

## Protection of the Right to Life in Kosovo: Does the Performance of Public Authorities in Kosovo Meet the Standards Established by the Case-law of the European Court of Human Rights?

Bardh Bokshi

*Constitutional Court of Kosovo, Prishtina, KOSOVO*

Received 26 August 2019 ▪ Revised 10 November 2019 ▪ Accepted 21 November 2019

### *Abstract*

The aim of this paper is to elucidate how public authorities in Kosovo discharge their duty to protect the right to life of individuals who are under their jurisdiction. The analysis will be predicated upon the case-law of Constitutional Court of Kosovo and on that basis actions or failure to act of other public authorities will be analyzed as well. The paper shall address questions of protection of individuals from violent actions perpetrated by private persons, protection of individuals who are under custody of public authorities, compensation of victims and temporal jurisdiction of the Constitutional Court of Kosovo. We shall see whether the performance of public authorities in Kosovo in relation to the right to life can withstand the standards set out by the well-established case law of the European Court of Human Rights or is it a rigid performance characterized by excessive formalism.

**Keywords:** right to life, compensation, domestic violence, state responsibility, temporal jurisdiction.

### 1. Introduction

Before looking into the performance of public authorities in Kosovo in relation to the right to life as guaranteed by Article 2 of the European Convention on Human Rights (hereinafter, the ECHR), we should expound a little bit on the basic principles that govern the approach of the European Court in relation to the right in question. The approach of the European Court to the interpretation of Article 2 is guided by the fact that the object and purpose of the ECHR as an instrument for the protection of individual human beings requires that its provisions must be interpreted and applied so as to make its safeguards practical and effective (Guide on Article 2 of the ECHR). Article 2 ranks as one of the most fundamental provisions in the ECHR, one which in peace time, admits of no derogation under Article 15 of the ECHR. Together with Article 3, it enshrines one of the basic values of the democratic societies making up the Council of Europe (*Ibid.*). Article 2 contains two substantive obligations: the general obligation to protect by law the right to life, and the prohibition of intentional deprivation of life, delimited by a list of exceptions (*Ibid.*). Having regard to its fundamental character, Article 2 of the ECHR also contains a procedural obligation to carry out an effective investigation into alleged breaches of its substantive limb (*Ibid.*). The Constitutional Court of Kosovo (hereinafter, the Constitutional Court) since it

became operational on September 2009 has had to deal with several cases involving the right to life as guaranteed by Article 2 of the ECHR and Article 25<sup>1</sup> of the Constitution of Kosovo (hereinafter, the Constitution). The Constitutional Court and other public authorities by virtue of Articles 22<sup>2</sup> and 53<sup>3</sup> of the Constitution-as far as human rights are concerned-are bound by the ECHR and have a constitutional duty to make their decisions consistent with the decisions of the European Court. This is a reason why we shall analyze the protection of the right to life by public authorities in Kosovo in relation to the standards and tests developed by the well-established case-law of the European Court. In the ensuing chapters of this paper we shall analyze two cases culled from the case-law of the Constitutional Court in relation to the right to life, as guaranteed by Article 2 of the ECHR and Article 25 of the Constitution, as well as the performance of other public authorities in that regard, most notably the courts of general jurisdiction. We shall also see whether Kosovar authorities have shown to be characterized by excessive formalism and rigidity when called to protect a fundamental right, such as the right to life. There shall ensue an analysis of the obligation of public authorities including the Constitutional Court pertinent to: (i) protection of the right to life of individuals from violent acts perpetrated by private persons and domestic violence; (ii) the obligation to protect the right to life of individuals in public prisons with the view to both substantive and procedural limbs of Article 2 of the ECHR ; (iii) obligation to award compensation to the victims for non-pecuniary injury sustained by them; (iv) the obligation and awareness not to impose undue and disproportionate burden on the victims in pursuing legal avenues which offer no prospect of success; and, (v) application of the temporal jurisdiction of the Constitutional Court with respect to allegations of violation of the right to life.

- The responsibility of authorities should be engaged even in cases where the life of an individual is threatened by a private party.
- The application of the rule on temporal jurisdiction of courts must take into due consideration the specificities of safeguards guaranteed by Article 2 of the ECHR and 25 of the Constitution.
- The applicants must not be made to bear the disproportionate burden to exhaust legal remedies which offer no prospects of success.
- Judgments of courts finding a violation of the right to life should, inter alia, afford just satisfaction for moral injury.

2. The obligation of public authorities to protect the right to life of individuals from violent acts of private persons, domestic violence and the question of compensation of victims

In an individual but high profile case (Case No. KI41/12, *Applicants, Gëzim and Makfire Kastrati*), the applicants are the parents of the deceased D.K., who alleged, inter alia, before the Constitutional Court that the municipal court in Prishtina by its inaction namely by not issuing an emergency order<sup>4</sup> (Law on Protection Against Domestic Violence, No.03/L –182, Article 13) has violated the right to life as guaranteed by Article 25 of the Constitution in

---

<sup>1</sup> Article 25 of the Constitution of Kosovo establishes that everyone enjoys the right to life and that capital punishment is prohibited.

<sup>2</sup> Article 22.2 of the Constitution of Kosovo establishes that the European Convention on Human Rights and its protocols are directly applicable in the legal system of Kosovo, and that, in case of conflict; it has priority over provisions of laws and other acts of public institutions.

<sup>3</sup> Article 53 of the Constitution of Kosovo establishes that human rights and fundamental freedoms guaranteed by the Constitution must be interpreted consistent with the case-law of the European Court of Human Rights.

<sup>4</sup> Article 13.2 of the Law on Protection against Domestic Violence stipulates that an emergency protection order may be requested by the protected party, an authorized representative of the protected party, a victims advocate and a representative of social welfare center in case the victim is of minor age.

conjunction with Article 2 of the ECHR to the detriment of D.K. as a direct victim and to them as indirect victims (*Ibid.*, Case No. KI41/12). The Applicants further stated that the municipal court in Prishtina was under legal obligation to act within twenty four (24) hours from the moment D.K., submitted the request for an emergency protection order, and that, there were no remedies which may be used by the victim in case of inaction by the municipal court (*Ibid.*). The Constitutional Court qualified the right to life as the most important right of human rights from which all other rights derive. The Constitutional Court also referred to the general principles laid down by the relevant case-law of the European Court, namely the Case of Osman v. the United Kingdom<sup>5</sup>. The Constitutional Court reiterated that it is the duty of public authorities not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (*Ibid.*). The Constitutional Court further noted that this duty also extends to a positive obligation on public authorities to take preventive operational measures, to protect an individual whose life is at risk from the criminal acts of another individual (*Ibid.*). The Constitutional Court went on to state that in cases where authorities knew or ought to have known the existence of a real and immediate risk to an identified individual by a private person, they are under positive obligation to take measures, which judged reasonably, might have been expected to avoid such a risk (*Ibid.*). The Constitutional Court noted that the municipal court in Prishtina knew or ought to have known that there was a real and immediate risk to D.K., by a private person (ex-spouse) from the moment she had requested a protection order (*Ibid.*). In the light of the material before it, the Constitutional Court found that the municipal court in Prishtina was responsible under the law to take action in order to protect the life of D.K., but it had failed to do so. That inaction violated Article 25 of the Constitution and Article 2 of the ECHR (*Ibid.*).

Pertinent to the applicants' complaint about the lack of an effective legal remedy, the Constitutional Court noted that the law for protection against domestic violence does not foresee measures in cases when institutions fail to act (*Ibid.*). The Constitutional Court also noted that the Law on Kosovo Judicial Council<sup>6</sup> (Law on the Kosovo Judicial Council, No. 03/L-223, Article 45.5) does not offer any other possibility of complaint save for the Office of the Disciplinary Council—who has the right but not the obligation—to summon witnesses, gather information, investigate and determine whether the recommendation of disciplinary action should be presented to the Disciplinary Committee (*Ibid.*, Case No. KI41/12). The Constitutional Court concluded that the main responsible institution, the municipal court in Prishtina, failed to act with regard to the request of the deceased D.K., for issuing an emergency protection order as well as the failure to act by the KJC by not addressing the inaction of the municipal court (*Ibid.*). There was accordingly a violation of the right to an effective remedy as guaranteed by Articles 32 and 54<sup>7</sup> of the Constitution and Article 13 of the ECHR (*Ibid.*). In my view in this case, the Constitutional Court omitted to add the responsibility of public authorities to investigate, put to trial and punish the perpetrator of the violent act against the victim D.K. That is a crucial omission on the part of the Constitutional Court because there is a need to send home a strong message to public authorities to be more alert and sensitive and quick to act in order to prevent the loss of innocent life, which after all, the selfsame court qualified as the “most important right from which all other rights derive” (*Ibid.*). What is more, acting with due celerity to prevent loss of innocent lives goes to the very heart of substantive obligation of public authorities as required by Article 2 of the ECHR in connection with Article 25 of the Constitution. In addition, Case No. KI41/12, is a typical case of

---

<sup>5</sup> On the point of general principles with respect to the right to life see Judgment on the Merits by Grand Chamber, *Osman v. the United Kingdom*, No. 87/1997/871/1083, 28 October 1998.

<sup>6</sup> Article 45.5 of the Law on the Kosovo Judicial Council stipulates that it is the discretion of the Office of the Disciplinary Council to investigate and determine whether a disciplinary action should be forwarded before the Disciplinary Committee.

<sup>7</sup> Articles 32 taken together with Article 54 of the Constitution establish that everyone has a right to an effective remedy and to enjoy judicial protection of rights.

domestic violence against women and the Constitutional Court also should have touched upon the topic of making all forms of violence within the family as criminal offences which would enable the prosecutor to initiate criminal proceedings against the perpetrator and to enable the judiciary to adopt interim measures aimed at protecting victims<sup>8</sup>. To the above-statement one could object that neither the applicants nor the deceased D.K., while she was alive, did not bring the matter to the attention of the Public Prosecutor with the view to initiating criminal proceedings against the perpetrator. The fact is that on several occasions the deceased D.K., petitioned with the municipal court in Prishtina requesting the issuing of an emergency protection order (*Ibid.*). That situation should have prompted the municipal court in Prishtina to bring the matter to the attention of the Public Prosecutor in Prishtina, which the court in question, regrettably and fatally failed to do. Regardless of the fact whether the applicants or the deceased D.K., informed or not the Public Prosecutor, the municipal court in Prishtina, was under a positive obligation to do all what can reasonably be expected to be done i.e., to either issue a protection order or to bring the matter to the attention of the Public Prosecutor. In this respect, according to the well-established case-law of the European Court, the national authorities cannot rely on victims' attitude for their failure to take adequate measures which could prevent the likelihood of an aggressor carrying out his threats against the physical integrity of the victim. In the context of domestic violence, victims are often intimidated or threatened into either not reporting the crime or withdrawing complaints (*Opuz v. Turkey*). With respect to the State's obligation to protect the right to life of individuals from violent acts of other private persons, the Inter-American Court of Human Rights has held that an illegal act which violates human rights and which is initially not directly imputable to a State can lead to international responsibility of the respondent State, because of the lack of due diligence to prevent the violation as required by the American Convention on Human Rights (*Velasquez-Rodriguez v. Honduras*). The corollary is that in Case No. KI41/12, the municipal court in Prishtina was under obligation to either issue a protection order against the perpetrator or inform the Prosecutor about the threats aimed against the victim D.K., by the perpetrator. Clearly the burden of action, in that situation, fell squarely with the municipal court in Prishtina because the victim D.K., and her next-of-kin have discharged their duty of "due diligence" merely by petitioning the said court, on several occasions, for a protection order. Such attitude as displayed by the municipal court in Prishtina, no doubt, amounts to a violation of the substantive limb of Article 2 of the ECHR in connection with Article 25 of the Constitution.

Another issue which should have been elaborated by the Constitutional Court, but which was not touched upon, was the issue of compensation of the applicants for the non-pecuniary damage they have sustained. Surely in sensitive cases such as the right to life the finding of a violation in and of itself cannot be considered to be a just satisfaction for the applicants<sup>9</sup>. The Constitutional Court itself is not vested with the power to award compensation for non-pecuniary damage in favor of the applicants. But that does not mean that the Constitutional Court, in the reasoning part of the judgment, cannot mention and remind public authorities to afford compensation for the non-pecuniary damage, at the very least, in line with the legal tradition and standard of living in Kosovo (Bokshi, 2018). The question of compensation for non-pecuniary damage is an international standard for protection of human rights alongside with the responsibility of public authorities on account of their lack of due diligence to prevent human rights violations, and to investigate and punish the perpetrators (*Ibid.*, *Opuz v. Turkey*). Moreover, on this point, in 2004, the Council of the European Union adopted a Directive (The Council of the European Union Directive, 2004/80/EC) relating to compensation of crime victims. That

---

<sup>8</sup> On this point see Recommendation by the Committee of Ministers of the Council of Europe Rec (2002) 5, 30 April 2002, on the Protection of Women against Violence. Retrieved 10 April 2019, from [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805e2612](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2612).

<sup>9</sup> With respect to awarding compensation for non-pecuniary damage see Judgment on the Merits delivered by a Chamber, *Trubnikov v. Russia*, no. 49790/99, 5 July 2005.

Directive acknowledges that frequently victims of violent crimes will not be able to receive compensation from the offender for various reasons, including their lack of funds and means to compensate the victim but also in cases where the offender cannot be identified (*Ibid.*). Accordingly, all member states shall ensure proper information dissemination in order to inform all potential applicants about the possibility of applying for compensation (*Ibid.*). In this regard, the Constitutional Court could have mentioned the issue of compensation of the applicants with the view to the international standards on effective protection of human rights especially seeing that the law on compensation of crime victims (Law on Crime Victim Compensation, No. 05/L-036) did not enter into force until 2015<sup>10</sup>. Due to fundamental nature of the right to life and pertinent to compensation of the applicants for non-pecuniary damage, the European Court has held that itself will in appropriate cases award just satisfaction, recognizing pain, stress, anxiety and frustration as rendering appropriate compensation for non-pecuniary damage (*Kontrova v. Slovakia*). The European Court in its case-law has persistently found that, in the event of a breach of Articles 2 and 3 of the ECHR, which rank as the most fundamental provisions of the ECHR, compensation for the non-pecuniary injury flowing from the breach should in principle be available as part of the range of possible remedies (*Ibid.*) Sure, the Constitutional Court is not vested by the Constitution nor by the Law on the Constitutional Court to award non-pecuniary damage but it has a constitutional duty to-at the very least- remind and place an obligation on Kosovar authorities to award non-pecuniary compensation to the Applicants due to death of their daughter. After all, the Constitutional Court and other public authorities in Kosovo have a constitutional responsibility predicated on Articles 22 and 53 of the Constitution to interpret fundamental rights and freedoms consistent with the decisions of the European Court. Thus, the Constitutional Court and other public authorities in Kosovo would do good to follow the logic of awarding compensation for non-pecuniary damage, as it is done by the European Court.

### 3. Protection of the right to life of persons in public prisons, the question of effective remedies and the temporal jurisdiction of the Constitutional Court

In Case No. KI134/14 (Case No. KI134/14, *Applicant, Sadik Thaqi*), the Applicant complained before the Constitutional Court about the death of his son while in prison and the responsibility of public authorities to investigate the cause of his son's death (*Ibid.*). He alleged a violation of the right to life as guaranteed by Article 25 of the Constitution in connection with Article 2 of the ECHR on substantive and procedural grounds (*Ibid.*). According to the summary of the facts as presented by the decision of the Constitutional Court, on 4 September 2003, a number of inmates in the Dubrava Prison attacked unarmed prison guards and took control of Pavilion No. 2 of that prison (*Ibid.*). The inmates in the Dubrava Prison barricaded the entrance to the cell block using mattresses and requested improved living conditions from prison authorities (*Ibid.*). The prison authorities intervened by removing the mattresses which were used by the inmates as barricade. In response the prisoners set the mattresses on fire and, as a consequence, five inmates died from the inhalation of toxic fumes and injuries sustained in the ensuing fire (*Ibid.*). The Applicant's son A.Th., was one of the prisoners that died in the riot in the Dubrava Prison (*Ibid.*). The United Nations Mission in Kosovo<sup>11</sup> (hereinafter, the UNMIK)

<sup>10</sup> Law on Crime Victim Compensation, No. 05/L-036, entered into force in 2015, which means that the Constitutional Court could not refer to it because its judgment in Case no. KI41/12 was rendered in 2013.

<sup>11</sup> See Article 10 of the Resolution 1244 (1999) Adopted by United Nations Security Council at its 4011<sup>th</sup> meeting, on 10 June 1999, which provides that the Secretary-General is authorized to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo while supervising the development of provisional democratic self-governing institutions ensuring conditions for a peaceful and normal life in Kosovo. Retrieved 25 April 2019, from [https://peacemaker.un.org/sites/peacemaker.un.org/files/990610\\_SCR1244%281999%29.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/990610_SCR1244%281999%29.pdf).



Prosecutor requested examination and autopsies of the bodies of the five deceased inmates (*Ibid.*). UNMIK established a commission “the Dubrava Commission” in order to establish the events of 4 September 2003 and the facts that had led up to them (*Ibid.*). The UNMIK Prosecutor requested that UNMIK investigators expand the scope of investigation and to include possible criminal conduct or negligence by the UNMIK employees. That recommendation was ignored by the UNMIK authorities (*Ibid.*). On December 2008 the case was officially handed over from UNMIK to the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO<sup>12</sup> in accordance with the Law on Special Prosecution Service in Kosovo<sup>13</sup> (Law on Special Prosecution Service in the Republic of Kosovo, Law No. 03/L-052). The EULEX Prosecutor terminated proceedings against the prisoners finding that there was no justified suspicion that the defendants had committed criminal offences (*Ibid.*). The Applicant was informed about the above-stated decision of the EULEX Prosecutor and that he had an option to submit a written application for extension of the investigation or to file an indictment against the defendants before the competent court within eight days upon receipt of ratification on termination of the investigation. The Applicant, it appeared, did not exercise either option (*Ibid.*). Instead, the Applicant filed a complaint with the Human Rights Review Panel<sup>14</sup> (hereinafter, the HRRP). With regard to the actions and omissions by UNMIK, the HRRP observed that it lacked jurisdiction and therefore declared that complaint inadmissible (*Ibid.*). With regard to the complaint against the prisoners, the HRRP declared that it had jurisdiction but found that EULEX discharged its responsibilities with regard to that complaint and consequently found that there was no violation of Article 2 of the ECHR (*Ibid.*). Thereafter, the Applicant pleaded the case of his son’s death requesting an investigation to be made with the Government of Kosovo, the State Prosecutor, the Supreme Court, the European Court and even reiterated his complaint with the EULEX (*Ibid.*). In a letter dated 07 June 2013, the Office of Chief Prosecutor of EULEX informed the Applicant that an investigation may be reopened only if new evidence is available that was not previously administered and considered (*Ibid.*). So the Applicant then, submitted a constitutional complaint with the Constitutional Court. The Constitutional Court first assessed the standing of the Applicant, and declared that the Applicant as the parent of the deceased A.Th., in accordance with its own case-law and the case-law of the European Court- is an indirect victim and is thus an authorized person to submit a complaint with the Constitutional Court (*Ibid.*). As regards the Applicant’s complaint against public authorities for failing to protect his son’s right to life, the Constitutional Court declared that it lacked temporal jurisdiction and that that complaint is *ratione temporis* incompatible with the Constitution (*Ibid.*). The Constitutional Court reasoned such a finding by declaring that the alleged interference, i.e., the death of the Applicant’s son occurred on 4 September 2003 whereas the Constitution entered into force on 15 June 2008, from which date the Constitutional Court has temporal jurisdiction (*Ibid.*). The Constitutional Court in order to support such a finding relied on

---

<sup>12</sup> EULEX Kosovo was launched in 2008 as the largest civilian mission under the Common Security and Defence Policy of the European Union. EULEX’s overall mission is to assist the Kosovo authorities in establishing sustainable and independent rule of law institutions. For more on EULEX Kosovo see COUNCIL JOINT ACTION 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO. Retrieved 25 April 2019, from [https://www.eulex-kosovo.eu/eul/repository/docs/WEJointActionEULEX\\_EN.pdf](https://www.eulex-kosovo.eu/eul/repository/docs/WEJointActionEULEX_EN.pdf).

<sup>13</sup> Article 2 of the Law on Special Prosecution Service in Kosovo, Law No. 03/L-052, stipulates that the Special Prosecution Office is established as a specialized prosecutorial office operating within the Office of the State Prosecutor of Kosovo.

<sup>14</sup> The European Union established the Human Rights Review Panel on 29 October, 2009 with a mandate to review alleged human rights violations by EULEX Kosovo in the conduct of its executive mandate. The Human Rights Review Panel was established on the basis of Council Joint Action 2008/124/CFSP of 4 February 2008, the EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel. Retrieved 9 August 2019 <http://hrrp.eu/index.php>.

its own case-law and the case-law of the European Court namely the case of *Blečić v. Croatia*<sup>15</sup>. Furthermore, the Constitutional Court added that it appears that the Applicant forfeited his right to complain because, under the applicable law at the time, he did not request extension of investigation nor did he file an indictment against the defendants<sup>16</sup> before the competent court (*Ibid.*). In addition, the Constitutional Court referred to the case-law of the European Court, namely the case of *Hugh Jordan v. the United Kingdom*<sup>17</sup>, wherein, inter alia, it was held that the obligation to investigate is not an obligation of result, but one of means. The Constitutional Court noted that the onus is on authorities to take reasonable steps available to them from to secure the evidence concerning the incident, including inter alia eyewitnesses testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (*Ibid.*). In the end, the Constitutional Court concluded that: (i) the complaint with regard to the responsibility of UNMIK/public authorities about the death of the applicant's son is incompatible *ratione temporis* with the Constitution; and, (ii) the complaint with regard to a lack of an effective investigation, is manifestly ill-founded because there is no evidence that the Public Prosecutor did not conduct a proper investigation when he took the decision that there was no person who could be indicted for the incident that caused his son's death (*Ibid.*). My estimation is that in Case No. KI134/14, the Constitutional Court was formalistic with the application of the *ratione temporis* principle and did not give due consideration to the specificity of the rights guaranteed by Article 2 of the ECHR and 25 of the Constitution. The Constitutional Court relied on the *Blečić* case in order to support its lack of temporal jurisdiction. However, in respect of *Blečić* case and pertinent to the application of *ratione temporis* principle vis-à-vis Article 2 of the ECHR, the European Court held that the test and criteria established in *Blečić* are of a general character, which requires that the special nature of certain rights, such as those laid down in Article 2 and 3 of the ECHR, can be taken into consideration when applying those criteria (*Šilih v. Slovenia*). The European Court reiterated in that connection that Article 2 together with Article 3 of the ECHR are amongst the most fundamental provisions and also enshrine the basic values of the democratic societies making up the Council of Europe (*Ibid.*).

On this point, even if it is accepted that the Constitutional Court lacked temporal jurisdiction to assess whether authorities, at the material time, did all that could reasonably be done to prevent the death of the Applicant's son, there is still the unresolved question whether there was an effective investigation with the view to establishing the cause of the death of the Applicant's son and punishment of the perpetrators. Having said that, the Constitutional Court should have been prepared to have some regard to the facts which occurred prior to entry into force of the Constitution because of their causal connection with subsequent facts which form the sole basis of the Applicant's constitutional complaint (*Ibid.*). According to the European Court, the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty (*Ibid.*). In that light, the European Court noted that although the procedural obligation under Article 2 is triggered by the acts concerning substantive aspects of the said article, it can give rise to a finding of a separate and independent interference. In that respect it can be considered to be a detachable obligation arising out of Article 2 capable of binding the

---

<sup>15</sup> Pertinent to the concept of temporal jurisdiction see Judgment delivered by Grand Chamber, *Blečić v. Croatia*, no. 59532/00, 8 March 2006.

<sup>16</sup> The Constitutional Court should have used the term suspects rather than defendants because individuals were suspected but no one was accused or stood trial. The term "suspect" is defined as "A person believed to have committed a crime or offense". The term "defendant" is defined as "A person sued in a civil proceedings or accused in a criminal proceeding". See Black's law Dictionary, Seventh Edition, ST. PAUL. MINN., 1999.

<sup>17</sup> On the question of state's obligation to carry out investigations see Judgment on the Merits delivered by a Chamber, *Hugh Jordan v. the United Kingdom*, no. 24746/94, 4 May 2001.

State even when the death took place before the critical date (*Ibid.*). The European Court noted that this approach finds support also in the jurisprudence of the United Nations Human Rights Committee and the Inter American Court of Human Rights, which have accepted jurisdiction *ratione temporis* over the procedural complaints relating to deaths which had taken place outside their temporal jurisdiction (*Ibid.*). With regard to the State's temporal jurisdiction, the Inter-American Court of Human Rights has held that according to the principle of continuity of the State in international law, responsibility exists both independently of changes in government over a period of time and continuously from the time of the act that creates responsibility to the time when the act is declared illegal (*Ibid.*, Velásquez-Rodríguez). In this light, it is regrettable that the Constitutional Court remained silent on the patent disregard of the recommendation of the UNMIK Prosecutor to the UNMIK authorities to investigate the alleged criminal conduct or negligence of UNMIK employees (*Ibid.*, Case No. KI134/14). Such lack of accountability of UNMIK-as a surrogate state- can be described as a paradox, whereby those entities that are in Kosovo to help preserve human rights and the rule of law are themselves not answerable to the very person they are obliged to protect (Benedek, 2005). The Constitutional Court should have at the very least declared that, in Case No. KI134/14, UNMIK insisted on being untouchable and should have voluntarily refrained from making full use of the immunity of itself and its staff (*Ibid.*). As an aside but related note nonetheless, the reason for full immunity of UNMIK before Kosovo courts was due to UNMIK Regulation 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo (*Ibid.*). In this regard, the Constitutional Court, at the very least, should have recognized the overriding preeminence of the right to life in the face of the regulation on immunities of UNMIK personnel because there must be some limit to such immunity which cannot be characterized by absolutism.

Bearing in mind the foregoing considerations, the Constitutional Court should have inquired whether public authorities did all that could be reasonably be expected of them-after entry into force of the Constitution<sup>18</sup>- to conduct an effective investigation and establish whether the death of the Applicant's son occurred due to negligence of prison authorities or due to violent acts of inmates? Unfortunately, the Constitutional Court failed to inquire whether state authorities conducted an effective investigation with the view to identify and punish those responsible for the death of the Applicant's son. Clearly the Applicant was denied of an effective remedy regarding the conduct of investigations related to his son's death which is in contravention with the general law principle, according to which where there is a right, there is a remedy (Barak, 1996).

In the context of prisoners, the European Court has held that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them (Paul and Audrey Edwards v. the United Kingdom). It is incumbent on the State to account for any injuries suffered in custody, which obligation is particularly stringent where that individual dies (*Ibid.*). The authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to request particular lines of inquiry or investigate procedures (Nachova and Others v. Bulgaria). In addition, the investigation must be accessible to the victim's family to the extent necessary to safeguard their legitimate interests. There must also be a sufficient element of public scrutiny of the investigation, the degree of which may vary from case to case (Giuliani and Gaggio v. Italy).

In Case No. KI134/13, the Constitutional Court should have said or admitted that there was no effective investigation conducted by the UNMIK authorities because it was not established how the death of the Applicant's son came about. Was he killed as a result of negligence of UNMIK

---

<sup>18</sup> The Constitution of Kosovo entered into force in June 2008 whereas the interference with the right to life which the Applicant complained occurred on or about 2003. This is a very important distinction because from 2008, public authorities of Kosovo exercised full powers in all areas related to the rule of law, the legislative, executive and the judiciary branches of the government.



officials or by fellow prison inmates? What about the actions or omissions of Kosovar authorities after the Constitution entered into force on 15 June 2008? Did they take action to shed light on the cause or the culprits for the death of the Applicant's son? The answer to those questions is negative. The Kosovar authorities did not take any steps to meet the criteria set out by the procedural aspect of Article 2 of the ECHR, which is an autonomous duty independently from the substantive aspect of Article 2 (*Ibid.*, *Silih v. Slovenia*). The Kosovar authorities-not unlike UNMIK authorities-failed to establish responsibility for the death of the Applicant's son. In the light of the foregoing, the Constitutional Court should have found that Kosovar authorities have violated Article 25 of the Constitution and 2 of the ECHR on procedural grounds due to failure to conduct an effective and thorough investigation.

As to the Constitutional Court's rationale that the Applicant had an option to file an indictment against the defendants/suspects before the competent court pertinent to the termination of the investigation, and thus, forfeited his right to complain (*Ibid.*, Case No. KI134/14). In this respect, it must be said that the Constitutional Court should have interpreted its subsidiary jurisdiction as set out in Article 113 (7)<sup>19</sup> of the Constitution with a degree of flexibility owing to the fundamental nature of the right protected by Article 25 of the Constitution in connection with Article 2 of the ECHR. The Constitutional Court did not do all it could do, in order to determine whether the remedy which the applicant allegedly did not use was effective and practical as opposed to theoretical and illusory (*Ibid.*, *Opuz v. Turkey*). Because the rights guaranteed by the ECHR should be practical and effective, and by the same token the rights guaranteed by the Constitution should be practical and effective too. In this respect, it must be underscored that the request of the UNMIK Prosecutor to expand the scope of investigation and to include possible criminal conduct or negligence by the UNMIK employees was ignored by the UNMIK authorities (*Ibid.*, Case No. KI134/14). Against this backdrop, the Applicant's decision not to file an indictment against suspects must not be held against him because it cannot be seen how an additional criminal complaint about the same issues lodged by the applicant might have led to a different outcome<sup>20</sup> (*Branko Tomašić v. Croatia*). In cases concerning a death in circumstances that might give rise to the State's responsibility the authorities must act of their own motion once the matter has come to their attention (*Ibid.*). They cannot leave it to the initiative to the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (*Ibid.*). In the light of the foregoing, it must be reemphasized that the Applicant, on many occasions, pleaded the case of his son's death before all authorities in Kosovo without success. Therefore, he should have been absolved of the disproportionate requirement to exhaust remedies which much likely would have proved to be futile as well. In other words, the Applicant, with respect to exhaustion of effective remedies showed that: (i) in fact he used legal remedies to his avail; (ii) that the legal remedies used by him were ineffective in relation to his case; and that, (iii) by way of ineffectiveness of legal remedies used by him, there were in fact, special circumstances absolving him from the requirement to pursue other legal avenues<sup>21</sup>. It follows, that the Applicant was denied of an effective legal remedy with the view to enforcing the substance of rights guaranteed by Article 2 of the ECHR in connection with Article 25 of the Constitution.

---

<sup>19</sup> Article 113 (7) of the Constitution of Kosovo determines that individuals may petition the Constitutional Court but only after having exhausted all legal remedies to their avail.

<sup>20</sup> On the concept of not straining applicants with undue and disproportionate burden to seek other legal avenues which offer no prospect of success see *Branko Tomašić v. Croatia*, no. 46598/06, Judgment on the Merits delivered by a Chamber, 15 January 2014.

<sup>21</sup> See conversely Case No. KI116/14, *Applicant Fadil Selmanaj*, Resolution on Inadmissibility of the Constitutional Court of Kosovo, of 21 January 2015.

#### 4. Conclusion

The highlighted cases in this paper indicate that public authorities including courts in Kosovo have a lot of catching up to do when it comes to affording protection of the right to life to individuals in line with the standards set out by the well-established case law of the European Court. The law enforcement bodies including the judiciary must be less formalistic and not place unreasonable burden of proof on the victim, for example, it cannot be expected from a victim to have knowledge of arcane aspects of the law, or to have blanket solution when construing concepts such as temporal jurisdiction without having due regard to the specificities of safeguards provided for by Article 2 of the ECHR and 25 of the Constitution. The public authorities as well as the public at large must sensitized about the vulnerability of women in cases of domestic violence, and in that regard, public authorities must act with due diligence in order to protect women from violation of their physical and psychological integrity and that the perpetrator's rights cannot supersede the victims' human rights to life (*Ibid.*, *Opuz v. Turkey*). The public authorities in Kosovo must recognize that in democratic states ruled by law, it is usually private parties that kill individuals, interfere with their private and family life, limit their freedom to express opinions, and disrupt peaceful assemblies (Florczak-Wator, 2017). That is the reason why the European Court replaced the idea of protecting the individual against State measures with the idea of protecting the individual through State measures (*Ibid.*). In addition, the Constitutional Court and the courts of general jurisdiction, in cases where they find a violation of the right to life, must make sure to award compensation for non-pecuniary damage in favor of the victim because only finding of a violation is not sufficient just satisfaction; and must not be satisfied to only render judgments of a declaratory nature. When applying and interpreting the principle of temporal jurisdiction, the Constitutional Court must have due regard to the specific safeguards guaranteed by Article 2 of the ECHR in connection with Article 25 of the Constitution and not apply the said principle indiscriminately. Moreover, public authorities in Kosovo must make sure that the remedies afforded to individuals produce real tangible results in order to truly live up to the standard that the rights guaranteed by the Constitution and the ECHR are intended to be practical and effective rather than theoretical and illusory, and provide a robust protection of fundamental rights, as it is set out by the well-established case law of the European Court.

#### Acknowledgements

This research did not receive any specific grant from funding agencies in the public commercial, or not-for-profit sectors.

The author declares no competing interests.

#### References

- American Convention on Human Rights (1969). Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969). Retrieved 10 April 2019, from <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>.
- Barak, A. (1996). Constitutional human rights and private law. *Yale law School-Faculty Scholarship Series*, 3698, 218-281. Retrieved from <https://digitalcommons.law.yale.edu/fss/>.
- Benedek, W. (2004). Final status of Kosovo: The role of human rights and minority rights. *Chicago-Kent Law Review*, 80, 215-233. Retrieved from <https://studentorgs.kentlaw.iit.edu/cklawreview/>.
- Black's Law Dictionary* (1999). Seventh Edition, ST. PAUL. MINN.

- Bokshi, B. (2018). Enforcement and effectiveness of decisions of constitutional court of republic of Kosovo in cases of violation of human rights. *Acta Universitatis Danubius*, 14, 122-133. Retrieved from <https://journals.univ-danubius.ro/>.
- Case No. KI116/14, *Applicant Fadil Selmanaj*, Resolution on Inadmissibility of the Constitutional Court of Kosovo, of 21 January 2015.
- Case No. KI41/12, *Applicants Gëzim and Makfire Kastrati*, Judgment of the Constitutional Court of Kosovo, of 26 February 2013.
- Case No. KI134/14, *Applicant Sadik Thaqi*, Resolution on Inadmissibility of the Constitutional Court of Kosovo, of 30 December 2015.
- Constitution of the Republic of Kosovo* (Constitution, K-09042008, Assembly of Kosovo, 9 April 2008, and its amendments, Official Gazette).
- Directive relating to compensation to crime victims* (2004). The Council of European Union 2004/80/EC. Retrieved 20 August 2019, from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0080&from=EN>.
- ECtHR, Case *Blečić v. Croatia*, Application no. 59532/00, Judgment delivered by Grand Chamber, 8 March 2006.
- ECtHR Case *Branko Tomašić v. Croatia*, Application no. 46598/06, Judgment on the Merits delivered by a Chamber, 15 January 2014.
- ECtHR, Case *Giuliani and Gaggio v. Italy*, Application no. 23458/02, Judgment on the Merits delivered by Grand Chamber, 24 March 2011.
- ECtHR, Case *Kontrova v. Slovakia*, Application no. 7510/04, Judgment on the Merits delivered by a Chamber, 31 May 2007.
- ECtHR, Case *Nachova and Others v. Bulgaria*, Applications nos. 43577/98 and 43579/98, Judgment on the Merits delivered by Grand Chamber, 6 July 2005.
- ECtHR, Case *Osman v. the United Kingdom*, Application no. 87/1997/871/1083, Judgment on the Merits delivered by Grand Chamber, 28 October 1998.
- ECtHR Case *Trubnikov v. Russia*, Application no. 49790/99, Judgment on the Merits delivered by a Chamber, 5 July 2005.
- ECtHR, Case *Opuz v. Turkey*, Application no. 33401/02, Judgment on the Merits delivered by a Chamber, 9 June 2009.
- ECtHR, Case *Paul and Audrey Edwards v. the United Kingdom*, Application no. 46477/99, Judgment on the Merits delivered by a Chamber, 14 March 2002.
- ECtHR, Case *Šilih v. Slovenia*, Application no. 71463/01, Judgment on the Merits delivered by Grand Chamber, 9 April 2009.
- Guide on Article 2 of the European Convention of Human Rights: right to life, Council of Europe/European Court of Human Rights 2018. [https://www.echr.coe.int/Documents/Guide\\_Art\\_2\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf) (referenced on 20 august 2018).
- Inter-American Court of Human Rights (1988). Case *Velásquez-Rodríguez v. Honduras*, (Ser. C) No. 4, Judgment, 29 July 1988.
- Law on Crime Victim Compensation No. 05/L-036.
- Law on Kosovo Judicial Council No. 03/L-223.
- Law on Protection Against Domestic Violence, No.03/L –182.
- Law on Special Prosecution Service in the Republic of Kosovo, Law No. 03/L-052.
- Recommendation on the protection of women against violence*, Council of Europe/Committee of Ministers, Rec (2002) 5. Retrieved 10 April 2019, from <https://www.coe.int › Themes › Violence against Women>.
- Resolution 1244 (1999). United Nations Security Council. Retrieved 25 April 2019, from [https://peacemaker.un.org/sites/peacemaker.un.org/files/990610\\_SCR1244%281999%29.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/990610_SCR1244%281999%29.pdf).
- The EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel. Retrieved 9 August 2019, from <http://hrrp.eu/index.php>.
- The European Union Rule of Law Mission in Kosovo (2008). Council Joint Action 2008/124/CFSP. Retrieved 25 April 2019, from [https://www.eulex-kosovo.eu/eul/repository/docs/WEJointActionEULEX\\_EN.pdf](https://www.eulex-kosovo.eu/eul/repository/docs/WEJointActionEULEX_EN.pdf).
- UNMIK regulation on the status, privileges and immunities 2000/47.

Wator, F. M. (2017). The role of the European Court of Human Rights in promoting horizontal positive obligations of the state. *International and Comparative Law Review*, 17(2), 39-53.  
<https://doi.org/10.2478/iclr-2018-0014>

