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TRANSITIONAL JUSTICE, MINORITY RIGHTS AND COMMUNITIES IN KOSOVO

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Introduction

There is not an agreed definition on international law on what or who constitutes a minority. However, in democratic theory and positive law three categories of minorities are recognized:¹ indigenous groups who were once hegemonic in their territory and who were displaced by the current state or its predecessor, other long-standing "national minority" groups who have long co-existed within the state, and new immigrant groups. This is not an exhaustive category list, because in some states some groups, like Roma, might not find their place within it. However, as stated in the 1990 Copenhagen Document² and by relevant activists on the protection of minority rights, such as Kurt Hamer,³ belonging to a minority is an individual choice to share an identity with a collective group of persons who do not constitute the majority. Identities are socially constructed over time and constantly change, but they build on common cultural, ethnic, religious and/or language characteristics. Moreover, belonging to a certain identity group does not depend on a state's decision.

The reality is that throughout history minorities have suffered mistreatment and repression, which often triggers war conflicts and crimes against humanity, as in the former Yugoslavia. Transitional justice (TJ) is the discipline⁴ which, after the end of a violent conflict, seeks to build these societies in transition in order to prevent further conflict through the restoration of civic trust, reconciliation, and the establishment of the rule of law and democratic order. This article focuses on Kosovo and the influence of identity perceptions and minority rights in transitional justice and vice versa.

Context in Kosovo

The previous dominant role in the social and political arena of certain ethnic group has seen their situation reversed after the conflict in Kosovo: The current dominant ethnic group, Albanian, constituted the dominant group before 1999 under the rule of a Serb governing minority in Kosovo. Nowadays, the situation has shifted. The remaining Serbs in Kosovo constitute an even smaller minority than before the conflict. Moreover, they no longer occupy the majority of the governing positions, which are now mainly held by the Albanian majority. Eight other ethnic groups reside in Kosovo and have found themselves involved in the conflict: Croats, Montenegrins, Egyptians, Roma, Ashkali, Turks, Bosniaks and Croats. This

¹Elena A. Baylis, "Minority Rights, minority wrongs," University of Pittsburgh, 2005, pg. 47

²Conference on Security and Co-operation in Europe, "Document of the Copenhagen meeting of the conference on the human dimension of the csce", see at: <http://www.osce.org/odihr/elections/14304>

³Kurt Hamer (1926 -1992) was the representative to various Danish and German minority groups and dedicated activist and minority right promoter.

⁴The theorists had not agreed yet whether transitional justice is part of the law discipline or a new multidiscipline. See more at: Christine Bell,

"Transitional Justice, Interdisciplinary and the State of the Field or Non-Field", The International Journal of Transitional Justice, Vol.3, 2009, 5-27.

situation creates a very sensitive scenario where the creation of a stable and sustainable multi-ethnic Kosovo is a unique challenge. The situation is of such sensitivity that not even the use of the term “minority” is well accepted in Kosovo, instead identifying the different ethnic groups under the term “community”. In this sense, “community” has a twofold meaning in the region: on one side, a group of people belonging to one of the specific ethnic groups above-mentioned, regardless of being a numerical majority or minority in the region; on the other side, that of “national minority”. Therefore, this later term is preferred to avoid encountering tense situations between the Serb population residing in Kosovo, among whom a broad number still see themselves as citizens of Serbia and hence are not willing to be considered a minority. Consequently, the article will use the term “community” instead of “minority” and also to refer to the groups that do not constitute a minority.

Transitional Justice contexts with an identity dimension

As the International Centre for Transitional Justice (ICTJ) has pointed out,⁵ the context where the identity dimension has played a strong role to the conflict tends to be characterized by a range of factors which hamper the successful achievement TJ. This article will briefly mention these factors while analyzing their presence in Kosovo:

1. *A pervasive sense of threat or fear of attack:* Although in the Southern part of Kosovo the communities largely share positive security perceptions on their freedom of movement, in northern Kosovo the communities still report considerable security concerns and obstacles on moving freely through other majority-community based municipalities.
2. *A widespread belief in identity myths:* Myths are often used by nationalist leaders for political reasons. These are usually linked to a group’s identity and may lead to distorted interpretations of other groups’ past and current actions. In Kosovo, there is strong support from all communities to find the truth about missing persons and bringing the perpetrators to justice, regardless of their nationality. However, in 2012 communities were more hesitant than some years before to consider perpetrators of war crimes as criminals.⁶ Astonishingly, the majority of people from all communities in Kosovo do not consider that members of their community have committed war crimes.⁷ On this line, the perception among Kosovo Albanians and Kosovo Serbs is totally opposite. While the first consider the Yugoslav Army, Serbian Police and Serb paramilitary as responsible for war crimes, the later place the burden of war crimes mainly on NATO forces and the KLA.⁸ Clearly, both parts are influenced by distorted perceptions coming from the media, which is their main source of information on the issue.⁹
3. *Mistrust and miscommunication:* The above-mentioned differing perceptions on the conflict also reflect the lack of communication between communities. Serbs, Croats, Montenegrins and some Roma strongly mistrust the Kosovo Government’s policies and continue to use Serbian public institutions.
4. *Elite-led mobilisation of groups:* The manipulative work of ethnic elites was especially widespread in the wake of the break-up of Yugoslavia.¹⁰ The practice is not currently used in the Kosovo politics, at least in the southern region. But in the north clashes persist between those considered “extremists” and “moderates” nationalist elites. “Extremists” are those who try to gain power and political support by enhancing misconceptions of a different ethnic group and who often insist that “moderates”, those

⁵Paige Arthur, “Identities in Transition: Developing Better Transitional Justice Initiatives in Divided Societies, Research Unit of the International Centre for Transitional Justice (ICTJ), 2009

⁶ Perceptions on transitional justice, United Nations Development Programme (UNDP), 2012, pg.7

⁷Idem, pg. 7

⁸Idem. Pg. 9

⁹Idem, pg. 9

¹⁰Paige Arthur, “Identities in Transition: Developing Better Transitional Justice Initiatives in Divided Societies, Research Unit of the International Centre for Transitional Justice (ICTJ), 2009, pg. 5

trying to strengthen a dialogue between communities and diminishing the importance of differenced ethnical features, are betraying their own people.

5. *Conflict over access to resources*: The use of resources still carries a lot of unsolved issues in Kosovo. Kosovo is among the richest countries regarding natural resources in Europe and has one of the largest coal reserves in the world.¹¹ It is especially rich on lignite and other mineral resources like zinc, lead, silver and chromium; and also in forests, rivers, mountains and soil.¹² The industrial mining complex of Trepča was the largest mining operational complex in the former Yugoslavia.¹³ Nowadays, production is low due to insufficient investment. Moreover, the mines are located in the Northern region, making the property and its use still very conflictive and claimed by both Kosovo and Serbia, which is one of the reasons for Serbia not backing down from its claims in the territory; particularly considering that energy reserves in central Serbia are running out.¹⁴ On the other hand, water resources are limited and unequally distributed compared to Kosovo needs. At the moment of writing this article (March 2014), the country is suffering a severe drought in some areas, which are not being solved due to lack of proper investment in the necessary structures. Moreover, Kosovo is placed in the upper part of mainstream trans-boundary waters, with the hydrological, ecological and management issues that this fact implies.¹⁵ Overall, the uncertain situation in Kosovo creates unstable infrastructure conditions and the significant investments which need to be made to use the existing resources, turn out to be a significant problem for the country to develop its energy potentials.

6. *Universal need for identity and dignity*: The groups inhabiting a territory in transition have the need to feel their identity preserved, to be recognized and to be protected from abuses against their dignity.

The fledgling state of Kosovo opted to face the reality of being a multi-ethnic state and establish a communitarian democracy and recognize communities as the constituent element of its existence. While only cultural rights are expected to directly refer to minority groups, other human rights like the right to non-discrimination and the right to equality are directly beneficial for communities.

The Republic of Kosovo claims to have one of the most progressive and advanced legal¹⁶ and institutional¹⁷ frameworks on the protection and promotion of human rights, and particularly of minority rights. In Article 22, the Constitution of Kosovo declares the direct applicability of international agreements and instruments and consequently of the human rights and fundamental freedoms guaranteed by them, including the Framework Convention for the Protection of National Minorities; which is the most important international legally binding instrument created to protect the rights of national minorities.¹⁸ Kosovo is not a member state of the United Nations or the Council of Europe,

¹¹ Šehit Muja, "Kosovo has a huge investment potential in natural resources", CNN Report, February 8 2012, see at: <http://ireport.cnn.com/docs/DOC-744339>

¹² Luca J. Uberti, "Is separation of powers a Remedy for the Resource Curse? Firm Licensing, Corruption and Mining Development in Post-War Kosovo", Centre for Energy and Natural Resources, American University in Kosovo & Rochester Institute of Technology, 2012

¹³ Luca J. Uberti, "Is separation of powers a Remedy for the Resource Curse? Firm Licensing, Corruption and Mining Development in Post-War Kosovo", Centre for Energy and Natural Resources, American University in Kosovo & Rochester Institute of Technology, 2012

¹⁴ Dušan Janjić, "Energy Security and Ethnic Conflicts in the Western Balkans," The Global Coalition for Conflict Transformation, see at: <http://www.transconflict.com/2010/07/energy-security-ethnic-conflict-challenges-in-balkans/>

¹⁵ Ruzhdi Pillana, Vahdet Pruthi, Arsim Ejupi, Valbon Bytyqi, "Water Resources Challenges in Kosovo and Trans-boundary Impacts", Department of Geography, Faculty of Mathematical and Natural Sciences, Pristina, Republic Of Kosovo, 2010
See at: http://www.rit.edu/~w-cenr/documents/data/Water_Resources-Kosovo.pdf

¹⁶ Legal framework on minorities: The Constitution of Kosovo, The Law on the Protection and Promotion of the Rights of Communities and their Members in Kosovo, Law on Anti-Discrimination, Law on Local Self Government, Law on the Use of Languages

¹⁷ Institutional framework on minorities. *At the central level*: Consultative Council for Communities, Office for Community Affairs, Office of the Language Commissioner, Advisory Office on Good Governance, Human Rights, Equal Opportunity and Gender Issues (AOGG), Ministry for Communities and Return (MCR), Committee on Rights and Interests of Communities and Returns (CRICR). *At the municipal level*: Municipal Office for Communities and Return (MOCR), Municipal Human Rights Unit (MHRU), Municipal Communities Committee, Deputy Chairperson of the Municipal Assembly for Communities, Deputy Mayor for Communities and the Ombudsperson as an independent organization.

¹⁸ International treaties and conventions introduced in article 22 of the Constitution of Kosovo:

hence it has not ratified their respective treaties and does not have the obligation to do so. Therefore, their mention in the Constitution, if not unique, is an advance on constitutional and international law and a progressive measure worldwide.

Criminal prosecution of war crimes and other transitional justice methods

Kosovo's legal system is an example of success in the TJ process. However, TJ has also been unsuccessful in former Yugoslavia. The EU has exclusively focused on cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY). This is the only TJ-related requirement established by the Commission Communication (1999) for South East European countries' to be fulfilled in order to access the European Union (EU). Other necessary methods of transitional justice have been left aside. Criminal prosecutions for international crimes are the original form of transitional justice to face war crimes, but not the only one. Truth Commissions, victim reparations, security system reforms, remembrance and memorialisation are other newer forms of dealing with the past while trying to ensure the non-repetition of the acts committed. In Kosovo, the prosecution of international crimes perpetrators is as necessary as elsewhere in the region; however, justice is so deeply entrenched and dependent on the ethnic group perception of the historical facts and there is such a lack of resources that is not viable and has proven ineffective in recent years. At the moment, the disbelief of the inefficient work of the ICTY is widespread among all communities, and only the members of the Serb community believe up to 56% that this institution is contributing to achieve justice.¹⁹

The narrow EU focus on transitional justice, channeling its full attention to prosecution of war crimes through the ICTY, originates from a conviction that the Tribunal is a key factor in rebuilding the rule of law in the Western Balkans, ending impunity for international crimes and facilitating reconciliation across the region.²⁰ In Kosovo, an alternative to international justice has also been adopted: hybrid international-domestic trials. To overcome the crisis of accountability and justice of the ICTY, the UN authorities issued a series of regulations allowing foreign judges to sit alongside domestic judges on existing local Kosovo courts to prosecute and defend cases.²¹ The idea was that the experience of international experts would fulfill the lack of experience of the local ones and at the same time bring a non-bias judgment to the cases, as far as most Serbian judges had refused to work under the Kosovo judicial apparatus. In these courts, international human rights law prevails over domestic law. Although this practice is quite accepted among Kosovo Albanians, of which up to 58% claim to be satisfied with their work, a majority of 80% of Kosovo Serbs feel dissatisfied with Kosovo courts.²²

The aim of war trials is to promote peace by punishing those individuals who were the most responsible for mass atrocities and "dismantle the ethno-nationalist ideologies which had been reinforced during the conflicts in ex-Yugoslavia."²³ That is why ICTY proceedings are perceived locally as punishing the whole nation,²⁴ which does not help to bridge communication and understanding among communities.

(1) Universal Declaration of Human Rights;(2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;(3) International Covenant on Civil and Political Rights and its Protocols;(4) Council of Europe Framework Convention for the Protection of National Minorities;(5) Convention on the Elimination of All Forms of Racial Discrimination;(6) Convention on the Elimination of All Forms of Discrimination Against Women;(7) Convention on the Rights of the Child;(8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment

¹⁹"Transitional Justice in Kosovo", Kosovar Institute for Policy Research and Development (KIPRED), 2008, pg. 16.

²⁰Hurst Hannum, "Peace vs Justice: creating rights as well as order out of chaos," International Peace Keeping, Vol.13, December 2006, (pp. 582 – 595)

²¹Laura A. Dickinson, "The relationship between hybrid courts and international courts: the case of Kosovo" New England Law Review, Vol 37: 4, 2003, pg. 1062

²²Perceptions on transitional justice, United Nations Development Programme (UNDP), 2012, pg.18

²³Iavor Rangelov, "EU conditionality and transitional justice in the Former Yugoslavia", CYELP, 2006, p. 371

²⁴Idem

As pointed out by Hurs Hannum,²⁵ the nature of mass atrocity in an ethnic conflict has a wider collective dimension than international law is ready to admit. Thus, individual punishments cannot heal *per se* collective wound.

As seen earlier, Kosovo faces one of these contexts where the identity dimension played an important role on the past violent conflict and its society is still suffering these consequences. At this point, TJ doesn't have to be expected to solve conflicts with an identity dimension, but has tools that might help to do so. Transitional justice non-judicial methods like truth commissions at the national level should be highly promoted. Truth commissions debunk myths, bring up intergroup apologies, listen to testimonies of marginalized communities, and work on giving more consideration to positive stories of humanity. It is also crucial to recognize the victims and design adequate reparations for them.

Due to the focus on prosecution as a tool for accountability, other domestic mechanisms of reconciliation were forgotten. It was not until 2008, and due to the initiative of three nongovernmental organizations from the Western Balkans - Humanitarian Law Centre (HLC), Research and Documentation Center and Documenta - that the Regional Commission for Establishing the Facts about War Crimes and Other Gross Violations of Human Rights Committed on the Territory of the Former Yugoslavia in the period from 1991-2001 (RECOM) was officially founded at the Fourth Regional Forum for Transitional Justice held in Prishtinë/Priština. Later, in 2012 the Kosovo Government finally decided to establish the Inter-Ministerial Working Group on Dealing with the Past and Reconciliation. These are the two only truth seeking non-judicial mechanisms established at the moment in Kosovo to ensure accountability, reconciliation and provide remedies. They came late and they are still not consolidating, but they are a first step for improving the TJ process in the region.

Another challenge, which is possibly more difficult, is to encourage less divisive forms of identification. Current politics and policies in Kosovo are based on strengthening community's identity claims: accommodate cultural communities' specificities and guarantee them political representation. Regardless of being necessary, it perpetuates the identification of the characteristics that divides communities, instead of promoting shared cultural values and features, which is another aim of minority rights.

One TJ strategy to overcome divisive forms of identification is to use neutral language of "victims" and "perpetrators" rather than identity categories. Another strategy can be to highlight crosscutting identities. Thus, it is ideal to focus reforms and TJ initiatives around other categories, for example gender or age, instead of that of ethno religious identity, or to draw attention to those who have crossed group boundaries.²⁶ One example would be to disclose positive stories of those who risked their lives to hide a vulnerable person from another community. Or either identify common needs that women from all communities suffer as a consequence of the conflict and work towards building reconciliation around this topic. These strategies might highlight similarities and common situations instead of differences. Consequently, they will promote trust among communities and among communities and the state. Given that efforts to build bridges between communities are often met with hostility in recent and intractable conflicts,²⁷ working on these fields is without a doubt a big challenge.

Conclusion

In conclusion, minority rights implementation and transitional justice's methods are entrenched and linked one with each other. An effective implementation of minority rights based policies and legislation

²⁵Hurst Hannum, "Peace vs Justice: creating rights as well as order out of chaos," International Peace Keeping, Vol.13, December 2006, (pp. 582 – 595)

²⁶Paige Arthur, "Identities in Transition: Developing Better Transitional Justice Initiatives in Divided Societies, Research Unit of the International Center for Transitional Justice (ICTJ), 2009, pg. 9

²⁷ Idem, pg. 7

will create the suitable environment for communities to live together; while coping with the past is indispensable to create the fitting conditions where minority rights can be promoted. Otherwise, communities will always identify the other groups as the “perpetrators” and the only minority rights framework to exist will be based on strengthening the claims of the marginalized, but not one that promote cooperation and trust.

That is why transitional justice non-judicial methods are as important as the promotion of minority rights and actually they are even part of the strategy to implement the latest. While, at the same time, the existence of a minority rights framework is a necessary existing condition for transitional methods to effectively work. Therefore, in the Kosovo context minority rights and TJ complement each other and one cannot be successful without the other one. On the other side, while Kosovo should strengthen transitional non-judicial methods, these are not meant to be seen as a substitute for criminal prosecutions of war crimes. The latest is also necessary to ensure a long stable peaceful state. Justice should not be sacrificed in the name of stability.

About ECMI Kosovo

ECMI Kosovo is the principal non-governmental organisation engaged with minority issues in Kosovo, with the overarching aim to develop inclusive, representative, community-sensitive institutions that support a stable multi-ethnic Kosovo. ECMI Kosovo contributes to the developing, strengthening and implementation of relevant legislation, supports the institutionalisation of communities-related governmental bodies, and enhances the capacity of civil society actors and the government to engage with one another in a constructive and sustainable way.