



## ARTICLES

# PROTECTION WITHOUT RECOGNITION: THE ROLE OF THE COUNCIL OF EUROPE IN STRENGTHENING HUMAN RIGHTS IN KOSOVO

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ABSTRACT: Areas of contested statehood present challenges to human rights on both a normative and a practical level. As areas of contested statehood face difficulties in acceding to human rights treaties and international organizations, more creative solutions have had to be found to ensure the protection of human rights in line with international standards. In recent years, Kosovo has been one of the most prominent examples of an area of contested statehood in Europe. This *Article* focuses on the role of one key international actor – the Council of Europe (CoE) – regarding the promotion of human rights in Kosovo. Combining doctrinal and empirical analysis, the *Article* discusses two key aspects of the relationship between the CoE and Kosovo: (1) the constitutionalisation and judicial application of the CoE's human rights standards in Kosovo's constitutional legal order; and (2) Kosovo's interaction with the CoE's human rights standard-setting, monitoring, and advisory mechanisms. This *Article* argues that these two aspects of the CoE's and Kosovo's relationship have been relatively impactful in embedding the CoE's human rights standards in Kosovo. This has occurred to such an extent that Kosovo's human rights system has now become inextricably tied to the Council of Europe's human rights standards, despite not (yet) being a member of the CoE.

KEYWORDS: constitutionalisation – contested statehood – Council of Europe – European Convention on Human Rights – European Court of Human Rights – Kosovo.

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## I. INTRODUCTION

A large part of the power of human rights lies in their claim to protect all individuals without prejudice. This counts doubly for a human rights institution such as the Council of Europe (CoE) whose effectiveness is premised on upholding this claim in its protection of individuals under the jurisdiction of its state parties.

Areas of contested statehood present an intricate test for the effective protection of human rights. These are territorial entities, irrespective of how they came into being, whose statehood and sovereignty are disputed internationally.<sup>1</sup> Their lack of recognition complicates the protection of human rights at a legal, political, and practical level.<sup>2</sup> For example, a state party to the Council of Europe must accede to the European Convention on Human Rights (ECHR) and strive to respect, protect, and fulfil the human rights of the individuals under its jurisdiction.<sup>3</sup> Furthermore, the state party accepts the jurisdiction of the European Court of Human Rights (ECtHR) and must thus abide by the Court's judgments.

However, that state can have a breakaway region in which it does not exercise effective control and thus cannot safeguard human rights.<sup>4</sup> Moreover, while it is complicated to derive human rights accountability from the responsibility of the original state, it is equally difficult to lay that burden on the *de facto* government of the area of contested statehood. For legal and political reasons, chief among which are its contested statehood and controversiality, it is challenging for the area of contested statehood to accede to the CoE and ECHR. This risks creating a human rights "vacuum" where the *de facto* government has some obligations under international human rights law but cannot accede to any of the relevant monitoring or enforcement mechanisms.<sup>5</sup> This is harmful to the overall mission of the Council of Europe in terms of undermining the protection, facilitation, and promotion of human rights under the ECHR.

<sup>1</sup> D Bouris and D Papadimitriou, 'The EU and Contested Statehood in its Near Abroad: Europeanisation, Actorness and State-building' (2020) *Geopolitics* 273, 280 ff; see also: D Papadimitriou and P Petrov, 'Whose Rule, Whose Law? Contested Statehood, External Leverage and the European Union's Rule of Law Mission in Kosovo' (2012) *JComMarSt* 746.

<sup>2</sup> See for an extensive study: A Berkes, *International Human Rights Law Beyond State Territorial Control* (CUP 2021); A Forde, *European Human Rights Grey Zones: The Council of Europe and Areas of Conflict* (CUP 2024).

<sup>3</sup> Arts. 1 and 3 of the Statute of the Council of Europe [1949]. The ECHR is the CoE's main human rights treaty, which also established the ECtHR. This is the CoE's only truly judicial organ and is a key part of its human rights infrastructure.

<sup>4</sup> This was recognized by the ECtHR in cases such as *Azemi* which was ruled inadmissible *ratione personae* on the grounds that Serbia lacked effective control over Kosovo and UNMIK: ECtHR *Ali Azemi v Serbia* App n. 11209/09 [5 November 2013]; see also: K Larsen, "'Territorial Non-Application' of the European Convention on Human Rights' (2009) *NordicJIL* 73, 88 ff; M Milanovic and T Papic, 'The Applicability of the ECHR in Contested Territories' (2018) *ICLQ* 779.

<sup>5</sup> M Milanovic and T Papic, 'The Applicability of the ECHR in Contested Territories' cit. 791; A Berkes, *International Human Rights Law Beyond State Territorial Control* cit. 262, 327 ff.

States are the principal bearers of human rights obligations. This remains true even though there is a wealth of alternative actors and mechanisms which also serve to protect and promote human rights.<sup>6</sup> Human rights institutions tend to operate on a state-centric basis, and internationally, the onus remains on governments to hold themselves and third parties accountable.<sup>7</sup> Because of this, attempts to fill this human rights “vacuum” should begin with the state.

For over two decades, Kosovo has been one of the most prominent cases of contested statehood in Europe. Since the end of the Kosovo War in 1999, Kosovo has been de facto separate from Serbia, yet it remains in a state of limbo.<sup>8</sup> Kosovo unilaterally declared its independence in 2008 and is on the path to complete self-governance. However, its statehood is still contested by many states.<sup>9</sup> Kosovo’s contested statehood has significant legal and political consequences. For one, Kosovo has been met with staunch resistance to its attempts at international integration.<sup>10</sup> Accession to international organizations and treaties has thus far been challenging. This has been to the detriment of the citizens and residents of Kosovo to whom fewer avenues of legal protection and redress are now afforded compared to states which have acceded to the CoE and ECHR. Consequently, both domestic and international actors have attempted to close the human rights gap. Due to Kosovo’s contested statehood they had to find alternative and creative ways to do so.<sup>11</sup>

In the literature to date on engaging with Kosovo, the EU’s role overshadows that of most other entities.<sup>12</sup> Not least through the European Union’s Rule of Law Mission in

<sup>6</sup> J Fraser, ‘Challenging State-Centricity and Legalism: Promoting the Role of Social Institutions in the Domestic Implementation of International Human Rights Law’ (2019) *The International Journal of Human Rights* 974, 975 ff; see e.g., Human Rights Council, Guiding Principles on Business and Human Rights of 16 June 2011, HR/PUB/11/04.

<sup>7</sup> A Callamard, ‘The Human Rights Obligations of Non-State Actors’ in RF Jorgensen (ed.) *Human Rights in the Age of Platforms* (MIT Press 2019) 199 ff.

<sup>8</sup> P De Hert and F Korenica, ‘The New Kosovo Constitution and its Relationship with the European Convention on Human Rights: Constitutionalization “Without” Ratification in Post-Conflict Societies’ (2016) *HJIL* 143, 148 ff.

<sup>9</sup> *Ibid.* As of 17 February 2023, only about half of the world’s countries recognize Kosovo as a state. CoE state parties that do not recognize Kosovo include Spain, Romania, Greece, Slovakia, and, unsurprisingly, Serbia. AJ Labs, ‘Which Countries Recognize Kosovo’s Statehood’ (17 February 2023) Al Jazeera [www.aljazeera.com](http://www.aljazeera.com).

<sup>10</sup> K Istrefi, ‘Kosovo’s Quest for Council of Europe Membership’ (2018) *Review of Central and East European Law* 255.

<sup>11</sup> K Novotna, ‘Laboratory of the International Community? Role of International Organizations in the Re-Establishment of the Rule of Law in Kosovo’ (2010) *Proceedings of the Annual Meeting (American Society of International Law)* 588.

<sup>12</sup> See e.g., A Lefteratos, ‘Contested Statehood, Complex Sovereignty and the European Union’s Role in Kosovo’ (2023) *European Security* 294; FM Seebass, ‘Nationbuilding gegen Nationalismus? Die Bestrebungen der Europäischen Union, die “albanische Frage” in Kosovo zu lösen’ in A Salamurović (ed.) *Konzepte der Nation im europäischen Kontext im 21. Jahrhundert* (Springer 2023) 245; L Reis, ‘From a Protectorate to a Member State of the European Union: Assessing the EU’s Role in Kosovo’ in BF Costa (ed.)

Kosovo (EULEX), the EU has been the most prominent international actor in the state-building and governance of Kosovo for over one and a half decades. Moreover, the EU's approach of using the (in)famous asterisk (\*) behind Kosovo's name embodies the tightrope it is walking between allowing some forms of international legal engagement while avoiding the impression that it fully recognizes Kosovo as a state.<sup>13</sup> The EU's prominent yet complex role was underlined again in early 2023, both by a judgment of the Court of Justice of the EU, ruling that the EU's engagement with Kosovo does not amount to implicit recognition of Kosovo's statehood, and by the EU's role in brokering the Ohrid Agreement on the normalization of relations between Kosovo and Serbia which was signed in March 2023.<sup>14</sup>

Although it is of course valuable to focus on the role and actorness of the EU, to obtain a more complete picture, the work of other actors should not be neglected. Besides the EU, the Council of Europe has also been highly active in Kosovo, yet the role it has played in Kosovo has received far less attention.<sup>15</sup>

Therefore, this *Article* aims to bring the role of the Council of Europe and its contributions to human rights in Kosovo more into focus. It does so specifically through both a systematic account of the use of the ECHR by the Constitutional Court of Kosovo (CCK) and an analysis of the interactions of Kosovar institutions with the CoE more broadly, *i.e.*, beyond the ECHR and ECtHR. The main argument of the *Article* is that through the constitutionalisation of European human rights law, as well as the Council of Europe's standard-setting, monitoring, and advisory mechanisms, the CoE's human rights standards have become the backbone of Kosovo's human rights infrastructure, despite Kosovo not (yet) being a member of the CoE.

*Challenges and Barriers to the European Union Expansion to the Balkan Region* (IGI Global 2022) 278; G Noutcheva, 'Contested Statehood and EU Actorness in Kosovo, Abkhazia and Western Sahara' (2020) *Geopolitics* 449; E Baracani, 'Evaluating EU Actorness as a State-Builder in "Contested" Kosovo' (2020) *Geopolitics* 362; D Bouris and D Papadimitriou, 'The EU and Contested Statehood in its Near Abroad: Europeanisation, Actorness and Statebuilding' (2020) *Geopolitics* 273.

<sup>13</sup> See, as the example *par excellence*, the EU's Stabilization and Association Agreement with the EU and on the use of the asterisk after the word "Kosovo", P van Elsuwege, 'Legal Creativity in EU External Relations: The Stabilization and Association Agreement between the EU and Kosovo' (2017) *European Foreign Affairs Review* 393, 402; Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo\*, of the other part [2016].

<sup>14</sup> Case C-632/20 P *Spain v Commission* ECLI:EU:C:2023:28 para. 72; see also: G Fedele 'A Country but not a State? The Apparent Paradox of International Statehood in Case C-632/20 P, *Spain v Commission (Kosovo)*' *European Papers* (European Forum Insight of 11 December 2023) [www.europeanpapers.eu](http://www.europeanpapers.eu) 537; United Nations Security Council, Agreement on Normalizing Relations between Serbia, Kosovo "Historic Milestone", Delegate Tells Security Council of 27 April 2023, SC/15268.

<sup>15</sup> The notable and laudable exceptions being B Hohler and B Sconczyk, 'The Role and Impact of the European Convention on Human Rights Beyond States Parties: The Curious Case of the ECHR in Kosovo' in S Schiedermaier, A Schwarz and D Steiger (eds) *Theory and Practice of the European Convention on Human Rights* (Hart 2022) 261, which also addresses the link between the ECHR and the Kosovo Specialist Chambers, and A Ford, *European Human Rights Grey Zones: The Council of Europe and Areas of Conflict*, cit. 143 ff, which also takes a wider view to include the human rights relationship within the UN.

To set the scene, the *Article* first delves into the (constitutional) history of Kosovo (Section II). Next, the *Article* evaluates the manner and degree to which the ECHR and ECtHR case law have been integrated into Kosovo's legal order. This is done through doctrinal analysis of the Constitution of Kosovo and key judgments of the Constitutional Court of Kosovo, complemented by an empirical approach to the Court's case law as a whole (Section III). In the final section, the role of the CoE's standard-setting, monitoring, and cooperation mechanisms in protecting and promoting human rights in Kosovo is analysed (Section IV). The final section summarises the *Article's* main findings and provides an outlook (Section V).

## II. A BRIEF (CONSTITUTIONAL) HISTORY OF KOSOVO

In simplified terms, most of what is now the government and legal infrastructure of Kosovo can be traced back to the end of the Kosovo War. The War began on 28 February 1998 and was fought between the Kosovo Liberation Army and the armed forces of the Federal Republic of Serbia and Montenegro. In March of 1999, as negotiations stalled, NATO launched an intervention into the conflict as a claimed response to threats of further ethnic cleansing and other atrocities.<sup>16</sup> Soon after, on 11 June 1999, that campaign came to an end. In the aftermath, an international presence was set up, agreed to in the Kumanovo Agreement, and laid out in United Nations Security Council Resolution 1244.<sup>17</sup> This resolution, while reaffirming Serbia's sovereignty over the province of Kosovo, set up the United Nations (UN) Interim Administration Mission in Kosovo (UNMIK) with the aim of establishing "an interim political framework agreement providing for substantial self-government for Kosovo".<sup>18</sup> Hereby, the long process of internationally supported state building began in Kosovo.<sup>19</sup>

Given the politically sensitive context of the post-war era, all these efforts have been undertaken without the taking of a position on Kosovo's statehood or lack of it – a concept termed status-neutrality.<sup>20</sup> As such, in providing support, the focus is laid on the building up of "organic processes of social formation" rather than the realization of a particular vision of Kosovo's final status.<sup>21</sup> This was the case for UNMIK as well as for the European Union Rule of Law Mission in Kosovo after it.

During UNMIK's period as the main administrator in Kosovo, it operated under the directions of UN Security Council Resolution 1244. The Resolution had tasked UNMIK chiefly

<sup>16</sup> NATO, Press Release on the situation in and around Kosovo of 12 April 1999, M-NAC-1(99)51.

<sup>17</sup> Security Council, Resolution 1244 of 10 June 1999, UN Doc S/RES/1244 Annex II.

<sup>18</sup> *Ibid.* 379-380; Resolution 1244 (1999) cit. para. 8.

<sup>19</sup> K Novotna, 'Laboratory of the International Community? Role of International Organizations in the Re-Establishment of the Rule of Law in Kosovo' cit.

<sup>20</sup> *Ibid.* 589; A Beha and A Hajrullahu, 'Soft Competitive Authoritarianism and Negative Stability in Kosovo: Statebuilding from UNMIK to EULEX and beyond' (2020) Southeast European and Black Sea Studies 103.

<sup>21</sup> D Chandler, 'Kosovo: Statebuilding Utopia and Reality' (2019) Journal of Intervention and Statebuilding 545, 553.

with the upholding of peace and security, the post-war reconstruction, the performance of civilian administrative functions, the maintenance of the rule of law and human rights, and the gradual transfer of those duties to domestic institutions.<sup>22</sup> In line with this, UNMIK held supreme governance competences in Kosovo. In practice, the United Nations itself operated two of the sections or “pillars” of UNMIK: “Humanitarian affairs” and “Civilian Administration”. Meanwhile, the Organization for Security and Cooperation in Europe (OSCE) led “Democratization and Institution Building”, and the European Union (EU) “Economic Reconstruction”.<sup>23</sup> Thus, as a precursor to later developments, the EU was already involved in statebuilding in Kosovo from a very early stage.

Though local actors were still excluded from key administrative functions, UNMIK sought cooperation with local political representatives resulting in an Agreement on a Joint Interim Administrative Structure.<sup>24</sup> Later, in 2001, the Constitutional Framework for Provisional Self-Government in Kosovo was adopted.<sup>25</sup> Although it was not actually a constitution, the Constitutional Framework already formally established strong ties between international human rights law and the governance of Kosovo.<sup>26</sup> Accordingly, under UNMIK, international human rights law first became directly applicable in Kosovo’s legal order.<sup>27</sup>

Throughout the early 2000s, the UN’s influence started to decrease.<sup>28</sup> In light of this, in 2005, the Special UN Envoy for Kosovo, Kai Eide, found that the EU would have to occupy a more prominent role in the state building process.<sup>29</sup> Furthermore, he argued that insofar as the end goal of that process was European integration, the “Kosovo project” was largely a European issue.<sup>30</sup> This was reaffirmed in the 2007 Ahtisaari Plan.<sup>31</sup>

The Ahtisaari Plan was a status settlement plan that was brought into being after a lengthy negotiation process. It was proposed by UN Special Envoy for Kosovo Martti

<sup>22</sup> Resolution 1244 (1999) cit. paras 10 and 11.

<sup>23</sup> M Brand, ‘The Development of Kosovo Institutions and the Transition of Authority from UNMIK to Local Self-Government’ (CASIN Research Paper 2003) 10.

<sup>24</sup> *Ibid.* 3.

<sup>25</sup> UNMIK, Regulation No. 2001/9 of 15 May 2001 on a Constitutional Framework for Provisional Self-Government in Kosovo.

<sup>26</sup> P De Hert and F Korenica, ‘The New Kosovo Constitution and its Relationship with the European Convention on Human Rights: Constitutionalization “Without” Ratification in Post-Conflict Societies’ cit. 150; Regulation No. 2001/9 on a Constitutional Framework cit. paras 3-5.

<sup>27</sup> Regulation No. 2001/9 cit. para. 3.3.

<sup>28</sup> See, for example, Security Council, Letter from the Secretary-General addressed to the President of the Security Council of 7 October 2005, UN DOC S/2005/635, 5: “The United Nations has done a credible and impressive job in fulfilling its mandate in difficult circumstances. But its leverage in Kosovo is diminishing. Kosovo is located in Europe, where strong regional organizations exist. In the future, they — and in particular the European Union (EU) — will have to play the most prominent role in Kosovo.”

<sup>29</sup> *Ibid.*; see also A Semenov, ‘Kosovo: A Silent European Consensus’ (2020) *IntlStud* 375, 379 ff.

<sup>30</sup> A Semenov, ‘Kosovo: A Silent European Consensus’ cit.

<sup>31</sup> Security Council, Letter from the Secretary-General addressed to the President of the Security Council of 26 March 2007, UN Doc S/2007/168.

Ahtisaari and would lay the groundwork for much of the future developments in Kosovo's governance. One key recommendation of the Ahtisaari Plan was the creation of a "European Security and Defence Policy Mission".<sup>32</sup> This mission was to be tasked chiefly with monitoring, mentoring, and advising on everything related to the Kosovar rule of law. In addition, the mission would have limited investigative, prosecutorial, and executive powers in several crucial and sensitive areas. Based on this, on 14 December 2007, the European Union Rule of Law Mission in Kosovo was approved by the Council of the European Union, under the umbrella of UNMIK.<sup>33</sup> Following political developments – in particular *vis-à-vis* Serbia – the final decision on EULEX was taken on February 4<sup>th</sup>, 2008, in the form of a Council Joint Action.<sup>34</sup> The new mission largely followed the blueprint laid out in the Ahtisaari Plan. Thereupon, Kosovo was now under the chief supervision of the EU.

Despite the fact that EULEX was created under the umbrella of UNMIK, it was not entirely a successor of the latter.<sup>35</sup> Though Resolution 1244 was never replaced, EULEX only formally operated on the same legal basis as UNMIK. EULEX was designed mainly as a rule of law mission with a focus on fighting corruption and organized crime.<sup>36</sup> Specifically, EULEX was tasked with providing support to Kosovo's rule of law institutions in their development, strengthening, independence, freedom from political interference, multi-ethnicity, sustainability, accountability, and adherence to international standards.<sup>37</sup> This continues to be EULEX's overarching goal. As such, EULEX brought in its own judges, prosecutors, and police force. However, outside of the areas where it held executive functions itself, EULEX was relegated to the aforementioned role of monitoring, mentoring, and advising local institutions.<sup>38</sup>

While EULEX was technically created as a status-neutral mission, that position would quickly become much harder to maintain. On 17 February 2008, 109 of the 120 members of the Assembly of Kosovo, the unicameral legislature under the 2001 Constitutional Framework, voted to unilaterally declare Kosovo's independence, bringing a long process to fruition. As the International Court of Justice ruled in its Advisory Opinion on the matter, this declaration was not in violation of international law.<sup>39</sup> However, what the

<sup>32</sup> *Ibid.* art. 12.

<sup>33</sup> European Council Conclusions of 14 December 2007.

<sup>34</sup> Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO.

<sup>35</sup> K Novotna, 'Laboratory of the International Community? Role of International Organizations in the Re-Establishment of the Rule of Law in Kosovo' cit. 589.

<sup>36</sup> *Ibid.*

<sup>37</sup> Art. 2 Council Joint Action 2008/124/CFSP cit.

<sup>38</sup> *Ibid.* art. 3; on 3 June 2021, the Council of the EU adopted Decision (CFSP) 2021/904 of the Council of 3 June 2021 amending Joint Action 2008/124/CFSP on the European Union Rule Mission in Kosovo\* (EULEX KOSOVO), which extended the mandate of EULEX Kosovo until 14 June 2023.

<sup>39</sup> ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [22 July 2010] Rep 403.

Court chose not to settle was the actual status of Kosovo following the Declaration of Independence.<sup>40</sup> Instead, it left the question of statehood politically open.

Soon after the Declaration of Independence, on 9 April, the newly declared Republic of Kosovo ratified its constitution. The Constitution was drafted by a twenty-one-member commission with support and oversight from both international constitutional advisors and international implementation agencies to ensure adherence to international and European norms, for example regarding the adequate protection of minorities.<sup>41</sup> Furthermore, the creation of the Constitution was deeply tied to the Ahtisaari Plan which had laid down conditions for the drafting of the document.<sup>42</sup> For example, the Ahtisaari Plan had demanded the elevation of international human rights law and some other aspects of international law to constitutional status.<sup>43</sup> Of the human rights treaties to which the Plan bound Kosovo, the ECHR was placed most centrally.<sup>44</sup> The final 2008 Constitution follows many of these recommendations almost wholesale.<sup>45</sup> Therefore, the ECHR, along with other human rights treaties, occupies a key role in Kosovo's constitutional legal order and human rights architecture.

This could create the impression that the constitutionalisation of international law and in particular the ECHR has been imposed on Kosovo. On the contrary, while internationally encouraged, in many instances, this has been a domestic political choice. Though, according to Hohler and Sonczyk, the CoE's human rights standards have a longer history as a basis for review under UNMIK and EULEX, Kosovo exists in a semi-permanent state of liminality and flux which has driven its position on international integration.<sup>46</sup> As Musliu argues, Kosovo's current political status is that of neither an existentially threatened nor a fully recognized state; neither a manifestly illegitimate nor a fully legitimate entity; and neither a country that is integrated into the EU nor one that is completely separated from the EU.<sup>47</sup> While Kosovo may possess certain markers of statehood, to date (writing in May

<sup>40</sup> R Falk, 'The Kosovo Advisory Opinion: Conflict Resolution and Precedent' (2011) AJIL 50, 50.

<sup>41</sup> V Morina, F Korenica and D Doli, 'The Relationship Between International Law and National Law in the Case of Kosovo: A Constitutional Perspective' (2011) ICON 274, 277; M Weller, *Contested Statehood: Kosovo's Struggle for Independence* (OUP 2009) 277.

<sup>42</sup> Security Council, Letter from the Secretary-General addressed to the President of the Security Council – Addendum: Comprehensive Proposal for the Kosovo Status Settlement of 26 March 2007, UN Doc S/2007/168/Add.1, arts 2-3 and 10.

<sup>43</sup> *Ibid.* arts 2-4.

<sup>44</sup> F Korenica and 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' (2011) Liverpool Law Review 209, 213 ff.

<sup>45</sup> Constitution of the Republic of Kosovo (With Amendments I-XXVI) [2008] (hereinafter: Constitution of the Republic of Kosovo); P Gruda, D Demiri and Z Cerkini, 'Constitutionalization of International Instruments on Human Rights: Lessons from Kosova' (2020) Perspectives of Law and Public Administration 44, 45.

<sup>46</sup> B Hohler and B Sonczyk, 'The Role and Impact of the European Convention on Human Rights Beyond States Parties: The Curious Case of the ECHR in Kosovo' cit. 267 ff.

<sup>47</sup> V Musliu, 'Spectres of Kosovo: 20 Years of Liminality and Aporia' (2020) Journal of Intervention and Statebuilding 556, 556.



2024), only 110 states worldwide, and 22 out of the 27 EU member states have recognized it.<sup>48</sup> Still many countries strongly oppose Kosovo's statehood.<sup>49</sup> Most notable among these are Serbia, China, Russia, and Spain. Therefore, a key facet of Kosovo's foreign policy has been a quest for greater international recognition.<sup>50</sup>

To this end, Kosovo's Government has attempted to accede to as many international organizations and instruments as possible. Accession has been possible in contexts where a unanimous vote is not necessary. For example, Kosovo was able to become a member of the World Bank and International Monetary Fund in 2009. However, this is more difficult in contexts where unanimity is required.<sup>51</sup> In these cases, states that, for example, do not recognize Kosovo for political reasons (e.g., wanting to avoid granting legitimacy to separatist movements) can block accession.

What does this mean for Kosovo's accession to the Council of Europe? More than two-thirds of the member states of the CoE recognize Kosovo – the number of votes required to approve accession.<sup>52</sup> While the 2023 Ohrid Agreement does not commit Serbia to recognize Kosovo, it does include a commitment to not obstruct its accession to the CoE, among other international organizations.

Moreover, it can be argued that Kosovo fulfils the requirements of being a European state that accepts the foundational principles of the CoE.<sup>53</sup> However, the CoE's admission procedure still faces several hurdles to be overcome. These include a member having to call a vote in the Committee of Ministers, thereby sponsoring Kosovo's invitation for membership, the subsequent two-thirds majority quorum and vote, as well as the diverse composition of the members of the CoE's Parliamentary Assembly, which is empowered to establish the exact criteria for membership.<sup>54</sup> At the end of the day, Kosovo may fulfil the substantive requirements for accession to the CoE, yet whether it is actually able to accede remains a highly political matter.

In April 2023, the Committee of Ministers approved Kosovo's bid for membership and communicated Kosovo's application to the Parliamentary Assembly.<sup>55</sup> In April 2024, the Parliamentary Assembly recommended that Kosovo be invited to become a member of the

<sup>48</sup> Ministry of Foreign Affairs and Diaspora of Kosovo, *International Recognition of the Republic of Kosovo* mfa-ks.net; European Parliament, Resolution 2011/2885(RSP) on the European Integration Process of Kosovo of 29 March 2012, art. 1.

<sup>49</sup> K Istrefi, 'Kosovo's Quest for Council of Europe Membership' cit. 256, 273.

<sup>50</sup> E Mehmeti, 'Quest for Statehood: Kosovo's Plea to Join International Organizations' (2017) *European Journal of Social Sciences Education and Research* 370.

<sup>51</sup> K Istrefi, 'Kosovo's Quest for Council of Europe Membership' cit. 256.

<sup>52</sup> Statute of the Council of Europe art. 20.

<sup>53</sup> *Ibid.* art. 4.

<sup>54</sup> *Ibid.* arts 4, 6 and 20; K Istrefi, 'Kosovo's Quest for Council of Europe Membership' cit. 271.

<sup>55</sup> Decision CM/Del/Dec(2023)1464bis/2.4 of the Deputies of the Council of 24 April 2023; also Consulate General of the Republic of Kosovo in Strasbourg, Note Verbale Ref 12/2022 and Letter Ref 248/2022 of 12 May 2022; Decision CM/Del/Dec(2023)1464bis/2.4 cit.

CoE.<sup>56</sup> The Assembly's report, at the same time, stressed also "the unprecedented circumstances of this application, as a number of Council of Europe member States do not recognise Kosovo as a State", calling for "[d]iplomacy, dialogue and compromise" moving forward.<sup>57</sup> Thus, while steps towards CoE membership have been made, obstacles remain. In any event, regardless of whether (or when) Kosovo ultimately becomes a member state of the CoE, there are valuable lessons to be learned from Kosovo's journey to date and the role of the Council of Europe in it, towards protecting human rights.

Between UNMIK to EULEX, the international community has been highly involved in statebuilding in Kosovo, yet attempts by the country itself to integrate more internationally have been met with staunch opposition. Due to this, Kosovo and the involved international actors have had to become more creative. Since accession can be impossible or very difficult, often the solution has had to be found domestically. The foundations for this can already be seen in Kosovo's constitutional history. This history demonstrates the deep ties between the emergent governance of Kosovo and the entrenchment of international human rights law in its nascent legal order. To elaborate on this still underappreciated aspect of Kosovo's journey, the following section analyses the alignment of Kosovo's human rights infrastructure with European standards.

### III. HUMAN RIGHTS IN KOSOVO'S LEGAL ORDER

There are two main ways through which Kosovo's legal order aligns itself with European human rights standards. The first is through the pride of place that Kosovo's constitution gives to human rights. The second is through frequent references made by the Constitutional Court of Kosovo to the case law of the European Court of Human Rights.

#### III.1. CONSTITUTIONAL INTEGRATION

In line with the Ahtisaari Plan, Kosovo's 2008 Constitution employed an innovative approach to working around the country's contested statehood by incorporating human rights standards directly. In doing so, the drafters of the Constitution bound Kosovo to mechanisms of international human rights law to which it could not actually accede or directly participate in shaping. This constitutionalisation of an extensive list of human rights treaties was part of an effort to establish an effective human rights infrastructure in Kosovo while accession to international human rights mechanisms remained difficult.<sup>58</sup>

In its preamble, the Constitution states that Kosovo is committed to "guarantee[ing] the rights of every citizen, civil freedoms and equality of all citizens before the law".<sup>59</sup> This

<sup>56</sup> Opinion 302 (2024) of the Parliamentary Assembly and of the Council of 16 April 2024 (provisional version), Application by Kosovo\* for membership of the Council of Europe.

<sup>57</sup> *Ibid.* para 20.

<sup>58</sup> P De Hert and F Korenica, 'The New Kosovo Constitution and its Relationship with the European Convention on Human Rights: Constitutionalization "Without" Ratification in Post-Conflict Societies' cit. 144 ff.

<sup>59</sup> Preamble of the Constitution of Kosovo.

already demonstrates the foundational role that human rights are supposed to play in the country's constitutional legal order. Accordingly, out of the Constitution's 162 articles, arts 21 through 62 are devoted to human rights. These set out key principles of Kosovo's human rights infrastructure along with a catalogue of human rights. Among these are not only civil and political rights but also socio-economic rights such as the rights to work and "health and social protection" in arts 49 and 51, respectively.<sup>60</sup>

Besides these, art. 22 provides a range of human rights treaties which are directly applicable and have priority over other domestic laws. These include several Council of Europe instruments, *i.e.*, the ECHR and its protocols, the CoE Framework Convention for the Protection of National Minorities (FCPNM), and (following Amendment no. 26 in 2020) the CoE Convention on Preventing and Combating Violence Against Women and Domestic Violence. Moreover, the article refers to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, 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. Furthermore, according to art. 19 of the Constitution, any human rights treaty that Kosovo may become a party to in the future enjoys the same position.

These treaties do not enjoy primacy over the Constitution itself.<sup>61</sup> Nevertheless, as De Hert and Korenica note, they are of constitutional status.<sup>62</sup> As such, all non-constitutional laws must be in harmony with these treaties on which the Constitutional Court is the final arbiter. This, together with the wide range of constitutionally protected human rights, gives the Constitution an intentionally progressive and human-right-centric outlook.<sup>63</sup>

In terms of laying out the legal structure for the relationship between the Council of Europe and Kosovo, the Constitution creates a conduit. According to art. 53, the "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>64</sup> Clearly, ECtHR case law has a key role to play in Kosovo's constitutional legal order, including when it comes to interpreting human rights that are enshrined in other instruments. Yet, the exact position of the case law of the ECtHR remains unclear and therefore requires a deeper analysis of the Constitution.

Here, two legal questions are important to consider: (1) to what degree is the ECtHR's jurisprudence constitutionally binding, and (2) what level of direct applicability does that jurisprudence have? Regarding the first question, the act of interpretation mentioned in

<sup>60</sup> *Ibid.* art. 51.

<sup>61</sup> J Marko, 'The New Kosovo Constitution in a Regional Comparative Perspective' (2008) *Review of Central and East European Law* 437, 448.

<sup>62</sup> P De Hert and F Korenica, 'The New Kosovo Constitution and its Relationship with the European Convention on Human Rights: Constitutionalization "Without" Ratification in Post-Conflict Societies' cit. 155 ff.

<sup>63</sup> J Marko, 'The New Kosovo Constitution in a Regional Comparative Perspective' cit. 447 ff.

<sup>64</sup> Art. 53 of the Constitution of Kosovo.

art. 53 refers to all conduct by public institutions which in some way interpret the human rights and freedoms protected by the Constitution.<sup>65</sup> It can therefore be concluded that the Constitution obligates the governmental institutions of Kosovo – in particular the judiciary – to act consistently with the case law of the European Court of Human Rights.<sup>66</sup> Still, art. 53 does not state whether governmental institutions interpreting constitutional rights and freedoms are fully bound by the ECtHR's jurisprudence or whether they simply have to follow it as a baseline that cannot be contradicted but which can be exceeded. Furthermore, art. 53 does not specify whether the judiciary must refer to ECtHR jurisprudence in its judgments. These questions will be analysed in the next section through an analysis of the CCK's jurisprudence.

Regarding the second question – the exact level of direct applicability of the ECtHR's case law: since all constitutional freedoms and rights that can be claimed by any legal or natural person must be interpreted in line with the case law of the ECtHR, this already enjoys a certain effect in the Kosovar legal order.<sup>67</sup> However, a subsequent question then arises as to whether a right or freedom can be claimed solely on the basis of the ECtHR's case law? In other words, the question arises whether ECtHR case law itself can be a source of law. Art. 53 of the Constitution states that it only applies to acts of interpretation of constitutional rights and freedoms, which, as explained above, only incurs an obligation on governmental institutions. Consequently, the Constitution does not seem to allow for persons to claim a right based solely on the ECtHR case law.<sup>68</sup> Nevertheless, when claiming a constitutionally protected human right or freedom, individuals can argue for an interpretation of that right that is consistent with ECtHR case law.<sup>69</sup> Thus, although constitutionally enshrined, the ECtHR's effect remains limited to its interpretive function.

In sum, the Constitution of Kosovo provides a special place for the ECHR and ECtHR in Kosovo's domestic legal order, even at a time when Kosovo is not yet a member state of the Council of Europe and even though the ECtHR's case law as such does not serve as a source of law and the CCK retains the ultimate control over constitutional interpretation.

<sup>65</sup> F Korenica and 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' cit. 217; AR Shala and MI Bajraktari, 'The Effect of the European Convention and the European Court of Human Rights within the Constitutional Order of Kosovo and their Relationship' (2015) *Mediterranean Journal of Social Sciences* 41, 45.

<sup>66</sup> P De Hert and F Korenica, 'The New Kosovo Constitution and its Relationship with the European Convention on Human Rights: Constitutionalization "Without" Ratification in Post-Conflict Societies' cit. 160.

<sup>67</sup> Arts 21 and 24 of the Constitution of Kosovo.

<sup>68</sup> F Korenica and 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' cit. 218.

<sup>69</sup> *Ibid.*

### III.2. JUDICIAL APPLICATION

To obtain a more precise understanding of the role of the ECHR and ECtHR case law in Kosovo's legal order, it is important to analyse the case law of the Constitutional Court of Kosovo. Hence, this section scrutinizes how the relationship between Kosovo's constitutional legal order, and the ECHR and ECtHR – as laid out primarily in art. 53 of the Constitution – has been operationalized by the CCK. This section demonstrates how the ECHR and ECtHR's case law operate as the backbone of Kosovo's human rights infrastructure.

The CCK is the ultimate interpreter of the Constitution in Kosovo.<sup>70</sup> As such, consistent with art. 113 of the Constitution, the CCK is competent to review the constitutionality of both national and municipal legislation following a referral by authorized parties. Among these authorized parties are governmental actors such as the Assembly of Kosovo, the President, the Government, the Ombudsperson, and municipalities. Furthermore, individuals may refer violations of their constitutional rights and freedoms to the Court but only after they have exhausted all other legal remedies. These individually brought cases make up the large majority of the cases before the Court.<sup>71</sup> Therefore, the CCK is a key player in operationalizing the relationship that has been established between Kosovo's constitutional legal order and the case law of the European Court of Human Rights.<sup>72</sup>

In terms of the approach taken by the CCK taken towards the case law of the ECtHR, as a starting point, the CCK's 2009 ruling in *Tomë Krasniqi v RTK et Al* provides a good understanding. Here, in the first case ever ruled on by the CCK, it affirmed that art. 53 of the Constitution should "serve as our very basis while interpreting all our decisions".<sup>73</sup> From this, one can deduce that the Constitutional Court views the ECtHR's jurisprudence as the basis for almost all constitutional issues before it.<sup>74</sup>

A further conceptualization of the relationship between the CCK, and the ECHR and ECtHR case law can be made based on the landmark cases of *Imer Ibrahimimi et al. v Supreme Court of Kosovo*, *Emrush Kastrati v Supreme Court of Kosovo*, and *Valon Bislimi v Ministry of Internal Affairs et al.* In *Ibrahimimi*, the Court referred to the ECtHR's case law but denied that it had to actually follow it.<sup>75</sup> Similarly, in *Kastrati*, the Court reaffirmed that it was

<sup>70</sup> Art. 112 of the Constitution of Kosovo.

<sup>71</sup> Constitutional Court of the Republic of Kosovo, *Annual Report 2020* (RV2020 2021) 28.

<sup>72</sup> V Morina, F Korenica and D Doli, 'The Relationship Between International Law and National Law in the Case of Kosovo: A Constitutional Perspective' cit. 295.

<sup>73</sup> Constitutional Court of the Republic of Kosovo decision of 16 October 2009, Akti Nr. MP-01/09 case Kl 11/09 *Tomë Krasniqi v RTK et Al*, 3.

<sup>74</sup> P De Hert and F Korenica, 'The New Kosovo Constitution and its Relationship with the European Convention on Human Rights: Constitutionalization "Without" Ratification in Post-Conflict Societies' cit. 161.

<sup>75</sup> Constitutional Court of the Republic of Kosovo decision of 23 June 2010 AGJ30/10, case Kl 40/09 *Imer Ibrahimimi and 48 Other Former Employees of the Kosovo Energy Corporation v 49 Individual Judgments of the Supreme Court of the Republic of Kosovo* para. 69.

constitutionally compelled to refer to ECtHR case law but that it was not bound by it.<sup>76</sup> In *Bislimi*, moreover, the Court relied on ECtHR case law to reach its conclusion but indicated that it did so voluntarily and not out of obligation.<sup>77</sup> As Hohler and Sonczyk argue, this approach allows the CCK to rely on the ECHR as a minimum level of protection – one which leaves room for a “broader interpretation of constitutional rights”.<sup>78</sup> Altogether, this demonstrates that the CCK views the ECtHR’s case law under art. 53 as a constitutionally-obligated resource in reaching its judgments but not one it need submit to.

Other cases, such as *Fadil Hoxha et al. v Municipal Assembly of Prizren, Fadil Selmanaj v Supreme Court*, and *L.L.C. CO COLINA v Law on the Prohibition of Games of Chance and Supreme Court* offer deeper insight into how the CCK has operationalized art. 53.<sup>79</sup> First, in *CO COLINA*, the CCK referenced over 60 ECtHR judgments in order to define a broad swathe of concepts and clarify provisions of the ECHR in its ruling on the merits. Next, in *Hoxha*, the CCK made reference to *Hatton and Others v United Kingdom, Guerra and Others v Italy*, and *McGinly and Egan v United Kingdom* in its decision to recognize environmental protection as part of Articles 2 and 8 of the ECHR. Similarly, in *Selmanaj*, the CCK relied on *Colozza v Italy, Ziliberg v Moldova*, and *Golder v United Kingdom* to recognize a right for defendants to participate in their trial, even though this is not explicitly mentioned in art. 6 of the ECHR or art. 54 of the Constitution. Together, these cases underline how foundational the ECtHR’s case law has been for the CCK in its adjudications on the scope and content of constitutionally protected human rights. Through this close level of adherence, the CCK has managed to introduce a certain level of direct applicability for the case law of the ECtHR.

To provide a more comprehensive, bird’s eye perspective of the use of ECtHR case law by the CCK, as an empirical complement to the *Article’s* doctrinal analysis, a selective keyword search was performed on the entire case law of the CCK (see Appendix at the end of the *Article* for further details). As of 2023, the European Convention on Human Rights is by far the most cited constitutionally protected human rights treaty by the CCK, pointing to a high level of integration of the CoE’s human rights instruments in the CCK’s

<sup>76</sup> Constitutional Court of the Republic of Kosovo Decision of 21 April 2010 MP16/10 case KI 68/09 *Emrush Kastrioti v Decision of the Supreme Court of Kosovo, Pkl. NO. 120/0*, dated 1 September 2009.

<sup>77</sup> Constitutional Court of the Republic of Kosovo Decision of 30 October 2010 AGJ63/10, case KI 06/10 *Valon Bislimi v Ministry of Internal Affairs, Kosovo Judicial Council, and Ministry of Justice*.

<sup>78</sup> B Hohler and B Sonczyk, ‘The Role and Impact of the European Convention on Human Rights Beyond States Parties: The Curious Case of the ECHR in Kosovo’ cit. 271 ff.

<sup>79</sup> See also: K Istrefi and V Morina, ‘Judicial Application of International Law in Kosovo’ in S Rodin and T Perisin (eds) *Judicial Application of International Law in Southeast Europe* (Springer 2015) 165, 175 ff; Constitutional Court of the Republic of Kosovo Decision of 22 December 2010 RK77/10, case KI 56/09 *Fadil Hoxha and 59 others v Municipal Assembly of Prizren*; Constitutional Court of the Republic of Kosovo Decision of 8 December 2011 AGJ163/11, case KI 108/10 *Constitutional Review of Judgment of the Supreme Court of Kosovo A.no.17o/2009 of 25 September 2009*; Constitutional Court of the Republic of Kosovo Decision of 13 March 2023 AGJ2139/23, case KI 185/21 *Constitutional review of Law no. 06/L-155 on the Prohibition of Games of Chance and Judgment ARJ. UZVP. no. 83/2021 of the Supreme Court of 7 September 2021*.

judgments. In over two-fifths of the Court's close to 2,000 cases, direct reference is made to the Convention – more than the second-placed Universal Declaration of Human Rights by about a factor of twelve. In total, the ECHR is mentioned more than 6,000 times throughout the CCK's jurisprudence.

The central role of ECtHR case law for the CCK is highlighted also by the observation that the CCK refers to the ECtHR's jurisprudence more often than to the ECHR. The ECtHR is mentioned in almost half of the CCK's cases, with a total of over 7,000 references.

The keyword search might even undervalue the CCK's reliance on ECtHR jurisprudence given that it misses indirect references to the ECtHR. For example, the CCK may cite its own previous case law which in turn relied on the ECtHR, rather than cite the ECtHR directly. Furthermore, the CCK's way of referencing has changed throughout its existence meaning that even more references may have been missed. Thus, the true level of integration may be even higher than this keyword search reveals. In any event, the important role the ECHR plays as a source of human rights and freedoms, and the case law of the ECtHR as a source of guidance used to interpret those human rights and freedoms is evident. At the same time, as a caveat, it should be noted that the focus on the CCK here does not reveal the degree to which lower courts in Kosovo's legal system rely on ECHR and ECtHR case law. Even though they could obviously be obliged to follow the CCK's lead, further research would be required to ascertain to which extent this is the case regarding human rights.<sup>80</sup>

On the whole, it can be concluded that Kosovo's model of constitutionalising international human rights law has meant that Kosovo's constitutional legal order has become strongly tied to European human rights norms. In particular, the ECHR and the case law of the ECtHR occupy a pivotal place in Kosovo's legal order. In a sense, they form the backbone of the country's human rights infrastructure and of the CCK's approach to human rights and constitutional adjudication, despite the fact that Kosovo is not yet bound under international law by the ECHR and not yet placed under the jurisdiction of the ECtHR.

Another question is to what degree that interaction has been reciprocal – whether the European Court of Human Rights has engaged with Kosovo's constitutional legal order. It should be noted that besides an early consultative role in the appointment of three of the nine CCK judges, the ECtHR itself has not directly interacted with Kosovo, both in referencing Kosovar court judgments and in deciding on human rights matters in Kosovo itself.<sup>81</sup> This is understandable, of course, given that Kosovo is not a member of the Council of Europe and thus not under the jurisdiction of the Court. It also makes sense since the Council's work has had to remain status neutral. Nevertheless, that does not

<sup>80</sup> See, for example, a study of the Kosovo Law Institute from 2020 which criticized the lack of references to the ECHR in the case law of other Kosovar courts, *Instituti i Kosovës për Drejtësi (Kosovo Law Institute), Praktika e GjEDNJ-së, obligim në letër* (September 2020) [kli-ks.org](http://kli-ks.org).

<sup>81</sup> B Hohler and B Sonczyk, 'The Role and Impact of the European Convention on Human Rights Beyond States Parties: The Curious Case of the ECHR in Kosovo' cit. 275.

equal inaction on the part of the Council of Europe, nor does it mean that the ECtHR has not engaged with human rights actors in Kosovo outside of judicial matters, as the following section demonstrates.

#### IV. STANDARD-SETTING, MONITORING AND COOPERATION MECHANISMS

A key arm of the Council of Europe's relationships with member states but also certain non-members are its standard-setting, monitoring, and cooperation mechanisms.<sup>82</sup> This methodological triangle of mechanisms sets the CoE apart from almost any other international human rights actor.<sup>83</sup> First, the Council of Europe sets standards and identifies objectives through the ECHR and its specialized human rights instruments such as the FCPNM.<sup>84</sup> Based on these, it provides monitoring and expert advice on the implementation of standards through its seven specialized monitoring commissions, committees, and commissioners. The Committee of Ministers and the Commissioner for Human Rights are also involved at a more general level with these monitoring activities. Subsequently, through both short and longer-term (technical) cooperation programmes, the CoE works to bridge the identified human rights, rule of law, and democratic gaps.<sup>85</sup>

Though the Council of Europe's work in Kosovo has been much more low-profile than that of the United Nations, NATO, OSCE, or European Union, it has not had a low impact. On the contrary, despite not having its own mandate, the CoE has been quite effective in Kosovo. Already in 1999, the OSCE arranged for the CoE to assist in police capacity-strengthening.<sup>86</sup> The CoE was also tasked with monitoring the implementation of the FCPNM by UNMIK in 2004, and with human rights oversight over NATO-run prisons in 2006.<sup>87</sup> Thus, from early on in the UNMIK administration, the CoE was an established player in Kosovo.

The Council of Europe's relatively low-profile role in Kosovo increased after the declaration of independence in 2008. Although the EU's EULEX Rule of Law mission has been the chief international player in Kosovo, the CoE has also been very active. The CoE

<sup>82</sup> Council of Europe, *Joint Programme: Horizontal Facility II – Standards* [pjp-eu.coe.int](http://pjp-eu.coe.int).

<sup>83</sup> Action Document for EU/CoE Horizontal Facility for Western Balkans and Turkey – Phase II Action ID IPA2018/040-113.05/MC/EU-CoE Horizontal Facility 6; Office of the Directorate General of Programmes, *Horizontal Facility II* [pjp-eu.coe.int](http://pjp-eu.coe.int).

<sup>84</sup> See above link. An exhaustive list of these instruments can be found on the CoE's website [www.coe.int](http://www.coe.int).

<sup>85</sup> Committee of Ministers of the Council of Europe, Overview of Co-operation Activities in Kosovo\* GR-DEM(2021)11 of 16 November 2021, 3.

<sup>86</sup> Permanent Council, Decision 305 of 1 July 1999, PC J 237 No 2.

<sup>87</sup> Committee of Ministers of the Council of Europe, Working Document CM(2004)110 on the Draft Agreement Between the United Nations Interim Administration Mission In Kosovo and the Council Of Europe on Technical Arrangements Related to the Framework Convention for the Protection of National Minorities of 18 June 2004; Agreement of 23 August 2004 between the United Nations Interim Administration Mission in Kosovo and the Council of Europe on Technical Arrangements Related to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.



has closely cooperated with the EU on several projects and has been one of, if not the key international human rights actor in post-independence Kosovo. Currently, the Council's flagship program is the Horizontal Facility for the Western Balkans and Turkey, which is a joint cooperation initiative between the European Union and Council of Europe. This is also active in Kosovo. Given the programme's scope, it serves as a useful demonstration of how the CoE has been able to rely on the full breadth of its standard-setting, monitoring, and cooperation mechanisms and instruments in Kosovo.

#### IV.1. THE HORIZONTAL FACILITY

The Horizontal Facility helps its partner countries with compliance with CoE and EU standards within the framework of further regional integration and potential future accession to the EU.<sup>88</sup> The Horizontal Facility was created in 2014 following the signing of a statement of intent between the CoE and the European Commission.<sup>89</sup> In 2019, it was renewed for a second phase, which ran through 2022. It was subsequently renewed for a third phase running from 2023 to 2026.<sup>90</sup> In the program, the two organizations announced cooperation on four themes: "Ensuring Justice", "Fighting Corruption, Economic Crime and Organised Crime", "Promoting Anti-Discrimination and Protection of the Rights of Vulnerable Groups", and "Freedom of Expression and Freedom of the Media".<sup>91</sup> Though during the first phase, the Horizontal Facility did not cover all four themes in Kosovo, it has done so since entering its second phase.<sup>92</sup>

Under the Horizontal Facility, the Council has undertaken actions along all sides of its methodological triangle.<sup>93</sup> Generally as a first step, many of the Council's monitoring bodies have monitored Kosovo's implementation of key CoE human rights treaties. Among these are the Framework Convention for the Protection of National Minorities, the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the Convention on Action against Trafficking in Human Beings.<sup>94</sup> As part

<sup>88</sup> Action Document for EU/CoE Horizontal Facility for Western Balkans and Turkey – Phase II Action ID IPA2018/040-113.05/MC/EU-CoE Horizontal Facility of 2018, 1.

<sup>89</sup> *Ibid.* 4.

<sup>90</sup> Action Document for "EU-Council of Europe Horizontal Facility for Western Balkans and Türkiye – Phase III – 2022" ACT-60702 of 2022, 1.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.* 5.

<sup>93</sup> Council of Europe, *Overview of Co-operation Activities in Kosovo\**, search.coe.int.

<sup>94</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Fifth Community Rights Assessment Report issued by the OSCE Mission in Kosovo, submitted by the Special Representative of the Secretary-General Head of UNMIK in conformity with the 2004 Agreement between UNMIK and the Council of Europe on Technical Arrangements related to the Framework Convention for the Protection of National Minorities ACFC/SR/V(2021)005 of 15 September 2021; Report to the United Nations Interim Administration Mission in Kosovo (UNMIK) on the visit to Kosovo\* carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) CPT/inf(2021)23 of 23 September 2021; Second report on the compliance of Kosovo\* with the

of this, the monitoring bodies have conducted visits to Kosovo, and Kosovo is often mandated to submit progress reports.<sup>95</sup> After the bodies' respective monitoring cycles, guidance and recommendations are provided on how to improve implementation.<sup>96</sup> Subsequently, the Council's mechanisms cooperate with the relevant actors in Kosovo to ensure the implementation of these recommendations.<sup>97</sup>

Also based on the monitoring bodies' conclusions, eight longer-term technical cooperation projects on implementation of European standards have been launched under the Horizontal Facility. In this, the CoE has engaged with all levels of government, as well as consultative bodies, civil society, international institutions, and the general public.<sup>98</sup> Many of these cooperation projects have been targeted at specific institutions and actors such as Kosovo's judiciary and in particular the CCK, prosecutors, or law enforcement.<sup>99</sup> Outcomes have taken the form of legislative change, capacity-strengthening in line with CoE standards, the creation of stakeholder partnerships to entrench standards and domesticate oversight, and the facilitation of "high level political discussions".<sup>100</sup> The impact of this work is further strengthened by the Council's strong relationships with many Kosovar governmental and civil society human rights actors such as ministries, courts, the Office of the Ombudsperson, the media, universities, bar associations, and NGOs.<sup>101</sup> By working together with such a broad variety of human rights actors, the CoE has been able to work toward a human rights infrastructure in Kosovo wherein its human rights standards are applied by the government, and where implementation and compliance are monitored by the courts, independent governmental human rights institutions, and civil society organizations.

standards of the Council of Europe Convention on Action against Trafficking in Human Beings GRETA(2021)11 of 6 July 2021.

<sup>95</sup> See e.g. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *2020 News: Council of Europe Anti-Torture Committee Visits Kosovo* (20 October 2020) [www.coe.int](http://www.coe.int).

<sup>96</sup> Fifth Community Rights Assessment Report issued by the OSCE Mission in Kosovo, submitted by the Special Representative of the Secretary-General Head of UNMIK in conformity with the 2004 Agreement between UNMIK and the Council of Europe on Technical Arrangements related to the Framework Convention for the Protection of National Minorities cit. 8.

<sup>97</sup> Action Document for EU/CoE Horizontal Facility for Western Balkans and Turkey – Phase II Action ID IPA2018/040-113.05/MC/EU-CoE Horizontal Facility cit. 8, 14.

<sup>98</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities Fourth Opinion on Kosovo\* ACFC/OP/IV(2017)001 of 8 March 2017, 10; B Hohler and B Sonczyk, 'The Role and Impact of the European Convention on Human Rights Beyond States Parties: The Curious Case of the ECHR in Kosovo' cit. 277.

<sup>99</sup> *Ibid.*

<sup>100</sup> Directorate of Human Rights, *Council of Europe Co-Operation Activities in South East Europe and Turkey: 2014-2019* (2019) 1; Committee of Ministers of the Council of Europe, Overview of Co-operation Activities in Kosovo\* cit.

<sup>101</sup> Committee of Ministers of the Council of Europe, Overview of Co-operation Activities in Kosovo\* cit.; Project Fiche on Promoting Human Rights and Protecting Minorities in the Western Balkans of 2011 No. 1 CRIS Nr 2011/022-964. 28.

Besides technical assistance and in parallel to the Council's monitoring bodies, expertise is also provided on an ad hoc basis in response to requests for legislative or policy advice for high-priority reforms through the Expertise Co-ordination Mechanism. Such requests can be made by ministers and other senior government officials, the speaker of the Assembly, heads of Assembly committees, the Office of the Ombudsperson, or other independent government institutions.<sup>102</sup> For example, in 2021, Kosovo's Minister of Justice requested an opinion on proposed amendments to the law on Kosovo's Prosecutorial Council.<sup>103</sup> Through the Expertise Co-ordination Mechanism, the Council is able to lend its expertise more quickly and efficiently to specific reforms, helping ensure that these are in line with its standards.

#### IV.2. OTHER PROGRAMMES AND PROJECTS

In addition to the Horizontal Facility, for completeness' sake it is also worth stressing that ever since the opening of the CoE Office in Pristina in 1999 – when the CoE began directly implementing projects – the Council has collaborated very closely with the European Union in Kosovo through other programmes and projects.<sup>104</sup> As a result, sixteen out of its thirty total projects have been undertaken jointly with the EU. In fact, four of the CoE's twelve current projects in Kosovo are part of the Horizontal Facility, and there are another four joint projects with the EU.<sup>105</sup> Due to their large scope and broad aims, these four projects are all to some degree affiliated with the Horizontal Facility. The nine current projects cover topics ranging from economic crime to Roma empowerment, and inclusivity in education.<sup>106</sup>

At the same time, many non-joint projects have been launched under the CoE's Human Rights National Implementation Division.<sup>107</sup> These projects were undertaken in collaboration with key Kosovar actors such as the Constitutional Court and the wider judiciary, the Ombudsperson, the Ministry of Justice, and the prosecutorial service. Notwithstanding the wide variety of topics and actors engaged with, each has followed the CoE's standardized project management methodology.<sup>108</sup>

<sup>102</sup> Council of Europe, *Expertise Co-ordination Mechanism* [pjp-eu.coe.int](http://pjp-eu.coe.int).

<sup>103</sup> European Commission for Democracy through Law (Venice Commission), Opinion No. 1080/2022 on the Revised Draft Amendments to the Law on the Prosecutorial Council of 23 March 2022, CDL-AD(2022)006.

<sup>104</sup> Council of Europe Office in Pristina, *Home* [www.coe.int](http://www.coe.int).

<sup>105</sup> Council of Europe Office in Pristina, *Ongoing Projects* [www.coe.int](http://www.coe.int); these figures count projects renewed for multiple phases as a singular project.

<sup>106</sup> For a full list of the projects visit the link in the footnote above.

<sup>107</sup> Council of Europe, *Human Rights National Implementation* [www.coe.int](http://www.coe.int).

<sup>108</sup> Council of Europe, *Project Management Methodology Handbook 2016* [rrjetikunderdhunesgjinore-monitorime.al](http://rrjetikunderdhunesgjinore-monitorime.al) 11-12; though it was only created in 2016, the CoE has been following this methodology for far longer.

Beyond the more formal methods in its toolbox, the CoE has also undertaken a large amount of more informal work – *i.e.*, outside the scope of a larger-scale technical cooperation project and often at a peer-to-peer level such as between policymakers or law enforcement from different countries. This engagement has taken many shapes: from meetings, conferences, and networks to capacity-strengthening through workshops, trainings, and placements/internships at the ECtHR. As part of this, the Human Rights Education for Legal Professionals Network (HELP) has been particularly active in Kosovo. It has provided training to legal professionals of all stripes on European human rights standards through trainings, online courses, and improvement of local training capacities.<sup>109</sup> This informal work presents another avenue through which the Council of Europe has been able to engage with Kosovar actors to support the implementation of its human rights standards.

#### IV.3. FROM PROJECTS TO CHANGE

Generally speaking, based on the evaluations of the Council's projects, the CoE seems to have been relatively effective in inspiring and shaping human rights developments in Kosovo. In numerous instances, concrete outcomes such as legislative, policy, or formal-structural reform (*e.g.*, the creation of internal monitoring mechanisms) have directly resulted from the CoE's work.<sup>110</sup> Often this took the form of more mundane structural changes such as an updated case management system for the CCK or improvement of the by-laws and operational procedures of the police.<sup>111</sup> However, in some cases, this legislative or structural change was more far-reaching such as when the Government of Kosovo implemented new laws aimed at further protecting cultural heritage based on recommendations from the FCPNM monitoring mechanism.<sup>112</sup>

Furthermore, the CoE's projects often also led to more non-formal change. For example, the awareness-raising, training, and capacity-strengthening programs developed by the CoE on many of its standards have had impacts beyond the more visible formal changes. In particular, the programmes completed with Kosovo's national human rights institutions have resulted in a higher and more uniform level of application of the

<sup>109</sup> Council of Europe, *HELP Network* www.coe.int.

<sup>110</sup> Council of Europe, Final report: Final Evaluation of the European Union/Council of Europe Horizontal Facility for the Western Balkans and Turkey – Phase I of 17 October 2019, 24, 65-66; Council of Europe, Mid-term Evaluation of the European Union / Council of Europe Horizontal Facility for the Western Balkans and Turkey – Phase II: Final Report of 21 June 2021, 36.

<sup>111</sup> Council of Europe, *Newsroom Improving the Protection of European Human Rights Standards by the Constitutional Court: Closing Conference of the Project* (18 June 2021) www.coe.int; Council of Europe, *Newsroom HF Kosovo\* Policing: Closing Event* (14 May 2019) www.coe.int.

<sup>112</sup> Fifth Community Rights Assessment Report issued by the OSCE Mission in Kosovo, submitted by the Special Representative of the Secretary-General Head of UNMIK in conformity with the 2004 Agreement between UNMIK and the Council of Europe on Technical Arrangements related to the Framework Convention for the Protection of National Minorities cit. 30.

CoE's human rights standards.<sup>113</sup> For example, this can be witnessed through the increasing degree to which the Constitutional Court has relied on ECtHR case law.

Finally, the CoE's influence can also be witnessed in the way it has been received by human rights actors in Kosovo. Here, the requesting of expert opinions by Kosovo government actors through the CoE's Expertise Co-ordination Mechanism is indicative of the wider attitude towards the Council of Europe.<sup>114</sup> This is also evidenced by the deference with which the judiciary has treated CoE resources such as the European Commission for the Efficiency of Justice database, as well as other relevant guidelines and principles.<sup>115</sup>

Overall, the Council of Europe's work in Kosovo attests to the unique position the organization holds. The CoE's internationally-leading and regionally-dominant human rights infrastructure, its broad range of mechanisms aimed at the national implementation of its large variety of human rights standards, and its track record of effective project management all mean that the CoE has continually been sought out by a range of human rights actors. This has often occurred through inter-institutional cooperation, such as with the European Union or the United Nations. Additionally, the CoE has been able to build up important and long-standing political and technical relationships at all levels and with all sorts of actors in Kosovo. Furthermore, the impact of the CoE's work also highlights the readiness of human rights actors in Kosovo to cooperate with the Council. Consequently, the Council of Europe has been able to slowly work towards the achievement of its overarching goals in Kosovo: to bring the country's human rights situation in line with the CoE's standards.

## V. CONCLUSION AND OUTLOOK

This *Article* has demonstrated how, despite Kosovo's contested statehood and the resulting difficulties regarding the accession to international bodies, the Council of Europe nevertheless fostered a strong human rights relationship with Kosovo. There are two main aspects of this relationship: (1) the constitutional integration and judicial application of the CoE's human rights standards, in particular the case law of the ECtHR as the interpretative baseline for the Constitution Court of Kosovo, and (2) interaction through the Council of Europe's standard-setting, monitoring, and advisory mechanisms. Through this, and despite the greater visibility of the EU in Kosovo, the CoE has become the key international human rights actor in Kosovo.

The CoE has been almost omnipresent in Kosovo's human rights system for a long time now, and consequently has fostered long-term technical and political relationships with a wide variety of actors in Kosovo on a broad range of topics. Firstly, the CoE's human rights

<sup>113</sup> See e.g.: Council of Europe, *Human Rights National Implementation: Improving the Protection of European Human Rights Standards by the Constitutional Court* [www.coe.int](http://www.coe.int).

<sup>114</sup> Final report: Final Evaluation of the European Union/Council of Europe Horizontal Facility for the Western Balkans and Turkey – Phase I cit. ii.

<sup>115</sup> *Ibid.* 24.

have been placed front and centre in Kosovo's human rights infrastructure through their incorporation into the legislative framework. Secondly, under the mantle of international cooperation, the CoE has been carrying out human rights monitoring and cooperation programmes for over two decades, actively working alongside its broad range of partners in Kosovo to ensure implementation and further incorporation of its human rights standards. As such, due to the place that it has been able to occupy in Kosovo, the CoE's standards have become the backbone of the country's human rights system.

Despite the obstacles Kosovo faces due to its contested statehood, it persists in its efforts to become a full member of the Council of Europe. However, major advances in its application procedure notwithstanding, at the time of writing, it remains unclear when – or indeed if – Kosovo will be able to become a full party.

In any event, whether or when Kosovo may accede to the CoE does not invalidate the lessons and insights to be drawn from more than two decades during which it worked with the CoE as a non-party and contested entity. During this time, several creative solutions to work around Kosovo's contested statehood were found, which may provide a template for other contexts where endeavours are sought to advance the cause of human rights in the face of contested statehood. Among these solutions are the constitutionalisation of European human rights standards; the persistent work of a well-regarded international organization covering a wide variety of human rights standards, following a proven methodology for domestic implementation, and cooperating with a diverse range of willing human rights actors; and the subsequent integration of those standards into all levels of the country's human rights infrastructure.

Despite its statehood remaining contested for the foreseeable future, and tensions with Serbia still flaring up from time to time, Kosovo is now closely integrated regionally and human rights more consolidated domestically. Even without accession, the CoE's legal clout and its well-established methodology have helped to decrease Kosovo's human rights "vacuum". In the event that Kosovo does manage to accede to the CoE, therefore, it can hit the ground running and fully integrate more easily into the Council of Europe's human rights infrastructure.

## APPENDIX

The decisions database of the website of the Constitutional Court of Kosovo (gjk-ks.org) was used as the database for the comprehensive keyword search. The *Article's* findings were last updated on 8 June 2023. The table below contains the search terms used.

Human Rights Instrument/Mechanism	Search Term	Total Cases	Total Mentions
European Convention on Human Rights (ECHR)	"Evropska Konvencija o Ljudskim Pravima" / "EKLJP"	853	6233
European Court of Human Rights (ECtHR)	"Evropski Sud za Ljudska Prava" / "ESLJP"	930	7343
Universal Declaration of Human Rights (UDHR)	"Univerzalna Deklaracija o Ljudskim Pravima" / "UDLJP"	70	244
Convention on the Rights of the Child (CRC)	"Konvencija o Pravima Deteta"	23	64
International Covenant on Civil and Political Rights (ICCPR)	"Međunarodni Pakt o Građanskim i Političkim Pravima" / "MPGPP"	12	43
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	"Konvencija o Eliminisanju Svih Oblika Diskriminacije Žena"	11	28
CoE Framework Convention for the Protection of National Minorities	"Okvirna Konvencija Saveta Evrope o Zaštiti Nacionalnih Manjina"	7	9
The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	"Konvencija Protiv Mučenja i Drugih Okrutnih, Necovecnih i Ponižavajućih Postupaka ili Kazni"	7	7

