified international treaties and Kosovo’s domestic legal order, allowing ratified treaties to penetrate in the domestic legal order *ex proprio vigore* (incorporate) and apply directly. The status of the ECHR in the Kosovo’s Constitutional system, however, is not of a normal treaty, since the Constitution establishes a privileged position to the latter via Art. 22.

<sup>35</sup> This is our argument; however this is implicitly viewed as such by the Constitutional Court’s rulings cited in the footnotes below. In addition to those rulings, the Constitutional Court has ruled more clearly on this in its decision: *Tome Krasniqi v. RTK*, Temporary Measure 11/09, 2009, Constitutional Court of Kosovo, available at <<http://www.gjk-ks.org>>.

<sup>36</sup> Overall, one must see the status of the ECHR and its Protocols within Kosovo’s domestic legal order on the basis of Art. 22: The ECHR and its Protocols are a constitutional source of power. See this in light of Judgment No. 40/09, 2009, *Ibrahimi and 48 other former employees of the Kosovo Energy Corporation v. the Supreme Court of the Republic of Kosovo*, KI 40/09, 2009, Constitutional Court of Kosovo, available at: <<http://www.gjk-ks.org>>. In this ruling, the Constitutional Court ruled that violation of the ECHR is – implicitly – a violation of the Constitution, and must thus be repaired on the basis of the Constitutional complaint mechanism. See also *Bislimi v. MI et al.*, KI 06/10, 2010, Constitutional Court of Kosovo, available at <<http://www.gjk-ks.org>>. The concept of human rights treaties’ supremacy in the domestic legal order is not particularly common in the comparative constitutional frameworks. See *O. Dutheillet de Lamothe*, Study No. 304/2004: Draft Report on Case-Law Regarding The Supremacy of International Human Rights Treaties, CDL-DI (2004) 005, European Commission for Democracy Through Law (Venice Commission), Strasbourg, 2.10.2004. See also *F. Korenica/D. Doli* (note 31). It is worth noting that in accordance with the language policy of Kosovo, the rulings of the Constitutional Court are published in three languages: Albanian, Serbian and English. Therefore, whenever we refer to these rulings in this article, we shall refer to the English versions.

<sup>37</sup> In order to be self-applicable, a treaty must be concrete enough so as to allow a court to resolve a controversy without the need to consult sub-legislative acts. See, for example, *C. Economides*, The Relationship Between International and Domestic Law, Report of the European Commission for Democracy Through Law (Venice Commission), Science and Technique of Democracy, No. 6, CDL-STD (1993) 006, Strasbourg, 1993.

in Kosovo are obliged by the Constitution to implement the ECHR and its Protocols. The Constitutional Court of Kosovo confirmed this in several baseline cases during 2009.<sup>38</sup>

In view of the constitutional justice, the Constitutional Court is tasked with the duty to assess the constitutionality of laws by using the ECHR and its Protocols, on the basis of Art. 22, as a substantive element of the Constitution. The Constitutional Court must, therefore, exercise control over the constitutionality of laws by ensuring that they comply not only with the Constitution, but also with the ECHR and all of its Protocols. Insofar as it must consider a legal instrument designed at the international level this broadens the Constitutional Court's jurisdiction for constitutional review. This gives the Constitutional Court a unique position among institutions protecting human rights in Kosovo.

### 3. The Status of ECtHR Case-Law Within the 2008 Kosovo Constitution

The ECHR cannot simply be considered as a stand-alone legal instrument, but indeed has an extensive machinery devoted to its interpretation and application, embodied most prominently by ECtHR case-law. Accordingly, the consideration of the rank and applicability of the ECHR within Kosovo's constitutional system is followed by a series of more challenging questions relating to the rank and applicability of ECtHR case-law. Art. 53 of the Constitution, which will be discussed below, is the *special* provision that addresses the function of the case-law of the ECtHR in the context of Kosovo's constitutional system.

The Venice Commission has argued from an international law perspective that, in principle, the case-law of the ECtHR forms part of the ECHR and that it has *erga omnes* effect for future situations.<sup>39</sup> Therefore, the Constitu-

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<sup>38</sup> See: In the UK, for example, despite the fact that, prior to 1998, it was asserted that courts have a duty to take account of the ECHR when interpreting a law affecting rights and freedoms, the Human Rights Act 1998 (officially published by United Kingdom's National Archives) now sets some limits as to when an individual may rely on the Convention rights before the English courts (see: Section 2(1), UK's Human Rights Act 1998). See *D. Wilson Jackson*, *The United Kingdom Confronts the European Convention on Human Rights*, 1997; and *A. L. Young*, *Parliamentary Sovereignty and the Human Rights Act*, 2009.

<sup>39</sup> European Commission for Democracy Through Law (Venice Commission), Opinion No. 209/2002 on the Implementation of the Judgments of the European Court of Human Rights, on the basis of comments by *J. Helgesen*, *G. Malinverni*, *F. Matscher*, and *P. Van Dijk*, CDL-AD (2002) 34, Strasbourg, 18.12.2002. On the other hand, the Venice Commission has

tion of Kosovo may be said to have constitutionalized ECtHR case-law by constitutionalizing the ECHR and its Protocols. The authors of the present article contend, however, that Art. 22 and the constitutionalization of the ECHR and its Protocols do *not* include ECtHR case-law. It is of course debatable whether it was necessary to include the ECHR alone and not also the case-law of ECtHR in a constitutional article, a point which will be addressed in the sections below.

We argue that Art. 22 has constitutionalized the text of the ECHR and its Protocols – but not the case-law of the ECtHR. Not only did the Drafting Commission hold this opinion – which serves to contextualize the overall understanding of constitutional justice in Kosovo<sup>40</sup> – but there is in fact a constitutional provision exclusively regulating the status of ECtHR case-law in the legal order of Kosovo (Art. 53, analyzed in detail below).<sup>41</sup> The existence of this Article suggests that the constitutionalization of the ECHR and its Protocols by Art. 22 does not automatically encompass the constitutionalization of the case-law of the ECtHR.

To clarify the position of the case-law of the ECtHR and to further explore the question at hand, it is important to consider that ECtHR case-law is binding on a state that is a party to the ECHR. This means that a judgment of the ECtHR is binding only for the state that is a party to the case being judged (*inter partes effect*). However, ECtHR case-law as a whole, is not (yet) binding *erga omnes* on states that are parties to the ECHR (although at least one notable personality has recently argued that states should recognize ECtHR case-law as having *erga omnes* effect as this would contribute to the efficiency of the ECtHR and provide a greater degree of legal certainty in the European Legal Space).<sup>42</sup>

Since Kosovo is not a party to the ECHR, it therefore has no international responsibility to follow the case-law of the ECtHR. In the constitutionalization of the ECHR, Kosovo did not follow the traditional ratification path and is therefore isolated from debates concerning the level and

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maintained that ECtHR case-law does not *ex proprio vigore* penetrate the domestic law of the ECHR signatories. Hence, the ECtHR only shows “whether a case standing before it is in line with the ECHR”, and it is for national bodies to enforce the matter domestically. However, based on Art. 46(1) ECHR, member states have the obligation to implement the ECtHR’s judgments in all cases to which they are a party (See Venice Commission [note 39]).

<sup>40</sup> See also the interview by *Fisnik Korenica* with Professor *Visar Morina* (note 25).

<sup>41</sup> Art. 53, 2008 Constitution of Kosovo (note 5).

<sup>42</sup> See the speech of the President of the ECtHR, Mr. *Jean-Paul Costa*, calling ECHR member states to recognize the *erga omnes* effect of ECtHR case-law although this is not legally binding. Proceedings of “High Level Conference on the Future of the European Court of Human Rights”, Interlaken, 18.-19.2.2010, Council of Europe, reproduced at <<http://www.coe.int>>.



form of connection between treaty and case-law. As Kosovo was not recognized by the CoE as having the capacity to become a member of the Council yet, it was not possible for Kosovo to accede to an instrument of the CoE such as the ECHR. Accordingly, the only valid conception of integration is that which one can derive from the Constitution itself and the context of its drafting. In this respect, Kosovo has obliged itself through its own Constitution to comply with ECtHR case-law. This is but a self-imposed domestic obligation deriving from the domestic legal order.

Therefore, the constitutionalization of the ECHR through Art. 22 of the Constitution does not extend to ECtHR case-law. Art. 53, discussed earlier, must be read as regulating and prescribing the status of ECtHR case-law within Kosovo's domestic legal order:

“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.”<sup>43</sup>

Following Art. 53 of the Constitution, one can claim that the international human rights dimension of Kosovo's Constitution is rather inclusive and broad. Art. 53 compulsorily refers the Kosovan courts to ECtHR case-law – an essential proposition concerning the relationship of Kosovan domestic law to European human rights law.<sup>44</sup>

In contrast to the process of constitutionalization of the ECHR, Art. 53 does not constitutionalize or incorporate ECtHR case-law into Kosovo's domestic legal order in the same way as Art. 22 constitutionalizes the ECHR. The duty to “follow” the contours of ECtHR case-law is to impose a general obligation on Kosovan courts to consider the case-law, but indicates that ECtHR case-law cannot serve as a source of direct effect of a right, freedom or duty flowing therefrom.<sup>45</sup> Accordingly, under Kosovo

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<sup>43</sup> Art. 53, 2008 Constitution of Kosovo (note 5).

<sup>44</sup> See S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, 2006, 279 (“[I]n 2002, for example, twenty-one European Constitutional courts declared themselves not bound by rulings of the European Court of Human Rights, although a larger majority said they were influenced by them.”).

<sup>45</sup> This raises the appealing question of whether the interpretation of the ECHR should be left to the ECtHR alone or whether this role should be complemented also by member states' courts. With this in mind, the Kosovan Constitutional system seems not to tolerate the Constitutional Court to make dynamic self-interpretations of the ECHR, released from the ECtHR case-law. For some interesting arguments on this, see Norwegian practice in E. Bjorge, *The Status of the ECHR in Norway: Should Norwegian Courts Interpret the Convention Dynamically?*, *European Public Law* 16 (2010), 45 et seq. Compare this with Greer's general arguments for a ECtHR that plays the role of an abstract ruler (note 44). On the other hand, as far as we are aware, no other authors have addressed this issue with regard to the

law, ECtHR case-law cannot be seen as a source of law from which one could directly derive rights.

Considering this conclusion, the obvious question that arises is, what model of connection is then fashioned? Art. 53 specifies that the constitutional rights and freedoms “must be interpreted consistently with [ECtHR case-law]”. To what extent are the courts bound by the jurisprudence of the ECtHR, or to what extent does this merely require “them to follow the lines of [ECtHR case-law]”?<sup>46</sup> If Art. 53 would subject Kosovo courts to ECtHR case-law, the latter would be binding and would oblige courts to use it as a source of authority when interpreting cases involving constitutional human rights. In contrast, asking courts “to follow the lines of [ECtHR case-law]” would mean that it would suffice for the courts not to contradict or disregard ECtHR case-law in their rulings.

Apparently the Kosovan Constitutional Court has adopted an approach laying somewhere between the extremes. This approach is based on a duty to “respect and consider” the case-law of the ECtHR, but not necessarily on a duty to refuse to do something which is not addressed by ECtHR case-law.<sup>47</sup> The Constitutional Court ruled in *Krasniqi v. RTK et al.* 2009 that “[...] [A]rticle 53 of the Constitution of the Republic of Kosovo should serve as ‘our very basis’ while interpreting all our decisions”.<sup>48</sup> At first glance, it seems that this ruling does not help in determining the scope of the duty required to follow ECtHR case-law. However, though reasoned in a very general manner, the above ruling shows that the Constitutional Court considers ECtHR case-law to be a basis for addressing not only is-

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Kosovo case. Such a “literature gap”, certainly, indicates the fact that Kosovo’s constitutional regime is in its infancy and that academic research in the field is only at its starting point.

<sup>46</sup> We develop the starting point of this debate from a similar logical background analysis delivered by *E. Wicks*, *Taking Account of Strasbourg? The British Judiciary’s Approach to Interpreting Convention Rights*, *European Public Law* 11 (2005), 405 et seq.

<sup>47</sup> This means that the Kosovan courts cannot explicitly refuse to recognize and follow the lines of a Strasbourg ruling. For a comparison, see how hard it is to assess whether domestic courts respect or follow Strasbourg, *E. Wicks* (note 46). Having to “follow”, rather than to be “bound to” ECtHR case-law, one must argue, indicates the level of the margin of appreciation and proportionality review that the Kosovan courts have on their hands. See a theoretical account on this general issue by *J. Gerards/H. Senden*, *The Structure of Fundamental Rights and the European Court of Human Rights*, *I.CON* 7 (2009), 619 et seq., at 623.

<sup>48</sup> *Krasniqi v. RTK et al.* (note 35). As highlighted above, each ruling of the Court in Kosovo is written and issued in three languages: Albanian, Serbian and English. The term “our very basis” is a quotation from the original ruling of the Constitutional Court: One should remind the reader here that the Kosovo Constitutional Court has three international judges who come, in the main, from international tribunals.

sues of human rights, but virtually every other constitutional issue as well.<sup>49</sup> Using this line of jurisprudential thought as a foundation, we can begin to analyze the question more substantially by considering the landmark cases in which ECtHR case-law has been viewed as binding or as required to be taken into account.<sup>50</sup>

The major Constitutional Court cases concerning the use of ECtHR case-law are: the 2009 cases of *Ibrahimi et al. v. Supreme Court*<sup>51</sup> and *Kastrati v. Supreme Court*<sup>52</sup> and the 2010 decision in *Bislimi v. MI et al.*<sup>53</sup> Review of these cases reveals that the Court consistently applies almost the same system of referring to Art. 53 in its reasoning. In *Ibrahimi et al. v. Supreme Court*, the Constitutional Court accepted its obligation to refer to ECtHR case-law but did not find itself obliged to follow ECtHR rulings (although it did so for the purpose of clarifying a constitutional provision and used such clarification as a means to rationalize the course of reasoning that it followed). The same line of reasoning can also be detected in *Kastrati v. Supreme Court*, where the Court followed an approach, once again, to demonstrate that it was obliged to refer to ECtHR case-law constitutionally, but indeed was not bound by its rulings. In the 2010 *Bislimi* case, the Constitutional Court went further and did in fact use ECtHR case-law to qualify the facts and to determine the merits of the case. However, its reasoning indicates that it did not do so out of duty – the Court did not consider itself *obliged* to base its ruling on ECtHR case-law. These three cases could be taken as the valid point of interpretation of Art. 53 of the Constitution.

In these three landmark rulings,<sup>54</sup> the Constitutional Court held that, on the basis of Art. 53 of the Constitution, ECtHR case-law does not consti-

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<sup>49</sup> For an indication of how broadly the Constitutional Court uses ECtHR case-law for referencing its cases, including cases that do not involve the interpretation of human rights, as governed by Art. 53 of the Constitution, see *Bislimi v. MI et al.* (note 36), and *Krasniqi v. RTK et al.* (note 35).

<sup>50</sup> Surprisingly enough, as *Schwartz* argues: “[...] [A]lthough the Convention has been cited by the Constitutional courts of Hungary, Poland, and Bulgaria, there is ‘usually very little analysis or discussion of the relevant case-law, but merely passing references to the relevant provisions’. In other words, while national Constitutional courts in central and eastern Europe may be said generally to uphold Convention standards, they do so without much direct reference to the Convention itself.” See *H. Schwartz, Struggle for Constitutional Justice in Post-Communist Europe*, 2000, 234.

<sup>51</sup> *Ibrahimi et al. v. Supreme Court* (note 36).

<sup>52</sup> *Kastrati v. Supreme Court*, KI 68/09, 2009, Constitutional Court of Kosovo, available at <<http://www.gjk-ks.org>>.

<sup>53</sup> *Bislimi v. MI et al.* (note 36).

<sup>54</sup> The Constitutional Court of Kosovo is quite a young court in regard to the level of established case-law on issues of structural human rights law, as highlighted above. This has

tute an obligation to which the court necessarily must submit. Instead, the case-law rather serves as an obligation to which the court refers to in crafting its argumentation and to clarify the facts that it needs to consider on constitutional grounds in each case. The Court, however, takes advantage, although implicitly, of ECtHR case-law when qualifying the merits of the case. This indicates respectful references to ECtHR case-law (especially compared with other South Eastern Europe countries, such as Albania).<sup>55</sup> All three cases, therefore, reflect the “mood” of the Constitutional Court; this suggests that ECtHR case-law is viewed as a tool for advancing the interpretation of constitutional provisions, rather than as an obligation requiring adherence to ECtHR precedents.<sup>56</sup>

Could the Constitutional Court refuse to follow a ruling of the ECtHR if, in the view of the Kosovo Court, a ruling of the European Court might curtail the rights guaranteed by the Constitution of Kosovo? What would the Constitutional Court do if a “*Solange*”<sup>57</sup> case should appear? We argue<sup>58</sup> that both the case-law of the Constitutional Court and Art. 53 of the Constitution leave room for the creation of a *Solange* situation. The same ra-

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facilitated our review of every ruling which has been handed down to date. Our considered opinion is that these three rulings represent important milestones concerning the authority of ECtHR case-law in Kosovo’s domestic legal order. It is also important to note that the Constitutional Court has received in these three years about 300 applications, approximately half of which have been adjudicated by the time of writing this paper.

<sup>55</sup> See, for instance, the case of Albania at *F. Korenica/D. Doli*, *The Relationship between International Treaties and Domestic Law: A View from the Albanian Constitutional Law and Practice*, *Pace Int’l L. Rev.* 24 (2012).

<sup>56</sup> This analysis is also supported by the observation that the Constitutional Court reviews only some ECtHR cases (as demonstrated in these three rulings) – due to the information overload that this process practically produces for the Court – and this is not sufficient for the Court in Kosovo to conclude what a fully-fledge position of ECtHR case-law has been (or should have been) in similar instances.

<sup>57</sup> We refer here to the 1974 landmark *Solange I* case, originally the *Internationale Handelsgesellschaft* case of the German Federal Constitutional Court. There the FRG Court ruled that it would refuse to recognize the primacy of EC/EU law if the latter infringed or diminished a right or freedom derived from German Federal Constitutional law. See, *Solange I – Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, decision of 29.5.1974, BVerfGE 37, 271 (1974), CMLR 540. For more about the *Solange* case, see Justice *S. Breyer*, *Constitutionalism, Privatization, and Globalization: Changing Relationships among European Constitutional Courts*, *Cardozo L. Rev.* 21 (2000), 1045. So, our question here is: Would the Kosovo Constitutional Court recognize the authority to itself to depart from the ECtHR case-law if it saw that ECtHR case-law diminished or restrained a right or freedom from the Kosovo’s constitutional catalogue of rights?

<sup>58</sup> This remains our conclusion, as there has not been any other work elaborating this issue neither in Albanian, Serbian or English. This gap in literature is due to the fact that Kosovo’s Constitutional regime is still very young. Accordingly, there are only a few, rather general, research contributions available.

tionale and system as used by the German Federal Constitutional Court could apply in Kosovo's constitutional justice system.

Since the Constitutional Court does not see itself bound to the use of ECtHR case-law as an immutable and inflexible source of precedent, one could argue that the Court would find itself freed from following an obligation stemming from ECtHR case-law if it were to determine that this would limit or curtail a right deriving from the Constitution of Kosovo. Even allowing for the fact that the Court recognizes and follows the constitutional provision that requires it to "be in line with" the ECtHR case-law,<sup>59</sup> this might still allow the Court to offer a broader interpretation of rights than those prescribed by ECtHR case-law,<sup>60</sup> given that allowing a broader scope of rights would not bring the court into conflict with its duty to "stay in line" with ECtHR case-law. This means that the phrasing "being consistent with" could be read as meaning "not being against"<sup>61</sup> ECtHR case-law. Therefore, Art. 53 of the Constitution and the current practice of the Constitutional Court also potentially condition the *Solange* rationale. The idea of allowing for this *Solange* loophole in the constitutional case-law in Kosovo suggests that the Constitutional Court seems to take international law merely as the minimum standard of human rights but not as the maximum. The Court could decide to go beyond the international standards in line with the reasoning explained above.<sup>62</sup>

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<sup>59</sup> As a reminder, this derives from Art. 53 of the Constitution of Kosovo.

<sup>60</sup> As regard to the Kosovo's case, this still remains merely a theoretical case. However, we take this approach from a specific provision – as an example – regulating the same issue in the European Union Charter of Fundamental Rights. The Charter establishes that the EU (including its Member States when acting as agents of EU law) may offer broader protection of rights than those enshrined by the ECHR. See: Charter of Fundamental Rights of the European Union, Art. 52, para. 3, available at <<http://www.europarl.europa.eu>>.

<sup>61</sup> We refer to both the letter and spirit of the case-law.

<sup>62</sup> Why would one make this comparison with *Solange* example here? Authors argue that the logic behind this constitutional position to the case-law of ECtHR lies on the concept of taking international law only as a source for enhancing the domestic human rights protection, but not as the source of validation of human rights that already exist domestically. A logical dualism wherein the Court ensures that domestic human rights protection could go beyond the international standards makes explicit the fact that international standards of human rights could be superseded and could not serve as a source of legitimation if a national court wishes to offer broader protection of rights.

#### 4. Article 53 and the Development of the Constitution

The rigid nature of the Constitution itself, which requires a double-majority vote for its amendment<sup>63</sup> preconditions the Constitutional Court to be the strongest and most authoritative constitution-maker – the institution rendering authoritative decisions and making practical constitutional rules – since legislative counter-balances can only challenge its rulings with great difficulty. In this context, the obligation deriving from Art. 53 to follow the case-law of the ECtHR, allows the Constitutional Court to interpret, and through interpreting, to make constitutional rules based on the case-law of the ECtHR.<sup>64</sup> Altogether, this directs the Constitutional Court to “Europeanize” the Constitution, through interpreting and ruling on constitutional provisions on the basis of the necessity to follow ECtHR case-law, leading to constitutional justice that may be heavily influenced by international jurisprudence.<sup>65</sup>

#### V. Conclusion

This article specifically analyzed the position of the ECHR and ECtHR case-law in the 2008 Constitution of Kosovo, identifying a novel form of integration of an international instrument into a domestic system of constitutional protection.

At the time of drafting the Constitution, Kosovo was not – nor indeed currently is – in the situation to sign, ratify or accede to an international agreement such as the ECHR. In order to bind Kosovan domestic standards

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<sup>63</sup> D. Doli/F. Korenica (note 12).

<sup>64</sup> Since the Constitution of Kosovo is of a rigid nature – one that could be amended only through high thresholds (supermajorities) and on basis of certain limits – the Constitutional Court of Kosovo takes the prerogative of making *factual* amendments to the Constitution as opposed to the *formal* ones that could be addressed by the parliament. This being said, the Constitutional Court – thanks to the rigid nature of the Constitution – becomes a very important actor in *factually* producing constitutional rules. The “factual” amendment to which we refer here is a concept which has been discussed in the paper cited in the below footnote.

<sup>65</sup> F. Korenica/D. Doli, Constitutional Rigidity in Kosovo: Relevance, Outcomes and Rationale, Pace Int'l L. Rev. (Online Companion), (February 2011), reproduced at <<http://digitalcommons.pace.edu>>. Of note is the fact that there is no contrasting argument to this in the existing literature, adding that the existing literature on Kosovo's constitutional law is rather scarce and probably very general to deal with such a narrow question. Also, when we refer to the international jurisprudence, we in fact connote to the jurisprudence of ECtHR, which substantially also originates from the jurisprudence of many international courts and tribunals.

of human rights protection to international standards and instruments, these instruments have been directly constitutionalized within the framework of the Constitution itself. As Kosovo has thus not ratified these instruments, and does not currently have the full international legal capacity required for full participation in these instruments, their integration and effect within domestic law has a very different logic from that found even in monist states. This “constitutionalization without ratification” approach raises a unique set of questions as to the logic of integration, rank, applicability, effect and function of these instruments in Kosovan law. These questions are fascinating in the isolated consideration of how the system functions in Kosovo, but also as they lead us to question our own conceptions of the function of international instruments of protection, and by extension, the relationship between domestic and international law.

To contextualize the discussion, the article offered a broad overview of Kosovo’s constitutional human rights system and explained that the constitutionalization of international human rights instruments, far from being an original conception of the drafters of the Constitution, was in fact a result and continuation of a trend stretching back to the beginning of the state building process, tied tightly to the role of international actors and influence over Kosovan domestic administration.

With this background in mind, the article then closely analyzed Art. 22, through which a range of international instruments, including the ECHR, gain constitutional rank within the domestic order.

This provided the theoretical legal framework for the more detailed analysis of the status of the ECHR and ECtHR case-law. The above analysis of Art. 22 leads to the conclusion that the ECHR has constitutional rank and is thus both directly applicable and effective in the domestic order. Therefore, all laws in Kosovo must conform to ECHR norms and that non-conformity would in fact be ground for constitutional review before the domestic courts.

However, the ECHR cannot simply be considered as a stand-alone legal instrument, but indeed has an extensive machinery devoted to its interpretation and application, embodied most prominently by ECtHR case-law. While in international law the two may have an almost inseparable connection, the authors argue that, by virtue of Kosovo’s unique constitutional status and the adopted approach of integration through constitutionalization which excludes tying the ECHR to ECtHR case-law, ECtHR case-law does not necessarily have a direct effect in Kosovo. According to Art. 53 of the Constitution ECtHR case-law is not directly applicable or effective in the same sense as the ECHR, but does perform a judicial function in the

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sense that the courts are obliged to “be consistent with” European Court rulings. Through consideration of Kosovan case-law interpreting this Article, however, it is clear that this article has been interpreted as an obligation to follow ECtHR case-law stopping short of establishing that ECtHR case-law creates binding borders for the courts. This leaves the choice and option to use ECtHR case-law substantively open.

This form of interpretation of the role of ECtHR case-law within the Kosovan system leads to two critical observations. First, that there would be the possibility to establish a *Solange* situation in Kosovan jurisprudence – in the sense that, should a conflict between Constitution and ECtHR case-law arise, the Court would be acting consistently in enforcing constitutional standards at the expense of staying strictly in line with the minimum standards of the ECtHR jurisprudence.

Second, due to the relatively inflexible construction of the constitutional system, the scope of movement given to the Constitutional Court by the possibility of integrating the wide ranging ECtHR case-law into its jurisprudence places it in a uniquely strong position in the interpretation, and thus the development, of the Kosovan Constitution. In this sense, Art. 53 has not only jurisprudential but also structural relevance.