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Incorporation of international human rights into national legislation: The case of Kosovo

Abstract

This contribution explores the incorporation of international human rights into state legislation, with a particular focus on Kosovo. We explore models of the interaction of national legal order with international law, as well as the wide margin of discretion in determining the enforcement of international human rights instruments. We further address the legal techniques for incorporating international human rights law and the role of the monitoring mechanisms of international organisations including the European Union and the Council of Europe. Kosovo represents an interesting example mainly because of the constitutionalisation and domestication of international human rights instruments during the UNMIK administration and after gaining independence. A member of neither the United Nations nor the Council of Europe, Kosovo has chosen to be legally bound by a long list of international human rights instruments. We examine how these norms have been further incorporated into national laws and whether legal incorporation was adequate in the Kosovo context.

Keywords: *international human rights, legal incorporation, European Convention on Human Rights, Kosovo, national legislation*

Introduction

National incorporation of international human rights norms has taken place over many decades since the adoption of the Universal Declaration of Human Rights in 1948 and the progressive ratification of an increasing number of multilateral treaties by the respective member states.[1]

The fundamental principle of sovereignty excludes any foreign authoritative instruction on how the relationship between the national and the international legal order shall be viewed by states.[2] At the same time, states do delegate differing degrees

1 See Louis Henkin (1997) 'International Human Rights Standards in National Law: The Jurisprudence of the United States' in Benedetto Conforti and Francesco Francioni (Eds.) *Enforcing International Human Rights in Domestic Courts* Kluwer Law International: The Hague, pp. 189-205 at 189-198; Thomas Buergenthal (1992) 'Self-Executing and Non-Self-Executing Treaties in National and International Law' *235 Recueil Des Cours: Collected Courses of the Hague Academy of International Law*: 303-392.

2 'The Committee notes that Article 2 of the Covenant generally leaves it to the States parties concerned to choose their method of implementation in their territories within the framework set out in that Article' UN Human Rights Committee (1994) *General Comment No. 3, Article 2: Implementation at the National Level* UN Doc. HRI/GEN/1/Rev. 1, § 1; '[E]ach State party

of competences to international and regional organisations.[3] Also, international and regional human rights treaty regimes require members to undertake the necessary steps to adopt the legislative or other measures necessary to give effect to the rights enumerated in the respective documents.[4] Certainly, human rights treaties provide for a wide margin of discretion in determining how to give effect to their treaty obligations.[5] This flexibility allows states to determine how best to implement their treaty obligations within the domestic law framework. Yet, while there is such a margin of discretion, member states are nevertheless obliged by international law to observe certain principles. The *pacta sunt servanda* principle provides that the treaty obliga-

must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights […]' UN Committee on Economic, Social and Cultural Rights (1990) *General Comment No. 3, The Nature of States Parties Obligations (Art. 2, Para. 1 of the Covenant)* § 4; '[T]he precise method by which Covenant rights are given effect in national law is a matter for each State party to decide…' UN Committee on Economic, Social and Cultural Rights (1998) *General Comment No. 9, The Domestic Application of the Covenant* UN Doc. E/C.12/1998/24 § 5.

3 For instance, member states have delegated differing degrees of competence to the EU over a range of policy areas. Certain policy areas are 'exclusive' to the EU, as a consequence of which the member states no longer have the authority to act within said areas.

4 See, generally, *International Covenant on Civil and Political Rights* 999 UNTS 171 [ICCPR]; Council of Europe *Convention for the Protection of Human Rights and Fundamental Freedoms* 213 UNTS 222 [European HR Convention].

5 *ibid*. ICCPR, Article 2.2 ('Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.'); *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3 [ICESCR], Article 2.1 ('Each State Party to the present Covenant undertakes to take steps [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'); *International Convention on the Elimination of All Forms of Racial Discrimination* 660 UNTS 212 [CERD], Article 2.1d ('Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization […]'); *Convention on the Elimination of All Forms of Discrimination Against Women* 1249 UNTS 14 [CEDAW], Article 24 ('States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.'); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1465 UNTS 85 [CAT], Article 2.1 ('Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.'); *Convention on the Rights of the Child* 144 UNTS 123 [CRC], Article 4 ('States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.'); *European HR Convention* Article 1 ('The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.').

tions are binding upon states and must be performed in good faith,[6] they must be interpreted and implemented effectively (i.e. the domestic courts must uphold international human rights standards) and no state can rely upon domestic law to justify failures to fulfil their international obligations.[7] Failure to implement these principles in national law and practice has been viewed as a violation of international law.[8]

In this vein, states may retain considerable discretion on the method of incorporating human rights treaties (i.e. direct incorporation, interpretation strategies or any other method of incorporation), but they are obliged ultimately to bring their domestic laws into full compliance with the human rights treaties to which they are a party. Consequently, states may resort to the enactment of specific norms and principles in their legislation, undertake legislative reforms to override inconsistent legislation, including constitutional norms, or remedy situations where non-legislative measures have been proven ineffective. Furthermore, in order to guarantee an effective incorporation of the relevant provisions, states are required to take positive measures to 'ensure' the rights enumerated, facilitate the implementation of human rights, prevent violations of those human rights by private individuals and other non-state actors and notify individuals of the rights granted to them under the treaties to which they are parties.[9]

The need to incorporate international human rights law into domestic legislation through any means finds support in the case law and periodic reports of the United Nations treaty bodies, reports of the Council of Europe Parliamentary Assembly

6 The *pacta sunt servanda* principle is enshrined in customary international law and in the *Vienna Convention on the Law of Treaties* 1155 UNTS 331 [VCLT], Article 26. According to Kolb 'Good faith and, to some extent as a prerequisite, to some extent a consequence thereof, *pacta sunt servanda* were to create a spirit of respect for the legal order and hence legal, political and economic stability as progress for all mankind.' R. Kolb (2000) 'La bonne foi en droit international public: Contribution à l'étude des principes généraux du droit' Université de France, Paris, in Markus Kotzur *Good Faith (Bona fide) Encyclopedia on Public International Law* Para. 4, available at: http://campus.unibo.it/180450/7/EPIL_Good_Faith_Bona_fide.pdf. The notion of good faith existed long before the VCLT (1969). On the critical discussion on the rise and 'death' of the 'good faith' principle, see: Michael P. van Alstine (2005) 'The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection' *Georgetown Law Journal* 93: 1885-1945.

7 cf. Article 27 VCLT.

8 See, for example, *Loizidou v. Turkey (Preliminary Objections)* ECtHR Judgement (23 March 1995) Application No. 15318/89 § 72. ('[T]he object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective […]').

9 UN Human Rights Committee, General Comment 3, *op. cit.* Note 3 § 1 ('[States'] obligation […] is not confined to the respect of human rights, but […] States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights.'); UN Human Rights Committee (2000) *General Comment No. 28 Article 3: Equality of rights between men and women* UN Doc. CCPR/C/21/Rev. 1/Add.10 § 2 (providing that states shall undertake steps to remove 'obstacles to the equal enjoyment' of rights).

(PACE), the case law of the European Court of Human Rights (ECtHR), progress reports from the European Union (EU) and scholarly work as well.[10]

The respective state's choice on how to incorporate international human rights law and the considerations that underlie this very choice are related to the cosmopolitan or isolationist nature of its legal order.[11] In principle, civil law countries tend to be monist whereas common law countries lean towards dualism,[12] although blanket generalisation in this regard is impossible. In particular in the latter, there is evident scepticism and reluctance, and sometimes outright hostility, on the part of domestic judges to the idea of incorporating international human rights treaty standards into a national system of constitutional guarantees.[13]

On the other hand, new states and states emerging from non-democratic experiences, such as Kosovo, might feel that reliance on international human rights norms is beneficial and encompasses a legitimising effect. After almost a decade of international administration, Kosovo authorities are moving ahead with their state-building efforts and European integrative intentions. Consequently, they must undertake all the necessary steps to meet European standards in the areas of democracy, rule of law and the protection of human rights.[14] In the context of a country that faced widespread human rights violations, it is of crucial importance to Kosovo that the enacted legal framework is in compliance with international human rights standards. However, it is questionable whether the incorporation of international human rights norms, without an adequate system in place ensuring legal coherence, without the adaptability of international human rights norms to local conditions and, moreover,

10 See Manfred Nowak (1993) *UN Covenant on Civil and Political Rights: CCPR Commentary* N. P. Engel: Kehl am Rhein, pp. 53-54; Oscar Schachter (1981) 'The Obligation to Implement the Covenant in Domestic Law' in Louis Henkin (Ed.) *The International Bill of Rights: The Covenant on Civil and Political Rights* Columbia University Press: New York, pp. 313-314; Henkin, *op. cit*; Mathew C. R. Craven (1995) *The International Covenant on Economic, Social and Cultural Rights* Clarendon Press: Oxford, p. 125; Rebecca J. Cook (1994) 'State Responsibility for Violations of Women's Human Rights' *Harvard Human Rights Journal* 7: 125-175.

11 Yuval Shany (2006) 'How Supreme is the Supreme Law of the Land? A Comparative Analysis of the Influence of International Human rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts', *Brooklyn Journal of International Law* 31: 341-404.

12 For a classical account of these two conventional theories, see Judge Lauterpacht in A. F. M. Maniruzzaman (2001) 'State Contracts in Contemporary International Law: Monist versus Dualist Controversies' *European Journal of International Law* 12(2): 309-328; Hans Kelsen (1949) *General Theory of Law and State* Harvard University Press, Cambridge (translation by Anders Wedberg), p. 365; Hans Kelsen (1967) *Pure Theory of Law* University of California Press: Berkeley, (translation by Max Knight), pp. 337-338; Hans Kelsen (1992) *Introduction to the Problems of Legal Theory* Oxford University Press: Oxford (translation by Bonnie Litschewski Paulson and Stanley L. Paulson), pp. 61-62.

13 Yuval Shany *op. cit*.

14 European Council in Copenhagen (1993) *Conclusions of the Presidency* SN180/1/93, 21-22 June, p. 13.

without being subject to international systems of review, provides an adequate method for the incorporation of international human rights standards.

Content-wise, the first part of this article analyses by what means and how far international human rights are incorporated into national law besides the example of Kosovo. In particular, it addresses the legal harmonisation of domestic law with international human rights and the role of national parliaments and courts. After setting the scene on the legal harmonisation of international human rights, the article subsequently examines the process of incorporation and domestication of international human rights standards in Kosovo. The case of Kosovo is analysed in two phases: namely, on the one hand, during the period of UN international administration; and, on the other, post-independence Kosovo. The objective of examining the case of Kosovo through the lens of these two distinct phases is to reveal the peculiar processes of legal harmonisation of international human rights in Kosovo and what impact these processes will have on Kosovo's future membership of certain international organisations that require compliance with a set of human rights standards. The article concludes with a few statements related to the need to institute adequate measures to implement human rights effectively in practice.

Incorporation of human rights standards into national legislation through legal harmonisation

The most frequent techniques for incorporating international human rights norms into national legislation are through explicit constitutional provisions specifying the constitutional status of international law in general or international human rights treaties in particular.[15] Another incorporation strategy applied is indirect incorporation through consistent interpretation. Under this legal strategy, national courts may be obliged, or at least encouraged, to construe domestic constitutions in the light of the international human rights treaties that the state has ratified. Another technique of incorporating human rights standards into national legislation is through legal harmonisation.[16]

The origins of the legal harmonisation process can be traced back to the second half of the 19th century.[17] The influence of the major European codification projects

15 Many legal systems of common law countries around the world have refrained from incorporating international human rights treaties into their constitutional instrument as directly enforceable norms: Buergenthal *op. cit*; see also Peter J. Spiro (2003) 'Treaties, International Law and Constitutional Rights*' Stanford Law Review* 55(5): 1999-2028.

16 Explicit and implicit resistance towards the incorporation of international human rights norms into national legislations has not been simply treated as a manifestation of hostility to internationalism on the part of states, neither has the issue been subsumed in the ordinary monism versus dualism debate. On the contrary, there are discrete arguments, supported by scholarly work, which challenge the applicability of norms to national legislations. These arguments have been grouped into a) separation of powers and democratic accountability concerns; b) fears of undermining legal coherence; c) cultural objections; and d) political reluctance to implement IHR law. See, generally, Shany *op. cit*.

17 Jose Angelo Estrella Faria (2009) 'Future Directions of Legal Harmonization and Law Reform: Stormy Seas or Prosperous Voyage?' *Uniform Law Review* 14(1-2): 5-34, at pp. 5-11.

(such as the French Civil Code and BGB, the German Civil Code) was evidenced not only in the countries that had colonial ties with Europe but also on other continents.[18] Early legal harmonisation processes were related to the unified legal codification of private law[19] while the contemporary context of legal harmonisation is related to the integrative purposes of states. Therefore, the contemporary process of legal harmonisation differs greatly from the intentions and conditions under which harmonisation started. The main difference is that, in colonial systems, the coloniser imposed harmonisation whereas, in an integrative process, states voluntarily declare their aspiration for legal harmonisation.[20] The difference is also related to the rule-making processes, the actors involved, the impact of supranational organisations and the tools used for harmonising the national legislation; altogether, these have resulted in a far more complex process. The long-standing aim of enhancing national legal certainty and security as the main purpose of harmonising national legislation with international law is supplemented by the aim of integration into regional and international organisations.

Following the Second World War, while international law was immensely transformed through the emergence of universal and regional organisations, the legal harmonisation process also underwent a phase of transformation.[21] With the establishment of the UN and the activism of the human rights movement, the international legal order that had predominated since the 1648 Treaty of Westphalia was suddenly challenged.[22] These developments posited a new set of premises: international law exists to foster the freedom and dignity of the individual; and the international legal

18 For an overview of codification in Europe and mixed jurisdictions see, generally, William Tetley QC (1999) 'Mixed Jurisdictions: Common Law *vs* Civil Law (Codified and Uncodified)' *Uniform Law Review* 4: 591-618 (Part I) and 877-905 (Part II).

19 For an overview of the unified legal codification of private law, see Peter-Christian Müller-Graff (1994) 'Private Law Unification by Means other than Codification' in Árthur S. Hartkamp *et al*. (Eds.) *Towards A European Civil Code* Nijhoff: Dordrecht, p. 19.

20 The concept of voluntarism is, however, disputable in this respect; most states are under pressure to integrate due to their strategic interests. Consequently, many authors have contested the will of states towards regional integration due to state scepticism about opening up to external influence through processes of norm diffusion or through the foreign policies of great powers. For an overview on Euroscepticism, see Sofia Vasilopolou (2009) 'Varieties of Euroscepticism: The Case of the European Extreme Right' *Journal of Contemporary European Research* 5(1): 3-23.

21 The claim of universality was ringed more than two decades ago by Professor Louis Henkin in his ground-breaking work *The Age of Rights*; see Zachary Elkins, Tom Ginsburg and Beth A. Simmons (2013) 'Getting to Rights: Treaty Ratification, Constitutional Convergence and Human Rights Practice' *Harvard International Law Journal* 54(1): 61-95.

22 On the human rights movement see, generally, Beth A. Simmons (2009) *Mobilizing for Human Rights: International Law In Domestic Politics* Cambridge University Press: Cambridge; David P. Forsythe (1991) *The Internationalization of Human Rights* Lexington Books: Lexington; Margaret E. Keck and Kathryn Sikkink (1998) *Activists Beyond Borders: Advocacy Networks in International Politics* Cornell University Press: Ithaca; Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (Eds.) (1999) *The Power of Human Rights: International Norms and Domestic Change* Cambridge University Press: Cambridge).

system must subject states to accountability for their treatment of individuals, including the treatment of their own citizens. The UN promulgated seminal texts articulating fundamental rights and creating international institutions to oversee their member states' compliance in this respect.[23] Overall, it can be evidenced from current state practice that the Universal Declaration of Human Rights (UDHR) and its complementary treaties have played a crucial role in spreading formal human rights into national legislation and have had a powerful co-ordinating effect on the contents of national constitutions.[24]

Besides these developments at the universal level, the rise of regionalism has further contributed to the advancement of human rights. Regional organisations, in particular the EU and the CoE, are increasingly active in the field of legal harmonisation.[25] Regional organisations assume extensive competence over certain areas of law, i.e. the CoE in the field of human rights and democratisation. They also claim the authority to negotiate international uniform law[26] with states outside of the region and states that have membership aspirations, but they also establish institutions to advise member states on meeting human rights standards.[27] This trend towards legal harmonisation has greatly affected both international and national rule-making processes.

Harmonisation plays a crucial role, especially in the context of European Union law. On the basis of the EU legal term 'approximation', harmonisation has been described as the power (and the will) to impose laws directly and indirectly.[28] This

23 These texts were widely ratified but also ignored. For the trend on treaty ratification, see Elkins *et al*. *op. cit*.

24 For an overview of the incorporation of human rights standards in national constitutions, see Moolamattom V. Pylee (2006) *Constitutions of the World* Universal Law Publishing Company: New Delhi.

25 Article 3 of the Statute of the Council of Europe requires that all members 'Must accept the principles and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council.' Statute of the Council of Europe ETS No. 1.

26 This is already the case in the area of private international law (i.e. conflict of laws), since the European Union joined the Hague Conference, and substantive private law in the case of UNIDROIT. See the remarks by José Angelo Estrella-Faria, Secretary-General of UNIDROIT, on the Hague Conference's potential collaboration with both UNIDROIT and UNCITRAL, in Peter D. Trooboff and Frederike E. M. Stikkelbroeck (2012) 'Reflections on the Hague Conference on Private International Law at 140 – 20 years forward *Hague Yearbook of International Law / Annuaire de La Haye de Droit International* 25: 59-74, at pp. 67-70.

27 One of the most prominent institutions is the European Commission on Democracy through Law, the Venice Commission. The Venice Commission helps member states in meeting European standards for democracy by assessing their democratic institutions as well as reviewing legislation. *For democracy through law – The Venice Commission of the Council of Europe*, available at: http://www.venice.coe.int/WebForms/pages/?p=01_Presentation.

28 Article 100 of the EC Treaty, as originally enacted, contained the impetus for vesting in the Community institutions the power to approximate the laws of the Member States for the purpose of fulfilling the 'mission' of the Common Market. That approximation function has been expanded considerably by the addition of Article 100a by the Single European Act, 28 February 1986: *Treaty Establishing the European Economic Community* 298 UNTS

power is substantially wielded by a supranational entity, i.e. the EU, based on its Treaty framework,[29] as well as through the decisions of the General Court and the Court of Justice of the European Union (the EU courts).[30] The scope of European integration has grown over the years[31] and EU legislative and judicial competences have been exercised broadly and with much flexibility. This flexibility is, on the one hand, particularly evident in the practice of the judicial organs of the EU in their quest for harmonisation in the field of human rights law.[32] EU courts have established a fairly common practice of combining Europe-wide norms, member state constitutional traditions, standards enshrined in the EU treaty and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). For a long period of time, the Court of Justice of the European Union (CJEU) filled the gaps in the original Treaties, thus ensuring not only the autonomy and consisten-

11. The most current version of this provision is reflected in Article 114 of the *Treaty on the Functioning of the European Union* Part Three: 'Union Policies and Internal Actions' Title VII: Common Rules on Competition, Taxation and Approximation of Laws Chapter 3: Approximation of Laws – Article 114 (ex Article 95 TEC) *Official Journal* 115, 09/05/2008 P. 0094 – 0095.

29 *ibid.*

30 See, for instance, the Cornwall County Council Case: *P. vs. S. & Cornwall County Council* ECJ Judgment (30 April 1996) Case C-13/94.

31 Giorgio Maganza (2014) 'Forty Years of European Integration: Steps Forward and Some Missed Opportunities' Fordham International Law Journal 37(5): 1451-1478.

32 Fundamental rights have played a central role in the jurisprudence of the European Court of Justice. This started in 1969 with the famous ruling in *Stauder vs. Stadt Ulm* CJEU Judgment (12 November 1969) Case 29/69; and continued with the similarly well-known case *Nold KG vs. Commission* CJEU Judgment (14 May 1974) Case 4/73. Other cases involve the judgment of 2001 in the case *Connolly vs. Commission* CJEU Judgment (6 March 2011), Case C-274/99; and another judgment of 2001 in the case *Commission v Cwik* CJEU Judgment (13 December 2001), Case C-340/00. Other cases concerning fundamental rights coming before the CJEU in 2010-2011 concern private and family life; data protection and the right to access to documents; non-discrimination; citizenship; and effective judicial protection. See, for instance, C-34/10 Oliver Brüstle v Greenpeace e.V. (18 October 2011); C-400/10 J. McB. v L. E. (5 October 2010); Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke and Eifert (9 November 2010). In 2014, the Court annulled the Data Retention Directive (Joined Cases C-293/12 and C-594/12 Digital Rights Ireland), and in the 2015 Judgment in Maximillian Schrems v Data Protection Commissioner (Case C-362/14) the CJEU declared that the Commission's US Safe Harbour Decision was invalid. On the main trends in the recent case law of the CJEU and ECHR in the field of fundamental rights see, generally: European Parliament (2012) *Main trends in the recent case law of the EU Court of Justice and the European Court of Human Rights in the field of fundamental rights* Directorate General For Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs Civil Liberties, Justice and Home Affairs, available at: http://www.statewatch.org/news/2012/may/ep-study-ecj-echr.pdf.

cy of the EU legal order but also ensuring human rights.[33] Today, the EU treaty contains a provision providing for the EU as an organisation to accede to the ECHR.[34]

Legislative reform in the form of legal harmonisation, on the other hand, encompasses more than merely putting the law into place: it involves reviewing and reforming not only the laws (i.e. the legislation already in place) but also those measures necessary to implement them effectively – regulations, institutions, policies, budget allocations and the process of reform in the state in question. Harmonisation denotes the process of eliminating differences in national laws by adopting an EU legal instrument requiring member states to amend their laws accordingly.[35]

33 The CJEU's willingness to protect fundamental rights developed, on the one hand, through the doctrine of supremacy of Community law, as proclaimed in Van Gend en Loos (Case 26/62) and Costa v Enel (Case 6/64); and, on the other, the reluctance of national constitutional courts, especially in Germany, to recognise this supremacy without sufficient guarantees of fundamental rights at Community level. The CJEU's main interlocutor on the question of fundamental rights was the German Federal Constitutional Court (Bundesverfassungsgericht, 'BVerfG') which, in its Solange I decision of 1974 (Case 2 BvL 52/71) expressed the view that Community law did not, at that time, ensure a standard of fundamental rights corresponding to that of the German Basic Law (Solange I (2 BvL 52/71) and Solange II (2 BvR 197/83)). Only after several ECJ judgments strengthening its 'general principles' case law, did the BVerfG in the Solange II judgment (Case 2 BvR 197/83) finally concede that the protection of fundamental rights ensured by the CJEU could be presumed to be equivalent to the protection granted by the German Constitutional Court. On the development of fundamental human rights in the practice of the CJEU see, generally: European Parliamentary Research Service (2015) *Fundamental Rights in the European Union, The Role of the Charter after the Lisbon Treaty* available at: http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/554168/EPRS_IDA(2015)554168_EN.pdf.

34 Article 6(2) of the TEU. Representatives of the 47 Council of Europe member states and of the European Union have finalised the draft accession agreement of the European Union to the European Convention on Human Rights. The draft Agreement on Accession of the EU to the ECHR was agreed at negotiators' level on 5 April 2013. For more on the process, see: Council of Europe (2013) *Accession of the European Union to the European Convention on Human Rights* at: http://www.coe.int/en/web/portal/view/-/asset_publisher/vn2ojsz0tUaf/content/accession-to-the-european-convention-on-human-rights. On the relationship between EU law and ECHR, see Jörg Polakiewicz (2013) *EU Law and the ECHR: Will EU Accession to the European Convention on Human Rights Square the Circle?* 26 September, available at: http://ssrn.com/abstract=2331497. For the position of the Court of Justice of the European Union, see *Opinion pursuant to Article 218(11) TFEU – Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties* CJEU Opinion (18 December 2014) Opinion 2/13. Here, the CJEU found that the Draft Agreement for the accession of the EU to the ECHR was not compatible with the Treaties. With this opinion, the Court not only declared the draft agreement on EU accession incompatible with the Treaties, but it also made any future accession very difficult, if not altogether impossible. Opinion 2/13 demonstrates the subsidiary interest of the Court in ensuring that EU citizens are fully protected. See, generally, Opinion 2/13 of the Court of 18 December 2014, EU:C:2014:2454.

35 Kathleen Gutman (2010) *The Constitutionality of European Contract Law* PhD thesis, University of Leuven, Chapter 5.

One essential feature in legal harmonisation through regional and international organisations is that the division of competences between the member states and the respective organisations are structured and regulated. This means that incorporating common standards into national legislations usually runs smoothly and in accordance with positive law. In the case of non-member states, however, the situation differs greatly and may be aggravated by many mistakes that, in practice, frequently result in inadequate implementation of human rights norms. Kosovo, in particular, serves as an illustrative example of the latter.

The case of Kosovo

Kosovo's population lived through a plethora of human rights violations, culminating in a decade of apartheid policy ended by the 1998-1999 conflict.[36] Human rights concerns played such a key role in the causes and the termination of the conflict that, at first, the international community and, later, the Kosovo authorities made substantial efforts to entrench human rights in the national legal order and its institutional system. For almost a decade, Kosovo was administered by the United Nations Interim Administration known as UNMIK, headed by the Special Representative of the UN Secretary General (SRSG). Therefore the SRSG, in his legislative capacity, undertook a commitment to integrate the main human rights treaties into the legal framework of Kosovo,[37] even though UNMIK itself was not a contracting party to any of those treaties.

During the UNMIK administration, human rights violations were reported by local and international organisations mandated with the protection of human rights. These violations were ultimately attributed to UNMIK's exercise of its authority yet, due to UNMIK's specific nature, they went largely un-remedied. UNMIK was granted extensive immunities and privileges which, in practice, led to a lack of accountability for alleged human rights violations.[38] UNMIK is still present in Kosovo but now with a very limited authority.

36 Noel Malcolm (1998) *Kosovo: A Short History* New York University Press, New York, p. 349; see also the Report of the US State Department (1999) *Ethnic Cleansing in Kosovo An Accounting* December, available at: http://www.State.gov/www/global/human_rights/kosovoii/homepage.html.

37 UNMIK (1999) Regulation No. 1999/24 *On the Law Applicable in Kosovo* 12 December, section 1.3.

38 The Human Rights Advisory Panel was established in 2007. See, generally, *Human Rights Advisory Panel Established* Press Release, available at: http://www.unmikonline.org/hrap/Documents%20HRAP/Press%20Releases%20Eng/Human%20Rights%20Advisory%20Panel%20Established.pdf. For a criticism of the lack of UNMIK accountability, see Remzije Istrefi (2010) 'Should the United Nations Create an Independent Human Rights Body in a Transitional Administration? The Case of the United Nations Interim Administration Mission in Kosovo (UNMIK)' in Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt (Eds.) *Accountability for Human Rights Violations by International Organisations* Intersentia: Antwerp, pp. 355-372.

On 17 February 2008, Kosovo declared its independence.[39] To date, Kosovo has not signed any regional or international human rights covenant, but its Constitution guarantees the implementation of international standards for human rights through the applicability of the relevant regional and international human rights treaties.[40] It will be argued in the following sections that the peculiar process of UNMIK administration and the challenges regarding the accession of post-independence Kosovo to some international organisations have made the unilateral process of the legal incorporation of international human rights standards incompatible with the existing models of interaction with international law. In this vein, it is pertinent to examine how international human rights instruments penetrate Kosovo's legal order and what are the mechanisms – if indeed there are any – for monitoring the observance of these international instruments in the context of Kosovo.

Incorporation of international human rights standards into national law during the 1998-2009 UNMIK administration in Kosovo

UNMIK's legislative authority was based on UN Security Council Resolution 1244[41] which empowered the SRSG to:

> … change, repeal or suspend existing laws to the extent necessary for carrying out his functions, or where existing laws are incompatible with the mandate, aims and purposes of the interim civil administration,

and to:

> … issue legislative acts in the form of regulations.[42]

The legislation enacted by the SRSG was to remain in force until repealed by the SRSG or suspended by rules issued by the institutions established under a political settlement.[43] In its Report to the Security Council, the Secretary-General affirmed:

> In implementing its mandate in the territory of Kosovo, UNMIK will respect the laws of the Federal Republic of Yugoslavia and of the Republic of Serbia insofar as they do not conflict with internationally recognized human rights standards or with regulations issued by the Special Representative in the fulfilment of the mandate given to the United Nations by the Security Council.[44]

39 On the impact of the independence of Kosovo in international law, see Wolfgang Benedek (2008) 'Implications of the independence of Kosovo for international law' in Isabelle Buffard *et al*. (Eds.) *International law between universalism and fragmentation, Liber amicorum in honour of Gerhard Hafner* Nijhoff Publishers: Leiden, pp. 391- 412, at p. 411.

40 Article 22 of the Constitution of the Republic of Kosovo.

41 Security Council Resolution 1244, 10 June 1999, S/RES/1244.

42 United Nations (1999) *Report of the Secretary-General to the Security Councilon the United Nations Interim Administration Mission in Kosovo* and ''*Harvard Human Rights Journal*95-146.

43 *On the Authority of United Nations Mission in Kosovo*,

44 United Nations (1999) *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*12 July,

This SRSG statement was later adopted as national law on the basis of UNMIK Regulation No. 1999/1 *On the Authority of the Interim Administration in Kosovo* which, in section 3, reads as follows:

> The laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as they do not conflict with standards referred to in section 2 [human rights], the fulfilment of the mandate given to UNMIK under United Nations Security Council resolution 1244 (1999), or the present or any other regulation issued by UNMIK.[45]

This provision of UNMIK Regulation No. 1999/1 has, thus far, caused much resentment on the part of the Kosovar Albanian legal community, as well as the population in general, as it has been perceived as institutionalising the discriminatory legislation of the previous Serbian regime. This resentment was so strong that, at one point, it caused the determined refusal of local judges and public prosecutors to apply the local legislation which was in force on 24 March.[46] The SRSG remedied this situation by promulgating UNMIK Regulation No. 1999/24,[47] which was later

45 *op. cit*Applicable law in Kosovo. The decision to apply Serbian laws that were valid on 23 March 1999 was very heavily criticised and, for quite some time, resisted by the Kosovar Albanian community. At one point, UNMIK was faced with the general resignation of Kosovar Albanian judges and prosecutors, which might have led to the closing down of the UNMIK judicial system. UNMIK tried to remedy this situation by creating a Joint Advisory Council for Legislative Matters, comprised of UNMIK, the Council of Europe and Kosovar Albanian representatives, in order to provide human rights screening of the Yugoslav legislation. In practice, Kosovar Albanian judges and prosecutors applied the laws that were valid in Kosovo before it lost its autonomy in 1989. Under the pressure of this unclear legal situation, the SRSG was strained to promulgate UNMIK Regulation No. 1999/24 *On the Applicable Law in Kosovo* which, to a certain extent – at least on paper – clarified the issue of the applicable law.

46 Robert Muharremi, Lulzim Peci, Leon Malazogu Verena Knaus and Teuta Murati (2013) *Administration and Governance In Kosovo: Lessons Learned and Lessons to be Learned* Centre for Applied Studies in International Negotiations at p. 14, available at: http://reliefweb.int/sites/reliefweb.int/files/resources/4005937192D07648C1256CCB003072D2-casin-koss-31jan.pdf.

47 UNMIK (1999) Regulation No. 1999/24 *op cit* Section 1 of which reads as follows:
APPLICABLE LAW
1.1 The law applicable in Kosovo shall be:
(a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder, and
(b)The law in force in Kosovo on 22 March 1989.
In case of a conflict the regulations and subsidiary instruments issued thereunder shall take precedence.
1.2. If a court of competent jurisdiction or a body or person required to implement a provision of the law determines that a subject matter or situation is not covered by the laws set out in section 1.1 of the present regulation but is covered by another law in force in Kosovo after 22 March 1989 which is not discriminatory and which complies with section 1.3 of the present regulation, the court, body or person shall, as an exception, apply that law.

amended by UNMIK Regulation 2000/59.[48] UNMIK Regulation 1999/24 provided for the obligation to respect human rights by explicitly listing a number of regional and international instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto (ECHR) and the International Covenant on Civil and Political Rights of 16 December 1966 and the Protocols thereto (ICCPR). All such treaties reflect in particular the internationally-recognised human rights standards which all those undertaking public duties or holding public office in Kosovo need to observe.[49]

With the promulgation of these two UNMIK regulations, international human rights standards became directly applicable in Kosovo's legal system. To this end, Section 1 of UNMIK Regulation 2000/59 provides that all those undertaking public duties or holding public office in Kosovo shall observe internationally-recognised human rights standards in exercising their functions.

The same Section states that, among others, the human rights standards contained in the ECHR and the International Covenant on Civil and Political Rights are to be applied accordingly. Furthermore, Section 3.5 of UNMIK Regulation 2000/47[50] obliges UNMIK personnel to respect the laws of Kosovo and to refrain from any action incompatible with that law. NATO Kosovo Forces (KFOR) were equally required to:

> Respect applicable law and UNMIK Regulations only in so far as they do not conflict with the fulfilment of the mandate given under Security Council Resolution 1244.[51]

The application of international human rights standards in Kosovo was further explicitly confirmed in the Constitutional Framework, under which the Provisional Institutions of Self-Government (PISG) and officials were obliged to:

> Promote and fully respect the rule of law, human rights and freedoms, democratic principles and reconciliation.[52]

> 1.3. In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards, as reflected in particular in: [list follows].

48 UNMIK (2000) Regulation No. 2000/59 *Amending UNMIK Regulation No. 1999/24 of 12 December 1999 on the Applicable Law in Kosovo* 27 October.

49 Other regional and international conventions that were mentioned include, amongst others, the International Covenant on Economic, Social and Cultural Rights 993 UNTS 3; the International Convention on the Rights of the Child 1577 UNTS 3. See also UNMIK (1999) Regulation No. 1999/24 *op. cit.* as amended by UNMIK (2000) Regulation No. 2000/59 *op. cit*.

50 UNMIK (2000) Regulation No. 2000/47 *On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo* 18 August.

51 *ibid*. Section 2.2.

52 Chapter 2(b) of the Constitutional Framework.

Even though, in Section 3.3, the Constitutional Framework prescribed that the provisions on rights and freedoms set forth in the instruments listed[53] are directly applicable in Kosovo, the above formulation did not render the relevant human rights instruments applicable in practice. One of the implications of this limited applicability was of a procedural nature. Individuals could not enforce their claims or request redress for alleged human rights violations due to the actions/inactions of the PISG, since UNMIK was not a signatory to the human rights treaties enshrined in the legal framework. Furthermore, the Constitutional Framework remained silent with respect to the availability of any protection against UNMIK and KFOR on the grounds of these organisations' immunities and privileges. This led to a lack of jurisdiction by Kosovo's judiciary over these two international entities. The result was that the list of norms encapsulated in the applicable law merely comprised a catalogue of human rights norms but no effective procedures to protect and enforce them.

Notwithstanding this lack of human rights protection in relation to the exercise of public authority by UNMIK, the attitude of UNMIK towards the incorporation of international human rights standards has had a major influence in shaping the overall legal system and institutions of Kosovo in terms of their application of international human rights standards. Under the UNMIK administration, Kosovo's provisional institutions established the institutions responsible for implementing these standards including the judiciary, the office of an ombudsman,[54] and agencies supporting human rights units at the central level[55] as well as, later, at the local one.[56]

This attitude also continued after the post-independence period, when Kosovo's legal community drafted further statutory provisions. This process will be explained in the section below.

53 The Constitutional Framework in Chapter 3 states that the following international human rights treaties are applicable in Kosovo: (a) The Universal Declaration on Human Rights; (b) The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; (c) The International Covenant on Civil and Political Rights and the Protocols thereto; (d) The Convention on the Elimination of All Forms of Racial Discrimination; (e) The Convention on the Elimination of All Forms of Discrimination Against Women; (f) The Convention on the Rights of the Child; (g) The European Charter for Regional or Minority Languages; and (h) the Council of Europe's Framework Convention for the Protection of National Minorities.

54 The Ombudsperson Institution in Kosovo was established via UNMIK (2000) Regulation 2000/38 *On the Establishment of the Ombudsperson Institution in Kosovo* 30 June.

55 Established by Prime Minister's Instruction No. 04/2007 (reinforcing earlier decisions in 2005). See the Administrative Instruction of Prime Minister No. 8/2005 *On Terms of Reference for Human Rights Units*.

56 Established by the Ministry of Local Government Administration (MLGA) through Administrative Instruction No. 02/2008 *On Human Rights Units*, and its amendments 01/2011 and 04/2011, available at: http://www.kryeministri-ks.net/repository/docs/REGJISTRI_I_AKTEVE_NENLIGJORE__Perditesuar_me__02_05.pdf.

International law in the national law: incorporation of human rights standards in Kosovo after 2008

The post-independence incorporation of international human rights standards in Kosovo's legislation was mainly shaped by the legacies of the human rights violations,[57] UNMIK's own law-making authorities,[58] Martti Ahtisaari's Comprehensive Proposal,[59] and Kosovo's strategic objectives.[60] This is reflected in the constitutional design of Kosovo but also in the legislative reform of domestic human rights law.[61]

The Constitution of the Republic of Kosovo contains a wide range of fundamental human rights and freedoms[62] and clear provisions on the incorporation of international human rights instruments.[63] Furthermore, it establishes operational provisions relating to international human rights instruments as being directly applicable in Kosovo's legal order and gives them priority over any conflicting domestic legal provisions and other acts of public institutions.[64] The leading human rights documents and treaties that have thus been constitutionalised in the Kosovo Constitution are the Universal Declaration of Human Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms 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. The only major human rights treaty missing

57 For a comprehensive development of fundamental rights in Kosovo, see Enver Hasani (2014) 'The Effect and Impact of International Treaties/Conventions on Human Rights in National Constitutional Systems: The case of Kosovo' in Luca Mezzetti (Ed.) *International Constitutional Law* Giappichelli: Torino.

58 International norms on human rights and fundamental freedoms have been part of the legal order of Kosovo since the enactment of the UNMIK regulations designed to administer the territory of Kosovo. Most of the UNMIK legislation promulgated in the form of Regulations is still in force and applicable. UNMIK regulations are accessible at http://www.unmikonline.org/regulations/.

59 Comprehensive Proposal for the Kosovo Status Settlement (2007), available at: http://www.kuvendikosoves.org/common/docs/Comprehensive%20Proposal%20.pdf.

60 As one of the newest states in the world, Kosovo's strategic objectives are related to its aspiration of being widely recognised and acquiring membership of regional and international organisations. For more on the strategic objectives considered in the process of constitution drafting, see John Tunheim (2009) 'Rule of Law and the Kosovo Constitution' *Minnesota Journal of International Law* 18: 371-379.

61 See, generally, Visar Morina, Fisnik Korenica and Dren Doli (2011) 'The Relationship Between International Law and National Law in the Case of Kosovo: A Constitutional Perspective' *International Journal of Constitutional Law* 9: 274-294.

62 Constitution of the Republic of Kosovo, Chapter II.

63 *ibid.* Article 22 (Direct Applicability of International Instruments and Agreements).

64 *ibid.*

from this list is the International Covenant on Economic, Social and Cultural Rights.[65]

Respect for general international law and international treaties is also enshrined in Articles 17-19 of the Constitution. The Constitution provides that other international instruments and agreements in the field of human rights and fundamental freedoms to which Kosovo might become a party apply as general rules of the Constitution.[66] In order to become a party to such treaties, they need to be ratified by a two-thirds majority of the deputies of the Assembly of Kosovo. Once ratified, they become part of the domestic order of Kosovo and prevail over regular laws.

In addition, the implementation of human rights and fundamental freedoms in Kosovo's Constitution is further enhanced by virtue of Article 53, which stipulates that the:

> [h]uman rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistently with the court decisions of the European Court of Human Rights.[67]

Therefore, the human rights and fundamental freedoms enshrined in the Kosovo Constitution must be interpreted in harmony with the long-established jurisprudence of the Strasbourg Court. It is also undisputed that human rights standards are of constitutional status not only from a material but also from a formal point of view. It remains with the constitutional and other courts, as well as with other relevant institutions, to implement them in practice.

As far as the relationship between the international and the national legislation is concerned, Kosovo follows a monistic conception which, considering the political position of Kosovo in international relations, is both theoretically and practically much more adequate in constructing and explaining the relationship between public international law and Kosovo's national law.[68] Therefore, in Kosovo international treaties of a self-executing nature are directly applicable under an act of recognition – i.e. the respective provisions in the Constitution – and form part of the national legal order.[69] These norms remain international legal norms, but they also become part of the national legal order of Kosovo, creating rights and duties for legal subjects and being binding on courts, administrative authorities and all other institutions.

Nevertheless, exceptions to the monistic rule of approach remain. In the case of non self-executing treaties, implementing legislation is required to make their application effective in practice. Generally, Kosovo's constitutional design is considered as one of the most favourable solutions for domestically incorporating the highest in-

65 Regarding the non-incorporation of the International Covenant on Economic, Social and Cultural Rights in the Kosovo Constitution, see Kushtrim Istrefi (2013) 'Constitutional Domestication of International Human Rights in the Kosovo Legal Order' *E drejta, Pravo Law* 1: 267-282 at p. 271.

66 Constitution of the Republic of Kosovo, Article 18 (Ratification of International Agreements).

67 *ibid.* Article 53 (Interpretation of Human Rights Provisions).

68 Hasani *op. cit*; Morina *et al*. *op. cit*. See also Istrefi *op*. *cit*.

69 Morina *et al*. *op. cit.*

ternational human rights standards, which is further enhanced through the jurisprudence of the Constitutional Court,[70] as well as – to a certain extent – the jurisprudence of mixed panels of EULEX judges and – albeit to a very low extent – through the jurisprudence of ordinary courts.[71] Currently, Kosovo is not a member of the UN or the CoE. In result, it is not in a position to ratify the relevant international instruments on human rights and neither are its citizens entitled to make use of the treaty mechanisms of international organisations (e.g. the ECtHR). However, Kosovo's authorities have voluntarily submitted reports to two UN treaties, the UN Convention on the Rights of the Child[72] and the UN Convention on the Elimination of all Forms of Discrimination Against Women.[73]

The European Commission has, since March 2002, reported regularly to the Council of the European Union and the European Parliament on progress towards European integration made by the countries of the western Balkans region, assessing their efforts to comply with the Copenhagen criteria and the conditionality of the Stabilisation and Association Process (SAP). Consequently, the reports analyse the political situation in Kosovo in terms of democracy, the rule of law, human rights, protection of minorities and regional issues. Also, such reports review Kosovo's capacity to implement European standards, including the approximation of its legislation and policies with the *acquis communautaire*.

Under the SAP, Kosovo committed itself to comprehensive legislative reform and further legislative alignment with the EU *acquis,* including in areas such as the rule of law, public administration, economy, competition and trade. To complete this process, Kosovo needs to adopt the necessary legislative changes, including constitutional amendments. In practice, this means that the necessary legislative changes need to be undertaken with respect both to legislation drafted by UNMIK and the existing institutional set-up that provides for human rights protection. The main human rights laws that required review regarding their conformity with European standards involved: the *Law No. 03/L-195 On the Ombudsperson*; the Draft Law *On Amending and Supplementing Law No. 03/L-195 On the Ombudsperson* of July 2013; the Draft Law *On Gender Equality*; the Draft Law *On Protection Against Discrimination*; and the Draft Law *On Freedom of Religion*.

Regular EC progress reports on Kosovo give an account of the considerable progress made by the Kosovo authorities in the process of harmonising Kosovo's legislation with international human rights standards.[74] However, the enforceability of legal and administrative remedies for human rights infringements remains a challenge and needs to be improved at all levels.[75]

70 Joseph Marko (2008) 'The New Kosovo Constitution in a Regional Comparative Perspective' *Review of Central and East European Law* 33: 437-450; Tunheim *op. cit.* at p. 375.
71 Istrefi *op. cit*.
72 Convention on the Rights of the Child *op. cit*.
73 Convention on the Political Rights of Women 193 UNTS 135.
74 European Commission (2013) *Kosovo 2013 Progress Report* Commission Staff Working Document available at: http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/ks_rapport_2013.pdf.
75 *ibid.*

In relation to the Ombudsperson, the EC reported a decrease in the credibility of this office for several years, as well as the non-implementation of recommendations from other institutions, limited capacity, delays in approving the Law *On the Ombudsperson*, financial dependence and the ignorance of municipalities that had a negative impact on the protection of human rights. The EC progress reports have reported that improvements have been made with respect to the institutional independence of the Office, which is expected to increase the respect for human rights.[76] The latest EC report states that, with the beginning of the implementation of the new law *On the Ombudsman*, increased and improved reporting has strengthened the institution. However, the secondary legislation for further enhancement of the human rights protection thus made available still remains to be adopted.[77]

In addition, according to the Commission's reports the range of institutions and bodies dealing with human rights at central and municipal levels is too dispersed and, at times, overlapping. It has therefore been recommended that the existing institutional set-up promoting and enforcing human rights needs to be simplified.[78] In this process, the Kosovo government assigned the Deputy Prime Minister with the task of overseeing the reform of the institutional structures that deal with human rights and the protection of minorities.[79] The Legal Section within the Office of the Prime Minister of Kosovo (LO), in close co-operation with all main stakeholders, outlined the Draft Regulation *On Mechanisms for Co-operation, Coordination, Monitoring, Reporting, Protection and Promotion of Human Rights*.[80] Besides the EU, the Council of Europe (CoE) also plays a crucial role in this respect. In order for the draft to be compliant with European human rights standards, the Legal Section requested the CoE office in Prishtina to assess the conformity of the Draft Regulation with European standards. In December 2012, the CoE delivered a formal Opinion on the draft.[81] The Opinion was quite critical of the document and strongly recommended a comprehensive review of the functioning of the non-judicial human rights mechanisms and the main human rights legislation in place.

In December 2013, the CoE, within the framework of the joint EU/CoE project *Enhancing Human Rights Protection*, delivered a comprehensive opinion on *Reform Proposals to Energise Non-Judicial Human Rights Institutions* that included legis-

76 *ibid.* at p. 10.

77 European Commission (2016) *Kosovo 2016 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* Commission Staff Working Document and Communication on EU Enlargement Policy, Brussels. The report is available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_kosovo.pdf.

78 EU-Kosovo Stabilization Association Process Dialogue (SAPD), Sectoral Committee on Justice, Freedom and Security (Pristina, 7-9 February 2012), *Conclusions Section 5 (Fundamental Rights)*.

79 This fact was not known widely among the general public. And it is hard to determine if this position is still active. The authors have tried to find information on the work of this position but have not been able to elicit any information.

80 From authors' files.

81 From authors' files.

lative expertise on Law No. 03/L-195 *On the Ombudsperson*, the Draft Law *On Amending and Supplementing Law No. 03/L-195 on the Ombudsperson* of July 2013, the Draft Law *On Gender Equality* and the Draft Law *On Protection Against Discrimination*.[82] In order further to clarify and simplify the institutional set-up and to enhance its effectiveness, the report analysed existing human rights legislation and human rights structures and reviewed them in the light of six distinct, but related, activities involved in securing human rights, namely: policy development; implementation; promotion; redress; monitoring; and reporting.[83] The report concluded with an overall assessment of the problems afflicting the existing structures – essentially the lack of capacity, confidence, focus and simplicity – and made a series of recommendations towards reconfiguring the structures and their responsibilities in order to comply with European standards. The recommendations by CoE experts have been integrated by the LO and three draft laws have been finalised. The Anti-Discrimination Law,[84] the Ombudsperson Law[85] and the Gender Equality Law[86] were adopted in 2015 as a package, with the aim of harmonising the law with European human rights standards and establishing the mechanisms that will address gaps and issues in the practical application of the laws. To date, the Draft Law on Freedom of Religion has not been submitted to the necessary procedures for its enactment.

Concerning the Draft Law *On Amendment and Supplementation of Law No. 02/L-31 on Freedom of Religion in Kosovo*, the Venice Commission delivered an Opinion.[87] Focusing on the institutional set-up of non-judicial human rights mechanisms, the EU recommended a review and institutional reform of these institutions, taking into account the findings of the reform proposal of the joint EU/CoE project on the protection of human rights.[88]

Despite the efforts by Kosovo's authorities towards harmonising the national legal framework, the CoE, in its 2013 PACE report, expressed concerns related to the lack of full implementation of the human rights standards enshrined in Kosovo's legislation.[89] However, at this stage, the CoE cannot guarantee that democracy, human

82 CoE/EU (2013) *Reform Proposals to Energise Non-Judicial Human Rights Institutions in Kosovo* December, available at: http://www.monckton.com/wp-content/uploads/2014/03/Human-Rights-reform-Kosovo.pdf.

83 *ibid.*

84 Law No. 05/L-021 *On Protection from Discrimination*.

85 Law No. 05/L-019 *On the Ombudsperson*.

86 Law No. 05/L-020 *On Gender Equality*.

87 Opinion *On the Draft Law on Amendment and Supplementation of Law No. 02/L-31 on Freedom of Religion in Kosovo* adopted by the Venice Commission at its 98th Plenary Session, Venice, 21-22 March 2014, available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)012-e.

88 EU-Kosovo Stabilization Association Process Dialogue (SAPD), Sectoral Committee on Justice, Freedom and Security (Pristina, 28 –30 January 2014), *Conclusions, Section 7.1 (Institutional Set-up)* available at: http://eeas.europa.eu/delegations/kosovo/documents/eu_kosovo/20140131_final_conclusions_-_sapd_committee_on_jfs.pdf.

89 CoE Parliamentary Assembly Recommendation (2013) *The situation in Kosovo and the role of the Council of Europe* 19 June, CM/AS(2013)Rec2006 final.

rights, the rule of law or good governance will be satisfactorily upheld in Kosovo.[90] Additionally, the body that best enforces European standards for human rights, the ECtHR, has no jurisdiction in Kosovo and cannot hear cases brought forth by Kosovo's citizens. Notwithstanding the current position of Kosovo *vis-à-vis* the CoE, Kosovo's citizens deserve:

> European standards for democracy, human rights, the rule of law and good governance.[91]

Instead of a conclusion

This article has explored the modalities for incorporating international human rights law into state legislation, with a particular recent focus on Kosovo. The interaction between international and national law has, so far, mostly been established by states with old legal traditions; in the case of Kosovo, however, this relationship is still in its infant stage. In examining two separate phases of the establishment of Kosovo's legal infrastructure – namely the period of the UNMIK regime and the post-independence period – this article has determined that Kosovo's interaction with international law could be described as a work in progress, oscillating between enhanced integration of the regional and international human rights standards set in place under UNMIK, and the review and amendment by the Kosovo authorities of the UNMIK-enacted legal framework in their EU integration activities.

The international human rights instruments incorporated into Kosovo's legislation during the UNMIK regime contained no clear provision which explicitly explained the relationship between the international human rights instruments and the national legislation. Legislation promulgated by UNMIK and PISG is considered solid with respect to human rights protection. However, this legislation requires revision by the newly-independent authorities in Kosovo in order to be compliant with European standards against the background of Kosovo's integrative aspirations. Moreover, implementation of human rights in practice has been hampered by controversial situations, i.e. the exercise of public authority by UNMIK and the privileges and immunities of UNMIK and KFOR, rendering the international structure un-accountable for the alleged human rights violations committed while exercising their extensive authorities.

Following the independence of Kosovo, the Kosovo Constitution provides for a lucid relationship with international law by way of incorporating international human rights treaties and stipulating their primacy over national laws. The Kosovo Constitution is thus very open towards international law and it provides for a monist model operating between international law and national law. The domestic laws that have been promulgated by UNMIK and PISG have been undergoing a revision, in parallel with the revision of the non-judicial human rights structures mandated with human

90 Lowell West (2013) *Kosovo's Path to the Council of Europe: Identifying Procedures, Obstacles and Solutions for Membership* Policy Report, Group for Legal and Political Studies, September 2013.

91 CoE Parliamentary Assembly Report (2013) *The situation in Kosovo and the role of the Council of Europe* 7 January.

rights protection, i.e. Human Rights Units at the local and central levels. The CoE has contributed legal expertise regarding the conformity of this human rights legislation and the non-judicial human rights structures with European standards. Now it rests with Kosovo's authorities further to enhance their political efforts in its integrative process in order to make the unilateral process of incorporating human rights norms fit within the international models of human rights protection, most importantly access of Kosovo citizens to the ECtHR. Until such a level of integration is reached, the lack of Kosovo's membership of certain international organisations, including the CoE and the UN, continue to bar Kosovo's citizens from the human rights protection mechanisms guaranteed by the respective international organisations.