

The Risks of “Continuing Situation” Litigation in Transitional Political Systems: Lessons from the ECtHR for the Constitutional Court of Kosovo

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INTRODUCTION

In two recent cases, the Constitutional Court of Kosovo (“the Constitutional Court”) has introduced the notion of a “continuing situation” into its jurisprudence.¹ A continuing situation is a set of circumstances that repeats anew every day, thereby preventing a legal time limit from beginning to run until the situation ceases. This functional, rather than formal, interpretation of time limits can significantly expand a court’s temporal jurisdiction. In countries that have undergone recent transitions, the magnitude of these effects can be great. As a young nation still grappling with the remnants of a former socialist regime, Kosovo is no exception. Despite the potential impact of introducing a continuing situation doctrine into its jurisprudence, the Constitutional Court has provided little guidance as to the limits of the concept within Kosovar constitutional law.

Because the Constitutional Court does not have discretionary jurisdiction, a vague continuing situation doctrine will lead to serious docket control problems. For all cases filed with the Court, a Judge Rapporteur must draft a report that includes a full summary of the facts and legal arguments presented.² A review panel of three judges then uses that report to vote on

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1. See Naim Rustemi and 31 Other Deputies of the Assembly of the Republic of Kosovo v. His Excellency, Fatmir Sejdiu, President of the Republic of Kosovo, Case No. KI 47/10, Judgment (Sept. 28, 2010); see also Imer Ibrahim and 48 Other Former Employees of the Kosovo Energy Corporation v. 49 Individual Judgments of the Supreme Court of the Republic of Kosovo, Case No. KI 40/09, Judgment (June 23, 2010).

2. See On the Constitutional Court of the Republic of Kosovo (Law No. 03/L-121) art. 22; see also Rules of Procedure of the Constitutional Court of the Republic of Kosovo 34 [hereinafter Rules of Procedure].

the admissibility of the referral.³ Regardless of the outcome of this vote, the Constitutional Court must produce an opinion. If the referral is admissible, the full Court will decide the merits of the case and write an opinion explaining its reasoning.⁴ Even if the referral is found inadmissible, however, the Court must still write an opinion discussing the case's facts and arguments, while enumerating the reasons for inadmissibility.⁵ Given this procedure, the primary difference between an admissible and inadmissible referral is whether the full Court deliberates on the case. Otherwise, *any* referral filed with the Constitutional Court entails a comparable amount of work. Because even manifestly ill-founded claims require the Court to expend considerable judicial resources, the Constitutional Court has great interest in ensuring that the attorneys and citizens of Kosovo understand what constitute meritorious claims. Calibrating the citizenry's expectations in this way requires coherent, cabined jurisprudential concepts.⁶ Without such clarity, citizens will feel encouraged to "take their chances" in the court system. If many of these of claims are inadmissible, then the time used to produce the required resolutions on inadmissibility will divert the Court's attention from those cases in which it has the authority to remedy constitutional violations.

Clarity is particularly pressing for a continuing situation doctrine. When the concept of a continuing situation is introduced into a country's jurisprudence, previously expired claims may suddenly become admissible. Eager applicants could attempt to capitalize on claims for which they had lost hope of obtaining relief. As the requirements for a continuing situation become more vague, more people may think that their cases qualify and will therefore file suit. Herein lies the problem the Constitutional Court faces. Without identifying the requirements of a continuing situation, the Court has opened itself up to a massive influx of cases that, even if inadmissible, still have the potential to overwhelm the Court's docket. A key example of this phenomenon is the many claims that could arise regarding property expropriated by the former Yugoslavia. Before the Constitutional Court adopted the notion of a continuing situation, the Court could have dismissed such cases as outside its temporal jurisdiction,⁷ thereby establishing a clear rule that informs citizens not to bring such claims. After the Court introduced the notion of a continuing situation, however, those same citizens see a renewed opportunity to have their property returned. The

3. See Law No. 03/L-121, art. 22; *see also* Rules of Procedure 35.

4. Rules of Procedure 57.

5. *Id.*

6. These efforts, while necessary, still may not be enough for the Constitutional Court to achieve adequate docket control. Although beyond the scope of this Note, the Court may also want to consider other means of control, such as a fee-shifting regime. *See, e.g.,* Jamie S. Henikoff & Scott R. Peppet, *The Attorney Accountability Act: A Case Study in the Complexities of Incentive-Based Legal Reform*, 1 HARV. NEGOT. L. REV. 223 (1996).

7. *See, e.g.,* Nexhmedin Llumnica v. Decision C1.nr.618/02 of the Municipal Court of Pristina, Case No. KI 03/09, Resolution on Inadmissibility (Dec. 14, 2010).

question then becomes whether the Constitutional Court intends to expand its jurisdiction to all such cases. Thus far, the Court’s cases reveal reluctance toward addressing the ills of the former Yugoslavia.⁸ If, as these instances indicate, the Constitutional Court seeks to limit its jurisdiction over such cases, then the Court must find a way to impose coherent limitations on the applicability of continuing situations within Kosovar law, or risk creating inconsistency in its jurisprudence.

For guidance on how to cabin its continuing situation doctrine, the Constitutional Court should consider the lessons learned by the European Court of Human Rights (“ECtHR”). There are many reasons the Court should look to the ECtHR for direction. In the international sphere, Kosovo’s compliance with ECtHR case law would bolster Kosovo’s legitimacy. Furthermore, by conforming to European human rights norms, Kosovo would advance its goals of membership in the Council of Europe and the European Union. Domestically, reference to ECtHR jurisprudence has a still more pressing impetus: the Constitutional Court is *obligated* to consider this case law. The Constitution of the Republic of Kosovo (“the Constitution”) incorporates the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) into Kosovar law.⁹ The Constitution further requires that constitutional rights “be interpreted consistent with the court decisions of the European Court of Human Rights.”¹⁰ Thus, although Kosovo is not formally bound as a party to the Convention, its domestic law considers ECtHR case law to be highly authoritative and entitles Kosovar citizens to bring constitutional claims under the Convention. As a result, the importance of considering the ECtHR-established limits on continuing situations is beyond just that of a means of docket control; under its mandate the Court is required to take these standards into account.

Beyond these loftier notions, the Constitutional Court’s jurisprudence forcefully impacts the situation on the ground in Kosovo. No case more dramatically exemplifies that power than the recent case involving Kosovo’s President.¹¹ In September 2010, the Constitutional Court held that the President of Kosovo, Fatmir Sejdiu, could not simultaneously serve as presi-

8. See, e.g., *id.* (dismissing a request for restitution of property expropriated in the 1970s); Ahmet Fetiu v. Decision A. No. 298/2009 of the Supreme Court of Kosovo, dated 11 September 2009, Case No. KI 54/09, Resolution on Inadmissibility (Oct. 15, 2010) (dismissing a request for restitution of property expropriated in the 1960s); Heirs of Ymer Loxha and Sehit Loxha v. Decision No. PKL. No. 21/07 of the Supreme Court of the Republic of Kosovo, dated 17 December 2008, Case No. KI 14/09, Resolution on Inadmissibility (Oct. 15, 2010) (dismissing a request for restitution of property expropriated in the 1940s).

9. CONST. OF THE REPUBLIC OF KOSOVO, June 15, 2008, art. 22.2.

10. *Id.* art. 53.

11. See Naim Rrustemi and 31 Other Deputies of the Assembly of the Republic of Kosovo v. His Excellency, Fatmir Sejdiu, President of the Republic of Kosovo, Case No. KI 47/10, Judgment (Sept. 28, 2010).

dent and the chairman of his political party.¹² The case, however, had been brought after the statute of limitations had expired. Thus, in order to find the case admissible, the Constitutional Court declared the case a continuing situation.¹³ Within a week of the Court's ruling, Sejdiu resigned from the presidency, which started a sharp downward spiral in Kosovo's political stability.¹⁴ Only a month after Sejdiu's resignation, Kosovo's legislature, the Assembly, voted that it had no confidence in the current government and dissolved itself in favor of holding emergency elections.¹⁵ These elections were disastrous. Irregularities were so rampant that preliminary reports questioned whether the results could be used at all.¹⁶ Ultimately, new elections were held in five districts,¹⁷ but even these new results were disputed for weeks.¹⁸ Now, the newly re-elected Prime Minister is being investigated for leading an international organ trafficking operation while in office.¹⁹

As an immediate result of the Constitutional Court's ruling, Kosovo's stability, which had gradually grown since independence, quickly began to crumble. Given Kosovo's background of political turmoil, the value of maintaining order should not be taken lightly. At this point, property restitution has not yet caused massive unrest, but the issue has the potential to increase the country's instability exponentially. Like other former socialist republics,²⁰ Kosovo must address this lingering matter, as evidenced by the many property cases that have begun to emerge at the Constitutional Court.²¹ Under the case law of the ECtHR, the Constitutional Court could exercise jurisdiction over some of these claims but not others. To best utilize its limited time and resources for cases in which it can provide relief, the

12. *Id.* ¶ 70.

13. *Id.* ¶¶ 30–35.

14. Petrit Collaku, *Kosovo December Election After No-Confidence Vote*, BALKAN INSIGHT (Nov. 2, 2010), <http://www.balkaninsight.com/en/article/kosovo-govt-loses-no-confidence-vote-snap-elections-called>.

15. *Id.*

16. Petrit Collaku, *Scale of Kosovo Fraud Daunts Observers*, BALKAN INSIGHT (Dec. 30, 2010), <http://www.balkaninsight.com/en/article/recounting-of-disputed-votes-continues-next-year>.

17. Lawrence Marzouk, *Polls Open for Kosovo Reruns*, BALKAN INSIGHT (Jan. 9, 2011), <http://www.balkaninsight.com/en/article/polls-open-for-kosovo-reruns>.

18. *Kosovo: Top International Envoy Calls for Credible Gov't*, BALKAN INSIGHT (Jan. 14, 2011), <http://www.balkaninsight.com/en/article/kosovo-top-international-envoy-calls-for-credible-gov-t>.

19. *Call for Independent Prosecutor to Probe Organ Harvesting Claims*, BALKAN INSIGHT (Jan. 19, 2011), <http://www.balkaninsight.com/en/article/kosovo-eu-mission-needs-special-prosecutor-to-investigate-kla>.

20. For insight into other property restitution regimes, see, for example, Megan J. Ballard, *Post-Conflict Property Restitution: Flawed Legal and Theoretical Foundations*, 28 BERKELEY J. INT'L L. 462 (2010); Cheryl W. Gray & Peter G. Ianachkov, *Bulgaria's Evolving Legal Framework for Private Sector Development*, 27 INT'L L. 1091 (1993).

21. See, e.g., Nexhmedin Llumnica v. Decision C1.nr.618/02 of the Municipal Court of Pristina, Case No. KI 03/09, Resolution on Inadmissibility (Dec. 14, 2010); Ahmet Fetiu v. Decision A. No. 298/2009 of the Supreme Court of Kosovo, dated 11 September 2009, Case No. KI 54/09, Resolution on Inadmissibility (Oct. 15, 2010); Heirs of Ymer Loxha and Sehit Loxha v. Decision No. PKL. No. 21/07 of the Supreme Court of the Republic of Kosovo, dated 17 December 2008, Case No. KI 14/09, Resolution on Inadmissibility (Oct. 15, 2010).

Court should work to develop a coherent, cabined continuing situation doctrine that clearly delineates the limits of the Court's jurisdiction. Under the current vague doctrine, the Court is inviting both meritorious and ill-founded claims. That result does not optimize the Court's institutional capacity to advance the rule of law and protect the rights of citizens.

In making this argument, this Note begins by giving a brief explanation of Kosovo's recent political history in Part I, which contextualizes Kosovo's present problems. Then, Part II explains the current notion of the continuing situation in Kosovar constitutional law. Part III examines several types of cases that may become admissible under the Court's vague continuing situation doctrine. For each type of case, the Note synthesizes the relevant case law from the ECtHR and then analyzes how that case law would inform the situation as applied to Kosovo. Finally, Part IV concludes by reiterating the importance to Kosovo of a cabined continuing situation doctrine.

I. A BRIEF HISTORY OF KOSOVO'S INDEPENDENCE

Before critiquing the jurisprudence of the Constitutional Court of Kosovo, it would be helpful to recount how the Court was established and the context from which it arose. The former Yugoslavia consisted of six republics and two autonomous provinces, one of which was Kosovo.²² Serbs once dominated the population of Kosovo; yet, by the nineteenth century, Albanians had become the majority.²³ In the early 1980s, Kosovar Albanians were an estimated 78% of the population,²⁴ and today, the figure is estimated at 92%.²⁵

Relations between Serbs and Kosovar Albanians were strained, particularly after 1989, when revocation of Kosovo's status as an autonomous province brought direct rule from Belgrade and a harsh array of discriminatory measures directed against Kosovar Albanians.²⁶ At the same time, in the early 1990s, disorder spread across Yugoslavia. Kosovo watched and waited as bloody wars broke out in Slovenia, Bosnia, and Croatia.²⁷ Kosovar Alba-

22. HENRY H. PERRITT, JR., *THE ROAD TO INDEPENDENCE FOR KOSOVO* 21–22 (2010).

23. ROBERT ELSIE, *HISTORICAL DICTIONARY OF KOSOVO* 3 (2d ed. 2011); NOEL MALCOLM, *KOSOVO: A SHORT HISTORY 194–96* (1998); *Kosovo*, CENTRAL INTELLIGENCE AGENCY WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html> (last visited Oct. 21, 2011).

24. MARGARET CORDIAL & KNUT ROSANDHAUG, *POST-CONFLICT PROPERTY RESTITUTION: THE APPROACH IN KOSOVO AND LESSONS LEARNED FOR FUTURE INTERNATIONAL PRACTICE* 16 (2009); BRANISLAV KRSTIĆ-BRANO, *KOSOVO: FACING THE COURT OF HISTORY* 92 (2004).

25. ELSIE, *supra* note 23, at 2; CENTRAL INTELLIGENCE AGENCY, *supra* note 23.

26. See PERRITT, *supra* note 22, at 28; see also ELSIE, *supra* note 23, at 8–10; Aidan Hehir, *Introduction: Kosovo and the International Community*, in *KOSOVO, INTERVENTION AND STATEBUILDING: THE INTERNATIONAL COMMUNITY AND THE TRANSITION TO INDEPENDENCE* 1, 6 (Aidan Hehir ed., 2010); MALCOLM, *supra* note 23, at 344–47.

27. See TIM JUDAH, *KOSOVO: WHAT EVERYONE NEEDS TO KNOW* 68 (2008); see also *Kosovo: The Balkans' Moment of Truth?*, 110th Cong. 10 (2008) (statement of Hon. Daniel Fried, Assistant Secretary of European and Eurasian Affairs, United States Department of State); COMMISSION ON SECURITY AND

nian unrest festered domestically and militant organizations, particularly the Kosovo Liberation Army ("KLA"), grew in popularity.²⁸ Violence steadily increased over the years and then exploded in March 1998, when the Yugoslav President, Slobodan Milošević, deployed soldiers and police forces in a large-scale assault against the KLA.²⁹ The first major strike was against separatist leader Adem Jashari and at least 46 other members of his extended family, all of whom were brutally murdered.³⁰ Kosovar Albanians were outraged.³¹ Thousands of ethnic Albanians across Europe returned to Kosovo to join the fight, while, at the same time, Milošević exiled hundreds of thousands of Kosovar Albanians in an attempt to keep the resistance at bay.³²

Violence continued to spread until October 1998, when Richard Holbrooke and NATO representatives negotiated a cease-fire.³³ The peace did not last, however. By the end of 1998, violent encounters between Serbs and Kosovar Albanians reemerged.³⁴ Haunted by the failure to intervene early enough to prevent the death of 7,000 Bosniaks in Srebrenica, Western leaders pushed NATO to end the violence in Kosovo.³⁵ As a result, on March 24, 1999, NATO launched an airstrike called Operation Allied Force.³⁶ The attack did not produce immediate results; it took Belgrade 78 days to surrender, and, in the process, much of Kosovo's infrastructure and economy were destroyed.³⁷ By June 1999, however, Belgrade had agreed to

COOPERATION IN EUROPE, CSCE 105-2-1, REPRESSION AND VIOLENCE IN KOSOVO 6 (Mar. 18, 1998) (testimony of Mr. Isa Zymberi, Director, Kosovo Information Center).

28. HENRY H. PERRITT, JR., KOSOVO LIBERATION ARMY: THE INSIDE STORY OF AN INSURGENCY 32 (2008); *see also* ELSIE, *supra* note 23, at 10; JUDAH, *supra* note 27, at 75-80; DICK LEURDIJK & DICK ZANDEE, KOSOVO: FROM CRISIS TO CRISIS 23 (2001); PERRITT, *supra* note 22, at 32-34.

29. *See* STEPHEN SCHWARTZ, KOSOVO: BACKGROUND TO A WAR 138-39 (2000); *see also* COMMISSION ON SECURITY AND COOPERATION IN EUROPE, *supra* note 27, at 39-44 (timeline detailing violence incited by the KLA between 1996 and February 1998); ELSIE, *supra* note 23, at 10; PERRITT, *supra* note 22, at 36.

30. *See* SCHWARTZ, *supra* note 29, at 138-39; *see also* ELSIE, *supra* note 23, at 142; JUDAH, *supra* note 27, at 81; PERRITT, *supra* note 22, at 36.

31. *See* PERRITT, *supra* note 22, at 36-37; *see also* PERRITT, *supra* note 28, at 38. Jashari has since become a prominent symbol of Kosovar Albanian nationalism. *See* ELSIE, *supra* note 23, at 142; JUDAH, *supra* note 27, at 27-28; SCHWARTZ, *supra* note 29, at 142. For example, many Kosovar Albanian homes contain photos of Jashari. *See* PERRITT, *supra* note 22, at 36 n.19. On the day Kosovo declared independence, t-shirts bearing his image and the phrase "Respected one (hero), the end [is here]" were a common sight. *See id.*, at 215. Even today, a large photo of Jashari hangs outside Pristina's "Youth and Sports Palace," the shopping and sporting complex that serves as the city's cultural hub. *See* GAIL WARRANDER & VERENA KNAUS, KOSOVO: THE BRADT TRAVEL GUIDE 126-27 (2007).

32. *See* PERRITT, *supra* note 22, at 36-37; *see also* SCHWARTZ, *supra* note 29, at 141-42.

33. PERRITT, *supra* note 22, at 39; *see also* Timothy W. Crawford, *Pivotal Deterrence and the Kosovo War: Why the Holbrooke Agreement Failed*, 116 POL. SCI. Q. 510-12 (2001); Hehir, *supra* note 26, at 7.

34. PERRITT, *supra* note 22, at 39; *see also* Crawford, *supra* note 33, at 513-14; JUDAH, *supra* note 27, at 84; Hehir, *supra* note 26, at 7.

35. *See* JUDAH, *supra* note 27, at 87; *see also* Hehir, *supra* note 26, at 7.

36. JAMES KER-LINDSAY, KOSOVO: THE PATH TO CONTESTED STATEHOOD IN THE BALKANS 14-15 (2009); *see also* ELSIE, *supra* note 23, at 11; JUDAH, *supra* note 27, at 87; Hehir, *supra* note 26, at 8.

37. *See* KER-LINDSAY, *supra* note 36, at 15; *see also* Hehir, *supra* note 26, at 9.

withdraw all troops from Kosovo and to allow the United Nations to establish an interim administration in the region.³⁸

From 1999 until 2008, the United Nations Mission in Kosovo (“UNMIK”) controlled most of Kosovar affairs.³⁹ Recognizing the need for a more permanent solution, in 2005 the U.N. appointed Martti Ahtisaari, the former president of Finland, as the U.N. Special Envoy to Kosovo.⁴⁰ Ahtisaari was tasked with leading negotiations between Kosovo and Serbia⁴¹ on a final settlement of Kosovo’s status.⁴² The eventual fruit of these efforts was the Comprehensive Proposal for the Kosovo Status Settlement (“the Ahtisaari Plan”).⁴³ Although the original intent was for the Security Council to adopt the plan as a Resolution, Russia refused.⁴⁴ Amidst further negotiations, Kosovo lost patience and declared independence under the provisions of the Ahtisaari Plan on February 17, 2008.⁴⁵ As provided for in the Plan, international institutions continued to supervise Kosovo, particularly the International Civilian Office (“ICO”) and the European Union Special Representative (“EUSR”).⁴⁶ These institutions are much smaller than UNMIK and more limited in focus: they ensure that Kosovo is properly implementing the Ahtisaari Plan.⁴⁷ Thus, in 2009, the ICO helped establish the Constitutional Court of Kosovo, a new institution called for by

38. ELSIE, *supra* note 23, at 11; KER-LINDSAY, *supra* note 36, at 15; Hehir, *supra* note 26, at 9.

39. UNMIK was tasked with “establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.” S.C. Res. 1244, ¶ 10, U.N. Doc. S/RES/1244 (June 10, 1999).

40. See U.N. Secretary-General, Letter dated Oct. 31, 2005 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2005/708 (Nov. 10, 2005) [hereinafter Letter dated Oct. 31, 2005].

41. Although the wars in the early 1990s had essentially dissolved Yugoslavia, Serbia, in a loose union with Montenegro, retained the name of Yugoslavia until 2003, when this union adopted the name Serbia and Montenegro. See *Montenegro*, CENTRAL INTELLIGENCE AGENCY WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/mj.html> (last visited Dec. 28, 2011). Montenegro would later secede from Serbia in 2006. *Id.*

42. See *Kosovo: The Balkans’ Moment of Truth?*, *supra* note 27; KER-LINDSAY, *supra* note 36, at 26–28; Hehir, *supra* note 26, at 11. For a criticism of Ahtisaari’s performance, see KER-LINDSAY, *supra* note 36, at 112–13.

43. See U.N. Secretary-General, Letter dated Mar. 26, 2007 from the Secretary-General addressed to the President of the Security Council addendum: Comprehensive Proposal for the Kosovo Status Settlement, art. 2, U.N. Doc. S/2007/168/Add.1 (Mar. 26, 2007) [hereinafter Ahtisaari Plan].

44. See *Kosovo: The Balkans’ Moment of Truth?*, *supra* note 27, at 11; ELSIE, *supra* note 23, at 19–20; PERRITT, *supra* note 22, at 172–73; Hehir, *supra* note 26, at 11.

45. See ELSIE, *supra* note 23, at 20; PERRITT, *supra* note 22, at 211. The International Court of Justice has recently ruled that this declaration of independence did not violate international law. See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 141, ¶ 122 (July 22).

46. See Ahtisaari Plan, *supra* note 43, art. 12. The Ahtisaari Plan refers to the International Civilian Representative, who heads the International Civilian Office. See *id.* at Annex IX, art. 4.3; see also ELSIE, *supra* note 23, at 135; Lawrence Marzouk, *Kosovo International Supervision ‘to End in 2012,’* BALKAN INSIGHT (July 21, 2011), <http://www.balkaninsight.com/en/article/kosovo-international-supervision-to-end-in-2012>.

47. See ELSIE, *supra* note 23, at 135; PERRITT, *supra* note 22, at 167.

the Plan.⁴⁸ The Court currently consists of six Kosovar and three international judges.⁴⁹

II. THE CONTINUING SITUATION IN THE CONSTITUTIONAL LAW OF KOSOVO

A. *The President's Case*

The Constitutional Court may receive cases through nine different mechanisms.⁵⁰ One method allows “thirty (30) or more deputies of the Assembly . . . to refer the question of whether the President of the Republic of Kosovo has committed a serious violation of the Constitution.”⁵¹ In the first published decision of the Court referred through that mechanism,⁵² thirty-two deputies sought judgment on whether President Fatmir Sejdiu was violating the Constitution by simultaneously serving as Chairman of his political party, the Democratic League of Kosovo.⁵³

The Constitution provides that, “[a]fter election, the President cannot exercise any political party functions.”⁵⁴ The President raised several defenses, the most potent of which was procedural: the deputies had failed to refer the question to the Constitutional Court within the statute of limitations.⁵⁵ According to the Law on the Constitutional Court, a referral made by deputies challenging an action of the President must be made within thirty days, “starting from the day the alleged violation of the Constitution . . . has been made public.”⁵⁶ President Sejdiu argued that the fact he simultaneously held presidential and party offices was made public on June 16, 2008, the date on which he was elected President of Kosovo.⁵⁷ Alternatively, President Sejdiu asserted that the latest point at which this fact could be considered public was November 17, 2009, the date of the last local elections, when, pursuant to applicable law,⁵⁸ the Democratic League

48. See Ahtisaari Plan, *supra* note 43, at Annex I, art. 6.

49. Steven Hill & Paul Linden-Retek, *Supervised Independence and Post-Conflict Sovereignty: The Dynamics of Hybridity in Kosovo's New Constitutional Court*, 36 YALE J. INT'L L. ONLINE 26, 27 (2010), <http://www.yjil.org/docs/pub/o-36-hill-linden-retek-hybridity-in-kosovo.pdf>.

50. See CONST. OF THE REPUBLIC OF KOSOVO, June 15, 2008, art. 113(2).

51. *Id.* art. 113(6).

52. All published decisions of the Constitutional Court are available online. A review of the decisions reveals that no published decisions prior to Case 47/10 had been referred to the Constitutional Court through the mechanism laid out in Article 113.6 of the Constitution. See *Decisions*, CONSTITUTIONAL COURT OF KOSOVO, <http://www.gjk-ks.org/?cid=2,4> (last visited Oct. 24, 2011).

53. Naim Rrustemi and 31 Other Deputies of the Assembly of the Republic of Kosovo v. His Excellency, Fatmir Sejdiu, President of the Republic of Kosovo, Case No. KI 47/10, Judgment, ¶ 4 (Sept. 28, 2010).

54. CONST. OF THE REPUBLIC OF KOSOVO, June 15, 2008, art. 88(2).

55. See *Naim Rrustemi*, Case No. KI 47/10, ¶ 17.

56. On the Constitutional Court of the Republic of Kosovo (Law No. 03/L-121) art. 45.

57. *Naim Rrustemi*, Case No. KI 47/10, ¶ 22.

58. On General Elections in the Republic of Kosovo (Law No. 03/L-073) art. 48.

of Kosovo listed President Sejdiu as the Chairman of the party.⁵⁹ Even based upon this later date, the referral would have been time-barred on December 17, 2009.⁶⁰

Thus, the Constitutional Court found itself in a difficult position. On one hand, the plain language of the statute granting the Court jurisdiction time-barred the referral. On the other hand, the President of the country was engaged in a rather clear violation of the Constitution.⁶¹ As an institution seeking “to build a new tradition of constitutionality in Kosovo,” the Court would have been hard-pressed to allow such a public figure to avoid reprimand due to a technicality.⁶² The Court ultimately decided that it could not allow such an “irrational result” as allowing the President to continue violating the Constitution “simply because a referral was not made to the Constitutional Court in a timely manner.”⁶³ Rather, the Court turned to the concept of a continuing situation: because the President’s violation of the Constitution was repeated every day, the time limit did not start to run until the violation stopped.⁶⁴

The Court’s opinion provided no further details about the requirements of a continuing situation. Judges Almiro Rodrigues and Snezhana Botusharova filed a joint dissent, in which they, as international judges with significantly more expertise in European judicial norms, emphasized that the Court did not thoroughly consider European standards regarding time limits.⁶⁵ The cavalier manner in which the Court deemed the President’s case a continuing situation is somewhat unsurprising, however, given the way in which the Court first introduced the continuing situation into Kosovar constitutional law.

B. The Kosovo Energy Corporation Case

The Constitutional Court first employed continuing situation jurisprudence in a case involving forty-nine citizens promised pension packages by their former employer, the Kosovo Energy Corporation (“KEK”).⁶⁶ These packages were agreed upon in either 2001 or 2002 (depending upon the specific applicant) and were supposed to continue until a nationalized Kosovo Pension and Invalidity Insurance Fund was operational.⁶⁷ In July

59. *Naim Rrustemi*, Case No. KI 47/10, ¶ 23.

60. See Law No. 03/L-121, art. 45.

61. See CONST. OF THE REPUBLIC OF KOSOVO, June 15, 2008, art. 88.

62. Enver Hasani, FOREWORD TO STRATEGIC PLAN OF THE CONSTITUTIONAL COURT OF KOSOVO: 2010–2013, 6 (2011), available at <http://www.gjk-ks.org/?cid=2,50>.

63. *Naim Rrustemi*, Case No. KI 47/10, ¶ 33.

64. See *id.* ¶ 34.

65. *Id.* ¶¶ 12–27 (Rodrigues and Botusharova, dissenting). For a thorough discussion of the effects a hybrid court may have on Kosovo’s sovereignty, see generally Hill & Linden-Retek, *supra* note 49.

66. *Imer Ibrahim and 48 Other Former Employees of the Kosovo Energy Corporation v. 49 Individual Judgments of the Supreme Court of the Republic of Kosovo*, Case No. KI 40/09, Judgment, ¶¶ 5–6 (June 23, 2010).

67. *Id.* ¶¶ 5, 8.

2006, however, KEK terminated the pensions, even though there was not yet a national Pension Fund.⁶⁸ The applicants contested this action in the Municipal Court of Pristina, which ruled in their favor and ordered that KEK pay monetary damages.⁶⁹ The Pristina District Court affirmed,⁷⁰ but in early 2009, the Supreme Court reversed the judgments of the District Court and held that KEK had lawfully terminated the pension agreements.⁷¹ On September 11, 2009, the applicants filed their case with the Constitutional Court.⁷²

Private individuals bringing claims to the Constitutional Court do so through a different constitutional provision than deputies who bring a case.⁷³ As such, the Law on the Constitutional Court provides different admissibility requirements.⁷⁴ Most importantly, private individuals must bring claims within four months of the alleged constitutional violation.⁷⁵ The Supreme Court quashed the vast majority of the applicants' claims in February 2009, which would have made them time-barred in June.⁷⁶ Since the referral was not filed until September, however, the Constitutional Court needed to find a way around this statutory time limit to rule on the case. For the first time, the Court employed the concept of a continuing situation.⁷⁷

The Court introduced this momentous concept in three short paragraphs.⁷⁸ The first paragraph described the analogous time limit for referring cases to the European Court of Human Rights.⁷⁹ The second paragraph provided the Constitutional Court's entire explanation of a continuing situation:⁸⁰

Examples of continuing situations include complaints concerning length of domestic court proceedings, detention, and an inability to enjoy possessions. According to the case law, where the al-

68. *Id.* ¶ 10.

69. *Id.* ¶ 18.

70. *Id.* ¶ 22.

71. *Id.* ¶¶ 24–26.

72. *Id.* ¶ 31.

73. CONST. OF THE REPUBLIC OF KOSOVO, June 15, 2008, art. 113(2)(7).

74. On the Constitutional Court of the Republic of Kosovo (Law No. 03/L-121) art. 49.

75. The alleged violation can be measured from the date the applicant is served with a court decision, the date the alleged violation becomes public, or the date a challenged law is passed. *Id.*

76. See Imer Ibrahim and 48 Other Former Employees of the Kosovo Energy Corporation v. 49 Individual Judgments of the Supreme Court of the Republic of Kosovo, Case No. KI 40/09, Judgment, ¶ 1 (June 23, 2010). Five decisions, however, were quashed in June 2009, rendering September 2009 within the four-month limit for those cases. *See id.*

77. *See id.* ¶¶ 39–41.

78. *Id.*

79. *See id.* ¶ 39.

80. *Id.* ¶ 40.

leged violation is a continuing situation, the time limit starts to run only from the end of the continuing situation.⁸¹

Based upon that description, the Court concluded in the third paragraph that the applicants’ case was a continuing situation.⁸²

These paragraphs provide little guidance to future applicants, or, more importantly, to the Constitutional Court itself about precisely what circumstances constitute continuing situations. The only ECtHR case cited in those paragraphs, *Jecius v. Lithuania*, is about criminal procedure.⁸³ Although legal analysis benefits from analogies to disparate areas of law, using only one such analogy for an entire legal justification is insufficient, particularly when there is a rich body of ECtHR case law on continuing situations in property law—the subject matter at hand in the case.⁸⁴ Moreover, the Constitutional Court is obligated to consider ECtHR case law when interpreting the Constitution.⁸⁵ The Court instead glossed over ECtHR precedent and created an expansive continuing situation doctrine that equally covers both the President’s case and the KEK case, despite vast differences in their content.

Without cabining this continuing situation jurisprudence, the Constitutional Court opens itself up to a myriad of potential claims. Even if the vast majority of these cases are inadmissible, the result could still debilitate the Court, which must spend considerable time producing an opinion for *every* referral.⁸⁶ For example, at the time of writing, 77 of the Court’s 112 published opinions were on inadmissible cases.⁸⁷ These cases divert limited judicial resources from those claims in which the Court can remedy constitutional violations. Therefore, the Court has a strong interest in establishing clear and cabined doctrines that inform applicants as to what constitutes a meritorious claim. To achieve that end in the specific context of property law, the Constitutional Court should carefully examine ECtHR cases involving continuing situations implicating Article 1 of Protocol 1 to the Convention (“P1-1”), which protects property rights.⁸⁸ The principles

81. *Id.* ¶ 41 (citing to *Jecius v. Lithuania*, App. No. 34578/97, ¶ 44 (Eur. Ct. H.R. July 31, 2000), available at <http://echr.coe.int/echr/en/hudoc>).

82. *Id.*

83. See *Jecius v. Lithuania*, App. No. 34578/97 (Eur. Ct. H.R. July 31, 2000) (holding that unlawful detention was a continuing situation and a violation of Article 5 of the Convention).

84. The Court references some of the foundational ECtHR case law on the basic interpretation of Article 1 of Protocol 1, see *infra* Part III.A, but does not discuss its applicability to continuing situations. See *Imer Ibrahim and 48 Other Former Employees of the Kosovo Energy Corporation v. 49 Individual Judgments of the Supreme Court of the Republic of Kosovo*, Case No. KI 40/09, Judgment, ¶¶ 50–54 (June 23, 2010).

85. CONST. OF THE REPUBLIC OF KOSOVO, June 15, 2008, art. 53.

86. See Rules of Procedure 57.

87. See *Decisions*, CONSTITUTIONAL COURT OF KOSOVO, <http://www.gjk-ks.org/?cid=2,4> (last visited Oct. 24, 2011).

88. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, E.T.S. 5 (entered into force Sept. 3, 1953), Protocol 1, art. 1, Nov. 4, 1950 [hereinafter ECHR].

developed in that corpus of case law could inform a coherent continuing situation doctrine in Kosovar constitutional law.

III. THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS APPLICABILITY TO KOSOVO

The following section synthesizes the major types of claims brought to the ECtHR as continuing situations in violation of Article 1 of Protocol 1 (“P1-1”). The section begins by briefly describing the core content of P1-1. Then, for each type of claim, the relevant ECHR case law is described and analyzed as to how it could inform cases in Kosovo.

A. Article 1 of Protocol 1

The full text of P1-1 reads:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.⁸⁹

The ECtHR has repeatedly stated that the three sentences of this Article contain three discrete rules: the first sentence of the first paragraph is the general, overarching rule; the second sentence of the first paragraph imposes requirements on specific instances of takings; finally, the second paragraph covers the right of States to control property.⁹⁰ Because the rules in the first paragraph concern the use of “possessions,”⁹¹ a critical debate in the P1-1 case law centers on defining possessions that are protected by the Protocol. The clearest example of a possession is property, either movable or immovable, that an applicant owns and currently has in her possession; such property is deemed an “existing possession.”⁹² A more nebulous kind of protected possession is an “asset,” which is a piece of property for which an

89. *Id.*

90. See, e.g., *Depalle v. France*, App. No. 34044/02, para. 77 (Eur. Ct. H.R. Mar. 29, 2010), *available at* <http://echr.coe.int/echr/en/hudoc>; *Broniowski v. Poland*, App. No. 31443/96, para. 134 (Eur. Ct. H.R. Sept. 28, 2005), *available at* <http://echr.coe.int/echr/en/hudoc>; *Sporrong and Lönnroth v. Sweden*, App. Nos. 7151/75 & 7152/75, 5 Eur. H.R. Rep. 35, para. 61 (1982).

91. ECHR, *supra* note 88, Protocol 1, art. I.

92. See, e.g., *Vajagić v. Croatia*, App. No. 30431/03, para. 34 (Eur. Ct. H.R. Dec. 11, 2006), *available at* <http://echr.coe.int/echr/en/hudoc>; *Kopecký v. Slovakia*, App. No. 44912/98, para. 41 (Eur. Ct. H.R. Sept. 28, 2004), *available at* <http://echr.coe.int/echr/en/hudoc>.

applicant has a legitimate expectation that the property will become an existing possession.⁹³ A legitimate expectation is usually settled domestic case law indicating that an applicant is entitled to the possession.⁹⁴

B. Formal Expropriation

1. General Principles

A critical divide in the P1-1 case law distinguishes between formal and *de facto* expropriations. The ECtHR does not have a standard, concise articulation of its formal expropriation doctrine. Cases involving formal expropriations, however, suggest that such a definition would closely resemble “an act of the State that deprives an applicant of a possession while also transferring ownership of that possession.”⁹⁵ Because formal expropriations are deprivations of property, they are subject to the second rule of P1-1, which requires that deprivations be done lawfully, in the public interest, and in a manner that proportionally balances public interest with individual rights.⁹⁶ Both the lawfulness and public interest requirements are easy to satisfy. “Lawfully” is interpreted to mean “in accordance with law,” not whether the law itself complies with the Convention; therefore, so long as a State has the formal power under its own law to expropriate, the first requirement is satisfied.⁹⁷ The public interest requirement is also easily satisfied, because the ECtHR defines “public interest” broadly so as to afford nations a wide margin of appreciation.⁹⁸ This flexibility stems from the ECtHR’s belief that domestic bodies are better placed to determine the

93. See, e.g., *Maria Atanasiu et al. v. Romania*, App. Nos. 30767/05 & 33800/06, para. 134 (Eur. Ct. H.R. Jan. 12, 2011), available at <http://echr.coe.int/echr/en/hudoc>; *Urbárska obec Trenčianske Biskupice v. Slovakia*, App. No. 74258/01 (Eur. Ct. H.R. June 2, 2008), available at <http://echr.coe.int/echr/en/hudoc>; *Kopecký*, App. No. 44912/98, para. 35; *Prince Hans-Adam II of Liechtenstein v. Germany*, App. No. 42527/98, para. 83 (Eur. Ct. H.R. July 12, 2001), available at <http://echr.coe.int/echr/en/hudoc>.

94. *Kopecký*, App. No. 44912/98, para. 48; cf. *Beshiri et al. v. Albania*, App. No. 7352/03, para. 80 (Eur. Ct. H.R. Aug. 22, 2006), available at <http://echr.coe.int/echr/en/hudoc>; *Jantner v. Slovakia*, App. No. 39050/97, paras. 29–33 (Eur. Ct. H.R. July 9, 2003), available at <http://echr.coe.int/echr/en/hudoc>; *Gratzinger v. The Czech Republic*, App. No. 39794/98, para. 73 (Eur. Ct. H.R. July 10, 2002), available at <http://echr.coe.int/echr/en/hudoc>. More recently, the ECtHR has also recognized that the tolerance of authorities in adverse possession cases can also create a legitimate expectation. See, e.g., *Öneryıldız v. Turkey*, App. No. 48939/99, paras. 127–129 (Eur. Ct. H.R. Nov. 30, 2004), available at <http://echr.coe.int/echr/en/hudoc>.

95. See, e.g., *Urbárska obec Trenčianske Biskupice*, App. No. 74258/01, para. 91; *Malhous v. The Czech Republic*, App. No. 33071/96 (Eur. Ct. H.R. July 12, 2001), available at <http://echr.coe.int/echr/en/hudoc>; *Prince Hans-Adam II*, App. No. 42527/98, para. 94.

96. See, e.g., *Perdigão v. Portugal*, App. No. 24768/06, para. 70 (Eur. Ct. H.R. Nov. 16, 2010), available at <http://echr.coe.int/echr/en/hudoc>; *Brumărescu v. Romania*, App. No. 28342/95, 33 Eur. H.R. Rep. 35, para. 78 (2001).

97. See, e.g., *Urbárska obec Trenčianske Biskupice*, App. No. 74258/01, para. 117; *Scordino v. Italy*, App. No. 36813/97, para. 81 (Eur. Ct. of H.R. Mar. 29, 2006), available at <http://echr.coe.int/echr/en/hudoc>; *Brumărescu*, 33 Eur. H.R. Rep., ¶ 78; *The Former King of Greece v. Greece*, App. No. 25701/94, paras. 79–82 (Eur. Ct. H.R. Nov. 23, 2000), available at <http://echr.coe.int/echr/en/hudoc>.

98. See, e.g., *Urbárska obec Trenčianske Biskupice*, App. No. 74258/01, paras. 118–120 (recognizing that “protection of the environment and the creation of stable ecological systems” is in the public

public interest of their own nations.⁹⁹ Because such a broad range of actions can fulfill the lawfulness and public interest requirements, the fair balance requirement carries the most weight, and the ECtHR regularly finds that a State's actions have not achieved such balance.¹⁰⁰

2. Admissibility Considerations

In formal expropriation cases, inadmissibility often prevents the ECtHR from ruling on the three requirements just described. According to the Convention, applicants must file claims with the ECtHR within six months of the final decision that exhausted domestic legal remedies.¹⁰¹ Therefore, claims are often time-barred, since many expropriations occurred during Cold War-era Communist regimes. Most of those claims are also inadmissible *ratione temporis*, because the expropriations occurred before the respondent States had ratified the Convention, and the ECtHR will not give the Convention retroactive effect by applying it to pre-ratification actions.¹⁰² It is noteworthy that the ECtHR will not separate subsequent legal proceedings from the original act of expropriation for admissibility purposes; in other words, if the expropriation occurred prior to ratification of the Convention, then a case is inadmissible *ratione temporis*, even if the proceedings that refuse to remedy the situation occurred after ratification.¹⁰³

When these temporal requirements are not satisfied, there is another route to admissibility: the continuing situation doctrine. Like the Constitutional Court of Kosovo did in the KEK case, the ECtHR can use continuing situations to give itself power to hear otherwise inadmissible cases. Unlike the Constitutional Court of Kosovo, however, the ECtHR has significant limitations on its continuing situation doctrine. One key constraint arises from the distinction between continuing situations and instantaneous acts with enduring effects.¹⁰⁴ A continuing situation prevents the applicable time limit from beginning to run, because the alleged violation re-occurs

interest); *The Former King of Greece*, App. No. 25701/94, paras. 87–88 (recognizing that resolving constitutional issues to help a country transition from a monarchy to a republic is in the public interest).

99. See, e.g., *The Former King of Greece*, App. No. 25701/94, para. 87.

100. See, e.g., *Urbárska obec Trenčianske Biskupice*, App. No. 74258/01, para. 132; *Vajagić v. Croatia*, App. No. 30431/03, para. 45 (Eur. Ct. H.R. July 20, 2006); *The Former King of Greece*, App. No. 25701/94, para. 99.

101. ECHR, *supra* note 88, art. 35(1).

102. See, e.g., *Blečić v. Croatia*, App. No. 59532/00, para. 67 (Eur. Ct. H.R. Mar. 8, 2006), *available at* <http://echr.coe.int/echr/en/hudoc>; *Prince Hans-Adam II of Liechtenstein v. Germany*, App. No. 42527/98, para. 85 (Eur. Ct. H.R. July 12, 2001), *available at* <http://echr.coe.int/echr/en/hudoc>; *Malhous v. The Czech Republic*, App. No. 33071/96 (Eur. Ct. H.R. Dec. 13, 2000), *available at* <http://echr.coe.int/echr/en/hudoc>.

103. See *Blečić*, App. No. 59532/00, para. 79.

104. See, e.g., *Blečić*, App. No. 59532/00, para. 74 (citing *Kadiķis v. Latvia*, App. No. 47634/99 (Eur. Ct. H.R. June 29, 2000)); *Jovanović v. Croatia*, App. No. 59109/00 (Eur. Ct. H.R. Feb. 28, 2002)).

everyday.¹⁰⁵ In contrast, an instantaneous act with enduring effects occurs one distinct time in the past, but the ramifications extend into the future. With a continuing situation, both hurdles to temporal jurisdiction are overcome. The six-month limitation will not have expired, assuming that the situation ceased less than six months prior to filing the case with the ECtHR. Similarly, even for acts occurring before ratification of the Convention, the *ratione temporis* objection fades, because the violation re-occurs after ratification.¹⁰⁶ Yet, if the same act were classified as instantaneous with enduring effects, it would not be admissible. The six-month time limit would start to run after the original act, and, if the act occurred prior to ratification of the Convention, it would still be inadmissible *ratione temporis*.¹⁰⁷

At first, this distinction may seem academic. For property cases, however, the difference has significant practical value, because there is a baseline assumption that “the deprivation of an individual’s home or property is in principle an instantaneous act and does not produce a continuing situation”¹⁰⁸ There are some exceptions to this assumption, which will be considered below, but formal expropriations are not an exception; they are considered instantaneous acts with enduring effects, rather than continuing situations.

3. Application to Kosovo

Before analyzing the application of ECtHR case law to Kosovo, it is necessary to discuss a few basics about the numerous expropriation regimes carried out by the former Yugoslavia. Within the first decade after World War II, the Yugoslav State declared itself the owner of all natural resources, confiscated land that belonged to enemies of the state, and seized land that “exceeded the legally permissible size for private ownership.”¹⁰⁹ Then, in the 1960s and 1970s, the government reorganized “state-owned” property into “socially-owned enterprises” that were technically owned by “soci-

105. See Naim Rustemi and 31 Other Deputies of the Assembly of the Republic of Kosovo v. His Excellency, Fatmir Sejdiu, President of the Republic of Kosovo, Case No. KI 47/10, Judgment, ¶ 34 (Sept. 28, 2010).

106. See, e.g., Urbárska obec Trenčianske Biskupice v. Slovakia, App. No. 74258/01, para. 93 (Eur. Ct. H.R. Nov. 27, 2007), available at <http://echr.coe.int/echr/en/hudoc>; Vajagić v. Croatia, App. No. 30431/03, paras. 21–24 (Eur. Ct. H.R. July 20, 2006), available at <http://echr.coe.int/echr/en/hudoc>; Broniowski v. Poland, App. No. 31443/96, paras. 122–24 (Eur. Ct. H.R. June 22, 2004), available at <http://echr.coe.int/echr/en/hudoc>; Iatridis v. Greece, App. No. 31107/96, paras. 49–50 (Eur. Ct. H.R. Mar. 25, 1999), available at <http://echr.coe.int/echr/en/hudoc>.

107. See, e.g., Blečić, App. No. 59532/00, paras. 53–54 (citing Jovanović, App. No. 59109/00; Malbous, App. No. 33071/96).

108. Blečić, App. No. 59532/00, para. 86; see also Malbous, App. No. 33071/96.

109. ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE MISSION IN KOSOVO, PRIVATIZATION IN KOSOVO: JUDICIAL REVIEW OF KOSOVO TRUST AGENCY MATTER BY THE SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO 6 (2008) (citing Official Gazette of the People’s Federal Republic of Yugoslavia No. 64/45 [CONSTITUTION]) [hereinafter OSCE, PRIVATIZATION IN KOSOVO].

ety.”¹¹⁰ These enterprises still account for a large percentage of property in Kosovo: in 1999, 43% of property in Kosovo was considered socially-owned.¹¹¹ In 2008, the year Kosovo declared independence, hundreds of socially-owned enterprises still existed.¹¹²

During Milošević’s rule, the government’s administration of socially-owned enterprises, along with other property regimes, discriminated against Kosovar Albanians, in hopes of increasing the population of Serbs in Kosovo.¹¹³ For example, many Kosovar Albanians were dismissed from their jobs at these enterprises.¹¹⁴ Strict rules also governed any sale of land in Kosovo from a Serb to an Albanian.¹¹⁵ Although the Yugoslav State attempted to monitor these transactions by requiring parties to register contracts, many people circumvented the law by selling land unofficially.¹¹⁶ As a result, the property registration system in Kosovo was considered defunct until independence.¹¹⁷ The effects of these problems were particularly apparent when refugees returned to Kosovo after the NATO intervention in 1999; the records were so poor that the government struggled even to determine the owners of land.¹¹⁸ To make matters worse, the retreating Yugoslav Army removed a vast number of records.¹¹⁹

Thus, starting in 2000, Kosovo faced an incredible challenge: reconstructing a nonfunctional property system. As part of its interim administration in Kosovo, the U.N. created a series of institutions to assist with this effort.¹²⁰ Two such bodies were the Housing and Property Directorate and the Housing and Property Claims Commission, both of which had the power to examine property rights violations that occurred between 1989 and 1999.¹²¹ Another institution was the Kosovo Trust Agency (“KTA”), which had the authority to administer Kosovo’s socially-owned enterprises that were still in existence on or after December 31, 1988.¹²² As these example institutions demonstrate, the U.N. focused on remedying property rights violations that occurred during the 1990s. Given Milošević’s oppres-

110. *Id.* at 6; accord J. David Stanfield & Skender Tullumi, *Immovable Property Markets in Kosovo*, TERRA INSTITUTE 4 (2004), http://www.terrainstitute.org/pdf/prop_kosovo.pdf (last visited Oct. 23, 2011).

111. See CORDIAL & ROSANDHAUG, *supra* note 24, at 16.

112. See OSCE, *PRIVATIZATION IN KOSOVO*, *supra* note 109, at 52.

113. See *id.* at 7.

114. See Stanfield & Tullumi, *supra* note 110, at 4.

115. See CORDIAL & ROSANDHAUG, *supra* note 24, at 19; Stanfield & Tullumi, *supra* note 110, at 4–5.

116. See CORDIAL & ROSANDHAUG, *supra* note 24, at 19; Stanfield & Tullumi, *supra* note 110, at 5.

117. See CORDIAL & ROSANDHAUG, *supra* note 24, at 19–20; Stanfield & Tullumi, *supra* note 110, at 3–5.

118. See CORDIAL & ROSANDHAUG, *supra* note 24, at 25; Stanfield & Tullumi, *supra* note 110, at 5.

119. See CORDIAL & ROSANDHAUG, *supra* note 24, at 25–26.

120. See generally Jose-Maria Arraiza & Massimo Moratti, *Getting the Property Questions Right: Legal Policy Dilemmas in Post-Conflict Property Restitution in Kosovo (1999-2009)*, 21 INT’L J. REFUGEE L. 421 (2009).

121. See CORDIAL & ROSANDHAUG, *supra* note 24, at 28.

122. On the Establishment of the Kosovo Trust Agency, UNMIK/REG/2002/12 (June 13, 2002).

sive regime and the numerous problems it caused, such a goal is important. Yet the U.N. framework did not address property rights violations that occurred prior to 1989. The majority of the potential problems discussed in this Note arise in connection with that key fact.

Although formal expropriation claims would contribute to the Constitutional Court's docket control problem, the claims would be easily dismissed using the ECtHR case law, thereby quickly calibrating Kosovar citizens' understanding of meritorious claims. The Yugoslav regimes were similar to those of other countries considered by the ECtHR in formal expropriation cases.¹²³ Therefore, Yugoslav formal expropriations, like those in the ECtHR case law, should be considered instantaneous acts. As such, most claims would be inadmissible, except those filed within the time limits, likely none given that the U.N. remedied expropriations occurring after 1989. Furthermore, the Constitutional Court would not have competence *ratione temporis* to hear those formal expropriation claims. If the expropriations are considered instantaneous in nature, then the violation does not re-occur after ratification of the Constitution. As a result, ruling on such claims would give the Constitution an impermissible retroactive effect.

Formal expropriation claims have already arisen at the Constitutional Court. In one case, the applicant sought restitution of land that was formally expropriated in 1974.¹²⁴ When this request was denied, the applicant challenged the decision in the Municipal Court of Pristina, which dismissed the case for lack of jurisdiction.¹²⁵ The Constitutional Court again dismissed the case but on different grounds: failure to produce any *prima facie* evidence of a claim.¹²⁶ The Constitutional Court also could have dismissed the case because the claim was not brought within the applicable time limits and because the expropriation occurred before ratification of the Constitution. In the future, the Court should explain the meaning of formal expropriations as employed by the ECtHR and, when appropriate, dismiss such cases on the clear grounds the ECtHR has delineated. If the Court were to do so, it would send a clear signal to citizens that formal expropriation cases are not meritorious. Without referencing these important concepts from the ECtHR case law, however, formal expropriation cases seem to fall within the Court's limitless notion of a continuing situation, thereby encouraging more citizens to bring such claims and diverting judicial resources from admissible cases.

123. Compare Official Gazette of the People's Federal Republic of Yugoslavia No. 64/45 [CONSTITUTION], with *Broniowski v. Poland*, App. No. 31443/96, para. 134 (Eur. Ct. H.R. Sept. 28, 2005), and *Prince Hans-Adam II of Liechtenstein v. Germany*, App. No. 42527/98, para. 83 (Eur. Ct. H.R. July 12, 2001), available at <http://echr.coe.int/echr/en/hudoc>.

124. *Nexhmedin Llumnica v. Decision C1.nr.618/02 of the Municipal Court of Pristina*, Case No. KI 03/09, Resolution on Inadmissibility, ¶¶ 9–13 (Dec. 14, 2010).

125. *Id.* ¶ 16 (“[O]nly the body that adopted the initial expropriation decision is competent to annul the decision”).

126. *Id.* ¶ 19.

C. *De Facto Expropriation*

A *de facto* expropriation, like a formal expropriation, is an act of the State that intends to deprive an applicant permanently of the right to use, sell, donate, or mortgage a possession. Yet, unlike a formal expropriation, a *de facto* expropriation does not transfer ownership of the property from the applicant to the State.¹²⁷ This distinction is crucial. If the State has not transferred ownership of the property, then the affected party still has a possession with which to bring a claim under P1-1. Furthermore, if that applicant is continually deprived of the possession, then the deprivation repeats everyday, thereby creating a continuing situation.¹²⁸ In contrast, a formal expropriation transfers ownership of the property from the applicant to the State. As a result, at the moment of expropriation, the applicant no longer has a possession with which to bring a claim. Therefore, the situation is an instantaneous act, and the time limit starts to run. Given that *de facto* expropriations are considered continuing situations, whereas formal expropriations are not, deciding the type of expropriation is likely determinative in whether a court can hear the case. In making this distinction, the ECtHR has considered three factors: (1) whether the expropriation transferred ownership; (2) whether the expropriation completely deprived the applicant of the rights to the property; and (3) whether the State intended to deprive the applicant of those rights permanently.

1. *No Proper Transfer of Ownership to the State*

The ECtHR has identified one primary way through which a State fails to transfer ownership of property to itself: when either an international body or a domestic court rules that the expropriation was unlawful.¹²⁹ An international body declaring an expropriation unlawful is rare, but discussing the one major case of this type is still useful, because it sets up the important issues to the more common cases in which a domestic court has deemed an expropriation unlawful. In *Loizidou v. Turkey*, the applicant

127. See, e.g., *Loizidou v. Turkey* (Merits), App. No. 15318/89, paras. 44–46 (Eur. Ct. H.R. Dec. 18, 1996), available at <http://echr.coe.int/echr/en/hudoc>; *Papamichalopoulos et al. v. Greece*, App. No. 14556/89, para. 41 (Eur. Ct. H.R. June 24, 1993), available at <http://echr.coe.int/echr/en/hudoc>; *Vasilescu v. Romania*, App. No. 27053/95, para. 48 (Eur. Ct. H.R. Dec. 18, 1996), available at <http://echr.coe.int/echr/en/hudoc>.

128. See, e.g., *Loizidou*, App. No. 15318/89, paras. 56–57; *Papamichalopoulos*, App. No. 14556/89, para. 40; *Vasilescu*, App. No. 27053/95, para. 48.

129. *Loizidou*, App. No. 15318/89, paras. 56–57 (original expropriation ruled unlawful by another international body); *Vasilescu*, App. No. 27053/95, para. 48 (original expropriation ruled unlawful by a domestic court). The ECtHR case law has also recognized other ways through which an act of expropriation failed to transfer ownership, but these rare situations have been confined to a few cases. See, e.g., *Urbárska obec Trenčianske Biskupice v. Slovakia*, App. No. 74258/01 (Eur. Ct. H.R. June 2, 2008), available at <http://echr.coe.int/echr/en/hudoc> (holding that the State did not transfer ownership when domestic expropriation law provided for government use, not ownership, of confiscated property); *Hirschhorn v. Romania*, App. No. 29292/02 (Eur. Ct. H.R. July 26, 2007), available at <http://echr.coe.int/echr/en/hudoc> (declaring as manifestly unlawful a domestic court's finding that an expropriation properly transferred ownership, because the domestic court failed to take into account critical facts).

owned several plots of land in northern Cyprus.¹³⁰ Beginning in 1974, however, Turkish forces prevented the applicant from accessing her land.¹³¹ Nine years later, in an act deemed contrary to international law by the U.N. Security Council, the "Turkish Republic of Northern Cyprus" declared independence¹³² and passed its own constitution.¹³³ This constitution called for widespread expropriation, including the applicant's property.¹³⁴ The ECtHR, however, ruled that the Constitution of the Turkish Republic of Northern Cyprus did not have the authority to transfer ownership of the applicant's property, because the constitution itself was the product of an illegal declaration of independence.¹³⁵ Without a valid transfer of ownership, the applicant still had a possession protected by P1-1; furthermore, the sustained inability to access that possession was both a continuing situation and a *de facto* expropriation.¹³⁶

The ECtHR's analysis in *Loizidou* is similar to the reasoning it has employed when a domestic court has deemed an expropriation unlawful. In *Papamichalopoulos et al. v. Greece*, for example, Greece transferred the applicants' land to the Navy and subsequently built a holiday resort for officers on the property.¹³⁷ Before the construction, however, both the State Counsel and the Minister of Agriculture had informed the Navy that the land was not eligible for expropriation.¹³⁸ Greek domestic law gave the government the right to take public forests, but the applicants' land was not public forest.¹³⁹ Multiple domestic courts affirmed this fact.¹⁴⁰ However, the Navy neither returned the land nor provided compensation.¹⁴¹ As in *Loizidou*, the ECtHR found that ownership of the property had not been transferred, because the respondent State lacked the authority to expropriate the land in question.¹⁴² Therefore, the applicants continued to have possessions protected by P1-1,¹⁴³ and the sustained deprivation of those possessions was both a continuing situation and a *de facto* expropriation.¹⁴⁴

Papamichalopoulos did not address the types of property that can be expropriated *de facto* and whether the ruling that finds the expropriation unlawful must come within a particular timeframe. Comparing *Papamichalopoulos* with

130. E.g., *Loizidou*, App. No. 15318/89, para. 12.

131. *Id.* at para. 63.

132. *Id.* at para. 42.

133. *See id.* at para. 18.

134. *Id.*

135. *Id.* at paras. 44–46.

136. *Id.* at paras. 62–63.

137. *Papamichalopoulos et al. v. Greece*, App. No. 14556/89, para. 41 (Eur. Ct. H.R. June 24, 1993), available at <http://echr.coe.int/echr/en/hudoc>.

138. *Id.*

139. *Id.* at para. 17.

140. *Id.* at paras. 9–12.

141. *See id.* at para. 31.

142. *See id.* at paras. 44–45.

143. *See id.* at paras. 39–41.

144. *See id.* at paras. 45–46.

another foundational *de facto* expropriation case, *Vasilescu v. Romania*, sheds light on these queries.¹⁴⁵ In *Vasilescu*, police officers searched the applicant's house and confiscated gold without a warrant.¹⁴⁶ Almost thirty years after the confiscation, the applicant filed a claim for restitution.¹⁴⁷ Through repeated appeals, Romanian courts held that the police had unlawfully confiscated the gold.¹⁴⁸ The ECtHR therefore found that the government had never transferred ownership to itself.¹⁴⁹ As a result, the applicant still had a possession with which to bring a claim under P1-1.¹⁵⁰ Only one hitch remained: Romania did not ratify the ECtHR until 1994, well after the 1967 confiscation.¹⁵¹ Yet, because the deprivation repeated every day, the situation continued beyond the date of ratification and thereby gave the ECtHR competence *ratione temporis* to hear the claim without giving retroactive effect to the Convention.¹⁵² The ECtHR thus declared the deprivation a *de facto* expropriation in violation of P1-1.¹⁵³

One of the simplest comparisons between these cases is that *Papamichalopoulos* applied to immovable property, whereas *Vasilescu* concerned movable property. Given this distinction, both types of property are subject to *de facto* expropriations. A more subtle difference between the cases concerns the timeframe in which the domestic court deemed the expropriation unlawful. In *Papamichalopoulos*, the domestic ruling was less than one year after the State's attempt to expropriate the land. In *Vasilescu*, the ruling was almost thirty years after the original confiscation. This difference did not concern the ECtHR. Rather, so long as the ruling judicial body had the authority to address the merits of the original expropriation, the ECtHR did not consider the length of time between the expropriation and the subsequent ruling. After such a judgment finds that the applicants retained ownership of the property in question, the ECtHR can declare the sustained deprivation of that property a continuing situation, and, if the other requirements are met, a *de facto* expropriation.

2. Complete Deprivation of Rights to the Property

An improper transfer of ownership is necessary, but not sufficient, for an action to qualify as a *de facto* expropriation. Applicants must then be deprived of their possessions. Therefore, the next critical question is the magnitude of the deprivation required. In both *Papamichalopoulos* and *Vasilescu*,

145. *Vasilescu v. Romania*, App. No. 27053/95, para. 48 (Eur. Ct. H.R. Dec. 18, 1996), available at <http://echr.coe.int/echr/en/hudoc>.

146. *Id.* at para. 8.

147. *Id.* at para. 28.

148. *Id.* at paras. 15–21.

149. *Id.* at para. 48.

150. *See id.*

151. *See id.* at para. 49.

152. *See id.* at paras. 48–54.

153. *See id.*

the ECtHR found that the applicants had lost "all ability to dispose of the property in issue."¹⁵⁴ Indeed, further analysis of the ECtHR case law indicates that a total deprivation, as opposed to a mere practical deprivation, is required for a taking to qualify as a *de facto* expropriation.

A key case supporting that conclusion is *Sporrong and Lönnroth v. Sweden*.¹⁵⁵ In *Sporrong and Lönnroth*, the Swedish government had granted itself permits to expropriate several parcels of land, including those owned by the two applicants.¹⁵⁶ In conjunction with those permits, the Stockholm County Administrative Board prohibited construction on the applicants' estates.¹⁵⁷ The original permits were set to expire in five years for the Sporrong estate¹⁵⁸ and in ten years for the Lönnroth estate.¹⁵⁹ The government continually renewed the permits, however, so that the construction prohibitions were in effect for twenty-five years on the Sporrong estate and for twelve years on the Lönnroth estate.¹⁶⁰ Notably, these permits gave the Swedish government the right to expropriate the estates, but transferring ownership would have required the State to execute that right through additional formal procedures.¹⁶¹ As a result, the State did not transfer ownership, thereby satisfying the first *de facto* expropriation requirement.¹⁶² Until the government executed that right, however, the permits still allowed the applicants "to use, sell, devise, donate or mortgage their properties," even though their abilities to do so were hindered.¹⁶³ For example, the applicants could still sell their estates, although they complained that no seller would pay full price for property that the government could take at any time.¹⁶⁴ Nonetheless, the ECtHR found that retaining the *possibility* of selling prevented the situation from qualifying as an expropriation.¹⁶⁵ Therefore, a *de facto* expropriation requires that a State completely deprive the applicants of their rights to the contested property.

The next logical question is what specific rights an applicant must lose for the taking to qualify as a *de facto* expropriation. In *Papamichalopoulos*, the

154. *Id.* at para. 53; *accord* *Papamichalopoulos et al. v. Greece*, App. No. 14556/89, para. 43 (Eur. Ct. H.R. June 24, 1993), available at <http://echr.coe.int/echr/en/hudoc> (holding that the applicants' property had been *de facto* expropriated, because the applicants were not able to "make use of their property or to sell, bequeath, mortgage or make a gift of it . . .").

155. App. Nos. 7151/75 & 7152/75, 5 Eur. H.R. Rep. 35 (1982).

156. *Id.* at paras. 11, 20.

157. *Id.* at paras. 16, 23.

158. *Id.* at para. 11.

159. *Id.* at para. 20.

160. *Id.* at para. 58.

161. *Id.* at para. 37.

162. *Id.* *Sporrong and Lönnroth* is one of the atypical cases referenced earlier, *see supra* note 129, in which the ECtHR found that a State failed to transfer ownership to itself without a domestic court first declaring as such. In this case, the ECtHR could not rely on a domestic ruling, because Swedish expropriation decisions were generally not subject to judicial review. *Id.* at para. 50. As a result, the ECtHR was required to conduct its own inquiry into the applicable domestic law. *Id.* at para. 37.

163. *Id.* at para. 62.

164. *Id.* at para. 58.

165. *Id.* at para. 63.

applicants lost the ability to “make use of their property or to sell, bequeath, mortgage or make a gift” of the property; this loss was sufficient to qualify the act as an expropriation.¹⁶⁶ In contrast, the ECtHR’s reasons for not classifying the situation in *Sporrong and Lönnroth* as an expropriation focused on the applicants’ retention of the right to sell the property.¹⁶⁷ Together, these two decisions therefore imply that maintaining the right to sell is sufficient for a situation not to constitute a *de facto* expropriation, even when significant other rights are lost. This inference is supported by the ECtHR’s reasoning in *Hutten-Czapska v. Poland*.¹⁶⁸ In that case, the Polish government had set up restrictions on landlords’ abilities to terminate leases.¹⁶⁹ As a result, the applicant could not evict his tenant and thus lost the ability to use or occupy his house himself.¹⁷⁰ Nonetheless, the deprivation of the applicant’s possession did not constitute a *de facto* expropriation because he maintained the right to sell the property to someone who would keep the tenant.¹⁷¹ The ECtHR has yet to clarify whether losing any other right is also necessary for a *de facto* expropriation to occur. Given the almost exclusive focus on the right to sell in *Sporrong* and *Hutten-Czapska*, however, it seems unlikely that the ECtHR would require any other particular loss.

3. Governmental Intent to Deprive Permanently

The ECtHR’s reasoning in *Hutten-Czapska* included a third consideration for determining when a situation qualifies as a *de facto* expropriation: whether the government intends to deprive applicants of their possessions permanently.¹⁷² The addition of this factor muddies the ECtHR’s *de facto* expropriation jurisprudence, because it is unclear whether this consideration should receive the same weight as the two other requirements. The Court’s recent case law, however, indicates that the government’s intent should receive significant weight. In *Ghigo v. Malta*, for example, the Maltese government allocated the applicant’s home to another person and required the applicant to keep the new occupant as a paying tenant.¹⁷³ As in *Hutten-Czapska*, the ECtHR took note of the fact that the applicant maintained the right to sell his property, even though he had lost other rights, including occupancy.¹⁷⁴ Yet, in the paragraph that explains why the circumstances do not qualify as a *de facto* expropriation, the ECtHR only dis-

166. Papamichalopoulos et al. v. Greece, App. No. 14556/89, para. 43 (Eur. Ct. H.R. June 24, 1993), available at <http://echr.coe.int/echr/en/hudoc>.

167. See *Sporrong and Lönnroth*, 5 Eur. H.R. Rep. 35, para. 63.

168. App. No. 35014/97, paras. 160–61 (Eur. Ct. H.R. June 19, 2006), available at <http://echr.coe.int/echr/en/hudoc>.

169. *Id.* at paras. 12–15.

170. *Id.*

171. *Id.* at paras. 160–61.

172. See *id.*

173. App. No. 31122/05, paras. 5–9 (Eur. Ct. H.R. Dec. 26, 2006), available at <http://www.echr.coe.int/echr/en/hudoc>.

174. *Id.* at para. 49.

cussed its finding that the State did not intend to deprive the applicant of his possessions permanently.¹⁷⁵ This focus on governmental intent is reiterated in other cases.¹⁷⁶

Although the government's intent was not referenced in older *de facto* expropriation cases, an inquiry into such objectives is still consistent with those holdings. In each of the foundational *de facto* expropriation cases previously discussed, the government intended to deprive applicants of their possessions permanently, so this new factor was satisfied, even if it was not addressed.¹⁷⁷ Therefore, the ECtHR could have now made this governmental intent a threshold requirement for a *de facto* expropriation without being inconsistent with its prior case law. That said, the recent cases are not clear enough to deem such intent a requirement yet. At this point, the case law also supports the proposition that the government's intent is merely another factor to consider alongside the other requirements.¹⁷⁸

4. Application to Kosovo

Consider a plausible scenario: a piece of property in Kosovo was expropriated, prior to 1989, but not in accordance with Yugoslav law. Perhaps, for example, a person was incorrectly classified as an enemy of the state.¹⁷⁹ The land in question has not been returned. These hypothetical, but realistic, facts could form the basis of a *de facto* expropriation claim in Kosovo. To qualify as a *de facto* expropriation under ECtHR case law, a body with competence to rule on the merits of the original expropriation would need to have deemed the act unlawful. With such a ruling, the expropriation would not have transferred ownership to the State, so the applicant would have retained a possession with which to bring a claim.¹⁸⁰ The importance of the government's intent remains unclear, but that ambiguity would not make a difference in this case, because the Yugoslav laws intended to deprive citizens of their possessions permanently. Thus, the only remaining question

175. *Id.* at para. 50 ("[T]he measures taken by the authorities were aimed at subjecting the applicant's house to a continuing tenancy and not at taking it from him permanently.").

176. See, e.g., *Urbárska obec Trenčianske Biskupice v. Slovakia*, App. No. 74258/01, para. 140 (Eur. Ct. H.R. June 2, 2008), available at <http://echr.coe.int/echr/en/hudoc>.

177. See, e.g., *Loizidou v. Turkey (Merits)*, App. No. 15318/89 (Eur. Ct. H.R. Dec. 18, 1996), available at <http://echr.coe.int/echr/en/hudoc>; *Vasilescu v. Romania*, App. No. 27053/95 (Eur. Ct. H.R. Dec. 18, 1996), available at <http://echr.coe.int/echr/en/hudoc>; *Papamichalopoulos et al. v. Greece*, App. No. 14556/89 (Eur. Ct. H.R. June 24, 1993), available at <http://echr.coe.int/echr/en/hudoc>.

178. It is clear, however, that that government's intent to deprive an applicant of possessions permanently is not sufficient for a *de facto* expropriation. In at least one recent case, the ECtHR has ruled that a State action, although designed to deprive applicants of their property permanently, should be analyzed under the third rule of P1-1, which covers State control of property, not expropriations. Therefore, the ECtHR's decision to analyze this case under the third rule automatically means that the situation was not considered a *de facto* expropriation. See *J.A. Pye (Oxford) Ltd. v. U.K.*, App. No. 44302/02, para. 66 (Eur. Ct. H.R. Aug. 30, 2007), available at <http://echr.coe.int/echr/en/hudoc> (holding that an adverse possession regime should be analyzed under the third rule of P1-1).

179. Several of the ECtHR cases were due to such misclassifications. See, e.g., App. No. 27053/95.

180. See, e.g., *Loizidou*, App. No. 15318/89; *Vasilescu*, App. No. 27053/95.

under the current case law would be whether the applicant was entirely deprived of her rights to use the property, particularly the right to sell. If so, then the situation would almost certainly qualify as a *de facto* expropriation and a continuing situation.

Such facts are not simply hypothetical: similar cases have already come before the Constitutional Court. In one case, for example, the applicants claimed that their father's land had been impermissibly expropriated by Yugoslavia in 1945, because the applicants' father was misclassified as an enemy of the state.¹⁸¹ The Constitutional Court declared the case inadmissible *ratione temporis*.¹⁸² That outcome, however, was only available because the applicants brought the case as a violation of the right to a legal remedy.¹⁸³ Had the applicants instead brought their claim under P1-1, the case would have qualified under ECtHR case law as a *de facto* expropriation and thus a continuing situation. As a result, the violation would have reoccurred after ratification of the Constitution, thereby eliminating the *ratione temporis* objection.

In another case, the Yugoslav State expropriated the applicant's land in the 1960s, but the State never registered the transfer of ownership.¹⁸⁴ In 2008, the applicant challenged the expropriation on those grounds, but the Supreme Court of Kosovo ruled that registration was a mere technicality.¹⁸⁵ The applicant then filed a claim with the Constitutional Court alleging a violation of his right to a fair trial.¹⁸⁶ The Court, however, found that the applicant failed to present *prima facie* evidence that the Supreme Court had considered the evidence inaccurately, which led the Constitutional Court to dismiss the claim as manifestly ill-founded.¹⁸⁷ Had this case been brought as a P1-1 claim, however, it would have been admissible as a *de facto* expropriation. Depending on the substantive law at the time, the State's failure to register the land may have prevented it from transferring ownership. In that case, the applicant would have retained a possession, so that the sustained deprivation of that property would constitute a continuing situation over which the Constitutional Court would have temporal jurisdiction.

Consider another hypothetical, which highlights the ways in which the Kosovo Trust Agency ("KTA") further complicates the situation.¹⁸⁸ The

181. Heirs of Ymer Loxha and Sehit Loxha v. Decision No. PKL.Nr.21/07 of the Supreme Court of the Republic of Kosovo, dated 17 December 2008, Case No. KI 14/09, ¶ 3, Resolution on Inadmissibility (Oct. 15, 2010).

182. *Id.* ¶ 27.

183. *Id.* ¶ 5.

184. Ahmet Fetiu v. Decision A. No. 298/2009 of the Supreme Court of Kosovo, dated 11 September 2009, Case No. KI 54/09, ¶¶ 8–9, Resolution on Inadmissibility (Oct. 15, 2010).

185. *Id.* ¶¶ 10–11.

186. *Id.* ¶ 12.

187. *Id.* ¶¶ 17–18.

188. See On the Establishment of the Kosovo Trust Agency, *supra* note 122 (amending UNMIK Regulation No. 2002/12 on the Establishment of the Kosovo Trust Agency, UNMIK/REG/2005/18 (Apr. 22 2002)). In 2008, the KTA was replaced by the Kosovo Privatization Agency ("KPA"), but the change makes little difference for the purposes of this Note, because the procedures employed by the

KTA had the authority to administer Kosovo's socially-owned enterprises, including the power to liquidate them.¹⁸⁹ Prior to liquidating an enterprise, the KTA did not need to determine if someone had a prior ownership claim to the property.¹⁹⁰ If such an ownership claim was discovered after liquidation, then the law protected the claims of those who had recently bought the land,¹⁹¹ and the KTA would merely allow the prior owner to share in a portion of the sale's profits.¹⁹² The proceeds gained by the prior owner would be less the KTA's administrative fees and the 20% entitled to employees of the enterprise.¹⁹³

These procedures could result in the KTA selling land that belonged to private citizens, which would create claims under P1-1.¹⁹⁴ Applicants in such cases would struggle to prove their past ownership claims, but if they could meet that requirement, then the Yugoslav State would have failed to transfer ownership to the socially-owned enterprise, which would most likely lead to classifying the case as a *de facto* expropriation. Since the KTA's mandate extends only to the administration of socially-owned enterprises, the KTA would not have had the authority to sell the land in question. Thus, the sale would be just one more phase in the applicant's continued deprivation of the property. In fact, given that the transaction would not have been completed pursuant to law, the sale could potentially even qualify as a second *de facto* expropriation. Either *de facto* expropriation would be considered a continuing situation over which the Constitutional Court could exercise jurisdiction, despite formal time limits.

These cases are only examples. Considering the magnitude of the Yugoslav expropriation regimes, many more potential claims lay in tow.¹⁹⁵ The Constitutional Court could address some of these claims on the merits, such

new institution are essentially the same as those used by the KTA. See On the Privatization Agency of Kosovo (Law No. 03/L-067).

189. Law No. 03/L-067 arts. 5–10. For a thorough discussion of the powers of the KTA, see generally OSCE, PRIVATIZATION IN KOSOVO, *supra* note 109.

190. UNMIK/REG/2005/18, *supra* note 188, §§ 5.3–5.4.

191. OSCE, PRIVATIZATION IN KOSOVO, *supra* note 109, at 26.

192. UNMIK/REG/2005/18, *supra* note 188, §§ 5.3–5.4.

193. OSCE, PRIVATIZATION IN KOSOVO, *supra* note 109, at 25.

194. See *id.* at 26.

195. See, e.g., Amrush Rexhepi v. Judgment of the Supreme Court of Kosovo, Rev. No. 256/08, dated 15 November 2010, Case No. KI 12/11, Resolution on Inadmissibility (Aug. 17, 2011) (dismissing as manifestly ill-founded a claim that the State has misallocated personal property in 1987); Denic D. Mladen and Vitkovic-Denic D. Milorad v. Decision of the Supreme Court of Kosovo, Cml.Gzz. br. 36/2007, dated 13 December 2007, Case No. KI 18/10, Resolution on Inadmissibility (Aug. 17, 2011) (dismissing *ratione temporis* a challenge to a Supreme Court decision that quashed a lower court holding that an expropriation from the 1960s was unlawful); Shpresa Loxha-Pllana v. Decision of the Municipal Court of Peja, C.no. 644/06, dated 1 July 2008, Case No. KI 87/10, Resolution on Inadmissibility (Aug. 17, 2011) (dismissing as time-barred a challenge to the termination of an appeal seeking restitution of land expropriated in the 1940s); Gjoke Dedaj v. Judgment of the Special Chamber of the Supreme Court on Kosovo Trust Agency Related Matters, SCC-04-0104, dated 23 October 2007, Case No. KI 115/10, Resolution on Inadmissibility (June 21, 2011) (dismissing as time-barred a challenge to the KTA's decision that a 1993 transfer of land was not done in accordance with law).

as those listed above, in accordance with ECtHR precedent. Such claims are the ones that the Court should encourage applicants to bring, so that it can remedy violations of constitutional rights. Yet, the Court's current vague continuing situation jurisprudence invites many more claims than those on which the Court has the authority to rule. By incorporating into Kosovar constitutional law the distinction between formal and *de facto* expropriations, the Court will send clear messages to applicants about the limits of its jurisdiction. In this way, the Court can focus its limited judicial resources on those situations in which it can provide relief.

D. Compensation

1. General Principles

Under ECtHR case law, States are given a wide margin of appreciation in determining the appropriate level of compensation for an expropriation.¹⁹⁶ Generally, compensation must reasonably relate to the property's market value, although deviations are permissible in exceptional circumstances.¹⁹⁷ As such, P1-1 does not provide a right to full compensation in all circumstances.¹⁹⁸ Nonetheless, the ECtHR reviews claims that compensation was not reasonably related to market value, and such cases have produced a significant body of fact-specific case law.¹⁹⁹

Whereas expropriations are covered by the second rule of P1-1, compensation cases are analyzed under the first rule.²⁰⁰ For example, in *Viașu v. Romania*, two administrative bodies decided that the applicant was eligible for expropriation compensation, but six years later the applicant still had not received any payment.²⁰¹ The ECtHR held that the failure to enforce these decisions violated the first rule of P1-1.²⁰² Similarly, in *Maria Atanasiu et al. v. Romania*, the ECtHR held that non-enforcement of a court

196. See, e.g., *Perdigão v. Portugal*, App. No. 24768/06, para. 70 (Eur. Ct. H.R. Nov. 16, 2010), available at <http://echr.coe.int/echr/en/hudoc>; *Vajagić v. Croatia*, App. No. 30431/03, para. 41 (Eur. Ct. H.R. Dec. 11, 2006), available at <http://echr.coe.int/echr/en/hudoc>; *Lithgow v. U.K.*, App. Nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, & 9405/81, paras. 121–22 (Eur. Ct. H.R. July 17, 1986), available at <http://echr.coe.int/echr/en/hudoc>.

197. See, e.g., *The Former King of Greece v. Greece*, App. No. 25701/94, paras. 89–90 (Eur. Ct. H.R. Nov. 23, 2000), available at <http://echr.coe.int/echr/en/hudoc>; *The Holy Monasteries v. Greece*, App. Nos. 13092/87 & 13984/88, para. 71 (Eur. Ct. H.R. Dec. 9, 1994), available at <http://echr.coe.int/echr/en/hudoc>;

198. See, e.g., *Scordino v. Italy*, App. No. 36813/97, para. 95 (Eur. Ct. of H.R. Mar. 29, 2006), available at <http://echr.coe.int/echr/en/hudoc>; *Broniowski v. Poland*, App. No. 31443/96, para. 182 (Eur. Ct. H.R. Sept. 28, 2005), available at <http://echr.coe.int/echr/en/hudoc>; *James v. U.K.*, App. No. 8793/79, para. 54 (Eur. Ct. H.R. Feb. 21, 1986), available at <http://echr.coe.int/echr/en/hudoc>.

199. See, e.g., *Scordino*, App. No. 36813/97 (holding that compensation that is, after taxes, approximately 20% of the market value of the property is a violation of P1-1).

200. See, e.g., *Vajagić*, App. No. 30431/03, para. 37.

201. *Viașu v. Romania*, App. No. 75951/01, paras. 20, 27 (Eur. Ct. H.R. Dec. 9, 2008).

202. *Id.* at paras. 58–60.

order requiring restitution violated the first rule of P1-1.²⁰³ At first, it may seem that such compensation cases should be analyzed as *de facto* expropriations and instead be subject to the second rule of P1-1. Consider, for example, the case of *Brumărescu v. Romania*, in which the ECtHR found that quashing an applicant's court order requiring restitution was a *de facto* expropriation violating the second rule of P1-1.²⁰⁴ This situation seems similar to cases analyzed under the first rule, particularly *Maria Atanasiu*, which concerned non-enforcement of an order requiring restitution.²⁰⁵ Although the ECtHR never differentiates between these three cases, the facts are distinguishable based upon the government's intent—a key factor in determining *de facto* expropriations.²⁰⁶ The quashing of a court decision granting restitution is an action that intends to deprive the applicant permanently of a property interest protected by P1-1.²⁰⁷ Therefore, the situation in *Brumărescu* is a *de facto* expropriation analyzed under the second rule of P1-1. In contrast, the respondent States in *Maria Atanasiu* and *Viașu* could argue that they planned to fulfill their obligations to provide compensation and did not intend to deprive the applicants of their possessions permanently. In light of the recent ECtHR case law discussed previously, cases like *Maria Atanasiu* and *Viașu* would therefore not qualify as *de facto* expropriations and should instead be analyzed under the first rule of P1-1.

2. Admissibility Considerations

The ECtHR's treatment of its temporal jurisdiction in compensation cases represents a significant break from its treatment of similar jurisdictional questions in expropriation cases. As discussed, the ECtHR will not consider cases in which the original act of expropriation was outside its temporal jurisdiction, even if the subsequent judicial proceedings were within the allowable time frame.²⁰⁸ In contrast, the Court will hear cases regarding compensation for expropriations that occurred outside its temporal jurisdiction, so long as the compensation proceedings were within the allowable time frame.²⁰⁹ In *Vajagić v. Croatia*, for example, the applicant's land was formally expropriated in the 1970s, but the government took de-

203. App. Nos. 30767/05 & 33800/06, para. 182 (Eur. Ct. H.R. Jan. 12, 2011), available at <http://echr.coe.int/echr/en/hudoc>.

204. App. No. 28342/95, 33 Eur. H.R. Rep. 35, paras. 76–77 (2001).

205. *Maria Atanasiu et al. v. Romania*, App. Nos. 30767/05 & 33800/06, para. 182 (Eur. Ct. H.R. Jan. 12, 2011), available at <http://echr.coe.int/echr/en/hudoc>.

206. See *supra* Part III.3.C.

207. It is well-established ECtHR case law that a domestic court order requiring restitution or payment of compensation creates a property interest protectable under P1-1. See, e.g., *Atanasiu*, App. Nos. 30767/05 & 33800/06, paras. 145–46; *Kopecký v. Slovakia*, App. No. 44912/98, para. 52 (Eur. Ct. H.R. Sept. 28, 2004), available at <http://echr.coe.int/echr/en/hudoc>; *Brumărescu v. Romania*, App. No. 28342/95, 33 Eur. H.R. Rep. 35, para. 70 (2001).

208. *Blečić v. Croatia*, App. No. 59532/00, 43 Eur. H.R. Rep. 48, para. 79 (2006).

209. See, e.g., *Urbárska obec Trenčianske Biskupice v. Slovakia*, App. No. 74258/01 (Eur. Ct. H.R. June 2, 2008), available at <http://echr.coe.int/echr/en/hudoc>; *Vajagić v. Croatia*, App. No. 30431/03 (Eur. Ct. H.R. Dec. 11, 2006), available at <http://echr.coe.int/echr/en/hudoc>.

cedes to determine an appropriate amount of compensation.²¹⁰ The ECtHR admitted that it had no competence *ratione temporis* to hear a claim on the expropriation itself, because the act was prior to Croatia's ratification of P1-1.²¹¹ Nonetheless, the ECtHR decided that the applicant's complaint centered on the delay in receiving compensation, which was a continuing situation that therefore extended past Croatia's date of ratification.²¹² Thus, the claim was admissible.²¹³ In this way, the ECtHR separates proceedings regarding compensation from the act of expropriation for admissibility purposes.

3. *Application to Kosovo*

Citizens who did not receive proper compensation for expropriated land could bring claims to the Constitutional Court under P1-1. ECtHR precedent supports finding such cases as continuing situations, even when the original act of expropriation is beyond the temporal jurisdiction of the Court.²¹⁴ Such P1-1 claims are not limited to applicants who received no compensation; the level of compensation is also reviewable if the amount did not reasonably relate to the market value of the property. In those cases, the Kosovar Government would need to argue that the public interest dictated the extent to which the provided compensation deviated from market value. A potential widespread example of this situation is employees of liquidated socially-owned enterprises, who share only 20% of the proceeds from the sale of the enterprise at which they worked.²¹⁵ Each employee could make a strong argument that a portion of 20% of the profits is far less than market value and that the public interest did not necessitate such a great deviation from full compensation. For similar reasons, people left off the employee lists (and therefore deprived of any compensation) would also have claims. One of Milošević's discriminatory measures was to fire many Albanians from their work at socially-owned enterprises.²¹⁶ For those who remained, employment records were abysmal.²¹⁷ Flocks of applicants

210. *Vajagić*, App. No. 30431/03 paras. 5–14.

211. *Id.* at para. 21.

212. *Id.* at para. 24.

213. *Id.*

214. See *supra* Part III.D.2. In fact, the Constitutional Court has held that the case of an applicant awaiting compensation from the KTA constitutes a continuing situation for its purposes. See The Independent Union of Workers of IMK Steel Factory of Ferizaj, represented by Mr. Ali Azem, President of the Union v. Constitutional Review of the Decision C No. 340/2001 of the Municipal Court of Ferizaj, dated 11 January 2002, Case No. KI 08/09, Judgment (December 17, 2010). Although this case was decided as a violation of the right to fair trial, ECtHR case law indicates that it also could have been decided as a violation of P1-1 and still have been classified as a continuing situation. Cf. *Vajagić*, App. No. 30431/03 para. 24.

215. See OSCE, PRIVATIZATION IN KOSOVO, *supra* note 109, at 25.

216. CORDIAL & ROSANDHAUG, *supra* note 24, at 19.

217. *Id.*

brought cases to the Special Chamber of the Supreme Court,²¹⁸ in which they claimed that they had been left off employee lists as a result of discrimination.²¹⁹ Although these proceedings resulted in many people being added to the lists of eligible employees,²²⁰ the mere twenty-day limit for challenging an employee list caused many more to miss the opportunity to bring claims.²²¹ Such applicants could now argue that the denial of compensation is a continuing situation over which the Constitutional Court can exercise jurisdiction.

These types of fact patterns are hinted at in two recent cases before the Constitutional Court.²²² In both these cases, the applicants claimed that they were unlawfully excluded from the employee lists of two socially-owned enterprises.²²³ The Constitutional Court declared both cases inadmissible because the applicants' cases were still pending before the Special Chamber of the Supreme Court, so the applicants had not yet exhausted their legal remedies.²²⁴ Nonetheless, these cases illustrate that problems regarding privatization are far from hypothetical. Consider what would have happened if the applicants had waited to file with the Constitutional Court until after the Special Chamber had reached decisions. Prior to introducing the notion of a continuing situation, the Constitutional Court could have dismissed the cases *ratione temporis*; the Court could not have ruled on the exclusion of the applicants from the lists of employees, because doing so would have given retroactive effect to the Constitution.²²⁵ In fact, the Court dismissed an earlier case for that exact reason.²²⁶ After the Court introduced

218. The Special Chamber of the Supreme Court had exclusive jurisdiction over matters regarding the KTA. See *On the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters*, UNMIK/REG/2002/13 (June 13, 2002), § 4.1.

219. See OSCE, *PRIVATIZATION IN KOSOVO*, *supra* note 109, at 14–15.

220. *Id.* at 15.

221. See Administrative Direction Amending and Replacing UNMIK Administrative Direction 2003/13, Implementing UNMIK Regulation No. 2002/13 on the Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, UNMIK/AD/2006/17 (Dec. 6, 2006), § 64.

222. Zvezdana Dimitrijević, Constitutional Review of the Decision SCEL-09-0001 of the Special Chamber of the Supreme Court of Kosovo, dated 8 January 2010, Case No. KI 10/10, Resolution on Inadmissibility (April 20, 2011); Jovica Joksimovic v. Decision SCEL-09-001 of the Special Chamber of the Supreme Court of Kosovo, dated 5 January 2010, Case No. KI 12/10, Resolution on Inadmissibility (Oct. 18, 2010).

223. See Zvezdana Dimitrijević, Case No. KI 10/10, ¶¶ 8; Jovica Joksimovic, Case No. KI 12/10, ¶¶ 16–17.

224. See Zvezdana Dimitrijević, Case No. KI 10/10, ¶¶ 18–19; Jovica Joksimovic, Case No. KI 12/10, ¶¶ 20–22.

225. Cf. Blečić v. Croatia, App. No. 59532/00, para. 79 (Eur. Ct. H.R. Mar. 8, 2006), available at <http://echr.coe.int/echr/en/hudoc>.

226. See Fillim Musa Guga v. Decisions SCEL-08-0001 and SCEL-08-0001 of the Special Chamber of the Supreme Court of Kosovo, dated 17 June 2008 and 10 September 2008, Case No. KI 33/09, Resolution on Inadmissibility (Oct. 18, 2010). The applicant had worked for a socially-owned enterprise but fled to Montenegro during the NATO intervention, which resulted in him losing his job. *Id.* ¶¶ 11–12. When the applicant returned home, he could not get his job back. *Id.* ¶ 13. The socially-owned enterprise was subsequently privatized, and the applicant was not included on the list of employees eligible for 20% of the proceeds. *Id.* ¶¶ 14–17. The applicant challenged the list of eligible employees but the KTA ruled against him. *Id.* ¶¶ 21–22. The applicant then filed a referral with the

the continuing situation into Kosovar jurisprudence, however, the same types of applicants can now claim that they have been continuously denied compensation, which would make such cases admissible.

Even prior to introducing the continuing situation doctrine, the Constitutional Court's own case law implied that such a result might one day occur. In the second case ever filed at the Constitutional Court, the applicants' land had been expropriated by Yugoslavia in the 1950s.²²⁷ The applicants requested restitution of the property in the early 1990s, and then again in 2000.²²⁸ The property, however, was never returned.²²⁹ The Court dismissed the claim as inadmissible, because the applicants had not first brought their claim to the Special Chamber of the Supreme Court, and because the applicants did not prove that they had inherited the legal rights to the property from the person from whom it had been expropriated.²³⁰ The Court, however, did indicate in *dicta* that such a claim could be admissible if the applicants had the legal rights to the property, and the claim was never heard before a tribunal.²³¹ In that case, the situation would constitute a deprivation of property without compensation.²³² Although the Constitutional Court never mentioned a continuing situation in that statement, the idea is implied, because a continuing situation doctrine is necessary for the Court to rule on a decades-old expropriation.

The Constitutional Court's subsequent case law does not follow the reasoning set out in this early case, even though that case is supported by ECtHR jurisprudence. Unlike with expropriations, ECtHR case law indicates that the Constitutional Court can exercise broad jurisdiction over compensation cases. Therefore, those are precisely the types of cases that the Court should encourage applicants to bring. If the Court were to rely upon the ECtHR's conception of the differences in admissibility requirements between expropriation and compensation cases—and clearly explain those differences in its own case law—the Constitutional Court would better communicate the types of claims in which it can provide relief. In so doing, the Court would encourage attorneys and applicants to bring only such admissible cases.

Constitutional Court, in which he claimed that the KTA had discriminated against him because of his Egyptian origin. *Id.* ¶¶ 23–24. The Constitutional Court, however, deemed the case inadmissible *ratione temporis*. *Id.* ¶¶ 25–29.

227. Kole Krasniqi v. Ministry of Agriculture and Directorate of Legal Property Issues and Land Consolidation of Gjakova Municipality, Case No. KI 02/09, Decision, ¶ 1 (Jan. 24, 2010).

228. *Id.*

229. *Id.*

230. *Id.* ¶ 3.

231. *Id.*

232. *Id.*

E. Positive Obligations

1. General Principles

Well-settled ECtHR case law affirms that States can impose positive obligations on themselves to provide restitution or compensation for past expropriations.²³³ A pivotal case in this regard is *Broniowski v. Poland*.²³⁴ Prior to World War II, Poland's border extended beyond the Bug River, but after the war, the River became Poland's eastern limit.²³⁵ As such, Poles who lived east of the river had to leave their property and move westward to remain within Polish borders.²³⁶ The Republican Agreements, which stipulated this border change, obliged Poland to pass laws that would compensate those forced to relocate.²³⁷ In response, Poland promulgated a series of legislative acts, some as late as the 1990s, which promised various amounts of compensation.²³⁸

Notably, Poland did not ratify P1-1 until October 10, 1994.²³⁹ Therefore, considering that the treaty depriving the repatriated citizens of their land was from the 1940s, it would seem that Poland could avoid liability under the Convention. Ruling on the citizens' claims would give retroactive effect to the Convention. This result, however, was not the conclusion reached by the ECtHR. Instead, the Court held that Poland's own legislative acts, which remained in effect after ratification, had created new property interests that were protected under P1-1 and had vested those interests in the applicant.²⁴⁰ Since this case, the ECtHR has consistently ruled that a State can create a new property right through legislation that promises either restitution or some other form of compensation.²⁴¹

2. Application to Kosovo

Kosovo declared independence in accordance with the Ahtisaari Plan,²⁴² and the Constitution provides that the Plan "shall take precedence over all other legal provisions in Kosovo."²⁴³ The Constitution also stipulates that "all authorities in the Republic of Kosovo shall abide by . . . Kosovo's

233. See, e.g., *Kopecký v. Slovakia*, App. No. 44912/98, para. 35, (Eur. Ct. H.R. Sep. 28, 2009), available at <http://echr.coe.int/echr/en/hudoc>; *Beshiri et al. v. Albania*, App. No. 7352/03, para. 81 (Eur. Ct. H.R. Feb. 12, 2007), available at <http://echr.coe.int/echr/en/hudoc>; *Broniowski v. Poland*, App. No. 31443/96 (Eur. Ct. H.R. June 22, 2004), available at <http://echr.coe.int/echr/en/hudoc>.

234. *Broniowski*, App. No. 31443/96.

235. *Id.* at para. 10.

236. *Id.* at para. 11.

237. *Id.* at paras. 39–40.

238. *Id.* at paras. 39–68.

239. *Id.* at para. 122.

240. *Id.*

241. See, e.g., *id.* at para. 133; *Kopecký v. Slovakia*, App. No. 44912/98, para. 35 (Eur. Ct. H.R. Sep. 28, 2009), available at <http://echr.coe.int/echr/en/hudoc>; *Beshiri et al. v. Albania*, App. No. 7352/03, para. 82 (Eur. Ct. H.R. Feb. 12, 2007), available at <http://echr.coe.int/echr/en/hudoc>.

242. See *supra* Part I.

243. CONST. OF THE REPUBLIC OF KOSOVO, June 15, 2008, art. 143(2).

obligations” under the Ahtisaari Plan and “take all necessary actions for their implementation.”²⁴⁴ This language is clear: the Ahtisaari Plan dictates the policies of independent Kosovo. The reach of the Plan is extensive, including detailed provisions about many issues, such as refugee rights,²⁴⁵ cultural heritage,²⁴⁶ and elections.²⁴⁷ The most relevant provisions for the purposes of this Note are the requirements regarding property. The Ahtisaari Plan requires that “Kosovo . . . recognize, protect, and enforce the rights of persons to private movable and immovable property located in Kosovo *in accordance with established international norms and standards*.”²⁴⁸ More specifically, the Plan stipulates a legislative agenda that the Assembly must adopt either by the end of the transition period or “immediately upon [its] conclusion”²⁴⁹ The transition period lasted for 120 days following March 26, 2007, when the Plan went into force, and ended on July 26, 2007.²⁵⁰ Among the items on the proscribed agenda was the passage of a law on restitution.²⁵¹

In October 2010, the Constitutional Court “remind[ed]” the Assembly of these obligations,²⁵² because, at that time, the Assembly had not yet passed a law on restitution.²⁵³ As of the time of writing, the Assembly has still not passed such a law, which is now more than four years overdue.²⁵⁴ Such delay cannot be considered “immediately” after the transition period, as the Ahtisaari Plan stipulates.²⁵⁵ Failure to pass this law thus likely violates the Constitution. Although the Constitutional Court was right to acknowledge the Assembly’s dereliction of duty in addressing this critical issue, the Court should also be concerned about its own caseload as a result of the Assembly’s inaction. Under ECtHR case law, the Kosovar Government’s acceptance of the Ahtisaari Plan, which requires passing a law on restitution, could have created new property interests in the same way that Polish legislation requiring compensation created such interests.²⁵⁶ If that is

244. *Id.* art. 143(1).

245. Ahtisaari Plan, *supra* note 43.

246. *Id.* art. 7.

247. *Id.* art. 11.

248. *Id.* art. 8.6 (emphasis added).

249. *Id.* Annex XII, art. 2.

250. *Id.* art. 15(1); *see also* Heirs of Ymer Loxha and Sehit Loxha v. Decision No. PKL.Nr.21/07 of the Supreme Court of the Republic of Kosovo dated 17 December 2008, Case No. KI 14/09, Resolution of Inadmissibility, ¶ 32 (Oct. 15, 2010); PERRITT, *supra* note 22, at 165.

251. Ahtisaari Plan, *supra* note 43, Annex XII, art. 2(13).

252. *Heirs of Ymer Loxha*, Case No. KI 14/09, ¶ 33.

253. *Id.* ¶ 32.

254. *See* Republic of Kosovo Assembly, Laws by Date of Promulgation, <http://www.assembly-kosova.org/?cid=2,122> (last visited October 24, 2011).

255. Ahtisaari Plan, *supra* note 43, Annex XII. As a further indication of how overdue this legislation is, the International Civilian Office, the organization responsible for overseeing the implementation of the Ahtisaari Plan, *see supra* note 46, has begun preparations for closing in 2012, *see* Marzouk, *supra* note 46.

256. *Cf.* Broniowski v. Poland, App. No. 31443/96, para. 122 (Eur. Ct. H.R. June 22, 2004), available at www.echr.coe.int/ECHR/EN/hudoc.

the case, then a continuing situation arises from the sustained deprivation of the interests protected by the Plan—that is, the continued absence of a forum that can provide either restitution or compensation.²⁵⁷ Thus, every citizen with any claim to a previous property right would have a forceful argument for an admissible case before the Constitutional Court.

Applicants can also make strong arguments that the Law on the Kosovo Privatization Agency created another affirmative right. The Preamble of the KPA law resolves to

ensure that *any person claiming to hold* an ownership or creditor right or interest in such an enterprise is provided with:

- (i) adequate rights of due process to have such claim heard and its validity determined, and
- (ii) if such claim is determined to be valid, adequate monetary compensation for the loss or impairment of the concerned right or interest.²⁵⁸

This law implies that any person with a claim to a share of a socially-owned enterprise deserves at least an administrative hearing to determine the merits of the claim. If a claim stems from a formal expropriation before the nationalization of the socially-owned enterprise, its applicants would not have the promised means to have their claims heard, because until a law on restitution is passed, no judicial body in Kosovo has jurisdiction to rule on the merits of such a claim. If a claim is valid, then the KPA statute also creates an affirmative right to compensation, as in *Browniowski*.²⁵⁹

Finally, Article 53 of the Constitution requires the Court to interpret the Constitution in light of ECtHR precedent.²⁶⁰ Thus, if the Court does not begin considering this case law, which it has not done in its continuing situation jurisprudence thus far, then it would also be possible for any citizen to bring a claim against the Court itself for failing to abide by its affirmative constitutional obligations. Given the widespread application of these claims, such cases have perhaps the greatest potential to overwhelm the Constitutional Court’s docket. Unlike the other issues addressed in this Note, however, the answer to this problem does not lie in cabining the Court’s continuing situation doctrine. In fact, ECtHR case law indicates that the Constitutional Court could hear such claims.²⁶¹ Even if the Court could limit its continuing situation doctrine to exclude such cases, the Constitutional Court should avoid that result. The Court should not seek to prevent citizen suits that ensure the new Kosovar government is functioning within its constitutional boundaries. Rather, the Constitutional Court

257. *Cf. Papamichalopoulos et al. v. Greece*, App. No. 14556/89, paras. 45–46 (Eur. Ct. H.R. June 24, 1993), available at <http://echr.coe.int/echr/en/hudoc>.

258. On the Privatization Agency of Kosovo (Law No. 03/L-067) Preamble (emphasis added).

259. *Broniowski*, App. No. 31443/96, para. 133.

260. CONST. OF THE REPUBLIC OF KOSOVO, June 15, 2008, art. 53.

261. *Cf. Broniowski*, App. No. 31443/96.

should remedy these failings before citizens bring actions. The Court can look to the ECtHR case law to fulfill its own obligations and remind the Assembly of its responsibilities through Court opinions. Otherwise, the government's failure to address these critical societal needs will mar its legitimacy in the eyes of its populace. For a transitional political system attempting to usher in a new era of stability, this legitimacy is essential.

IV. CONCLUSION

As this Note demonstrates, the Constitutional Court's adoption of a vague continuing situation doctrine could have grave implications. Under current precedent, potential applicants across the country could bring forth a multitude of claims that would dominate the Court's docket. To prevent this result, the Court must walk a fine line—encouraging claims for which it can provide relief while discouraging those outside its jurisdiction. If the Court does not do so, it risks being overwhelmed by manifestly ill-founded cases, thereby seriously delaying its ability to rule on admissible cases. This problem will only be exacerbated as the Court becomes more established in Kosovo's legal culture. As Kosovar attorneys become increasingly familiar with the Court, its procedures, and its case law, they are likely to file more cases.²⁶² The Constitutional Court must minimize the proportion of this increased caseload occupied by manifestly ill-founded claims. Otherwise, the Court will find itself overwhelmed. To avoid that situation, the Court should employ extensive application of ECtHR case law. Concepts such as the difference between formal and *de facto* expropriations would be invaluable tools for providing much-needed guidance to applicants as to the types of claims the Court can hear. Otherwise, the delays caused by a backlog of inadmissible cases would hinder "the public's access to . . . [c]ourts, which . . . weakens democracy, the rule of law and the ability to enforce human rights."²⁶³

Yet, for all the potential negative consequences of an unrestrained continuing situation doctrine, a well-conceived doctrine could achieve just the opposite: a dramatic rise in the legitimacy of Kosovar law. Domestically, a clear continuing situation doctrine that sends lucid signals to applicants could help optimize the balance between maximizing judicial economy and providing an effective remedy for the gamut of meritorious constitutional claims. Internationally, the benefits could be just as great. At first, it may seem odd to hold Kosovo liable for any of the wrongs endured under Yugoslav or Serbian regimes. The easy response is that the Ahtisaari Plan imposes such positive obligations. The more optimistic answer, however,

262. Cf. Costas Paraskeva, *Reforming the European Court of Human Rights: An Ongoing Challenge*, 76 NORDIC J. OF INT'L L. 196 (2007).

263. Maria Dakolias, *Court Performance Around the World: A Comparative Perspective*, 2 YALE HUM. RTS. & DEV. L.J. 88 (1999).

asserts that assuming those responsibilities bolsters the status of Kosovo as an independent entity in the eyes of the international community.²⁶⁴ Through a well-developed continuing situation doctrine, the Constitutional Court can aid the Assembly in structuring a framework that responsibly addresses these lingering problems in accordance with European human rights norms. Such efforts would be a critical benchmark as Kosovo seeks recognition from more countries, and, ultimately, membership in the European Union. In this way, the Constitutional Court can do its own part toward achieving Kosovo’s greater international ambitions.

264. See Tai-Heng Cheng, *Why New States Accept Old Obligations*, 2011 U. ILL. L. REV. 1, 29-30 (2011).

