PROSPECTS FOR TRANSITIONAL ENVIRONMENTAL JUSTICE IN THE SOCIO-ECONOMIC RECONSTRUCTION OF KOSOVO

by

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Abstract

Environmental justice is arguably a neglected aspect in the pursuit of transitional justice within post-conflict societies. The international and European institutional and legal frameworks that are currently applicable within Kosovo present a suitable backdrop against which to examine the different legal pathways towards providing for environmental justice within this transitional society. The implications of achieving environmental justice within the overall context of transitional justice in a fledgling state such as Kosovo will then be explored. In particular, the potential for transitional environmental justice to reconcile (if not resolve) deeper, more intrinsic ethnic and social divisions within Kosovo, as well as a means to reduce the negative environmental impacts of an overtly economic development agenda, is considered. A number of examples highlighting the potential of the international, European and domestic legal frameworks for achieving environmental justice within Kosovo will be showcased as a possible exemplar model for transitional societies in general.

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This paper consolidates recent desk-based research with fieldwork undertaken during three visits to Kosovo in July & November, 2009, and July, 2010, respectively, when the author conducted training conferences (alongside Professor Sheldon Leader of the Essex Business and Human Rights Unit and Law School, University of Essex, England) on the implications of human rights and environmental law for the Kosovo Laws on Expropriation and Privatization, respectively, under the auspices of the OSCE Mission in Kosovo. The author would like to acknowledge with thanks the assistance provided by Aygun Kazimova, (formerly) Acting Chief of the Property Section, Human Rights Department, OSCE Pristina office in Kosovo. The usual caveats apply.

Prospects for Transitional Environmental Justice in the Socio-Economic Reconstruction of Kosovo

Introduction

This paper addresses the issue of environmental justice within transitional societies, taking as its main focus the possibilities for achieving environmental justice in present day Kosovo. What are the prospects of achieving environmental justice within a transitional society like Kosovo? Specifically, does the notion of 'transitional justice' also encompass the notion of 'environmental' justice, such that it is at all possible to talk both conceptually and practically about achieving 'transitional environmental justice'? Following an introduction to the conceptual issues raised by these questions, this paper will examine the international and European institutional and legal frameworks to assist the socio-economic reconstruction of post-conflict Kosovo, with a view to assessing how far the provision of environmental justice by these frameworks promote the overall goal of transitional justice. The remaining sections of this paper will then map the concept of 'transitional environmental justice' as well as these international and European frameworks onto the domestic political and legal institutions in Kosovo to assess their potential for achieving environmental transitional justice.

I. Transitional Environmental Justice as an Alternative Normative Framework for Transitional Justice in Kosovo?

A *tour d' horizon* of 'transitional justice' scholarship by one of its leading exponents did not include 'environmental law' within the wide range of legal disciplines deemed

to be both applicable and already encompassed by this growing field. Bell identifies international and domestic criminal law, international human rights law, and (international) humanitarian law, as having distinct and competing claims for the resolution of 'transitional justice' dilemmas, therefore requiring a prior, 'internal' interdisciplinary debate on the appropriate framework of legal accountability suited to each transitional society in question.[1] While the lack of explicit inclusion of 'environmental' law (and 'environmental' justice) within the range of legal disciplines deemed relevant for the achievement of 'transitional justice' does not necessarily ring its death knell, it does at the very least signal the relatively low priority accorded to this particular goal (environmental justice) and its means (environmental law & human rights) of achievement, as an important component or aspect for the overall prospects of achieving 'justice' within transitional societies.

On the other hand, a seminal contribution on the applicable types of justice within transitional societies formulated along thematic lines, namely, criminal justice, historical justice, reparatory justice, administrative justice and constitutional justice, appears to allow for the inclusion of environmental justice more easily within its scope, as a further type of justice that may effect a 'normative shift' in a transitional society.[2] As Boraine has observed: 'It is when we come to the term "justice" that the issue of meeting the challenges of the future becomes more controversial. There are different

[1] Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field', *International Journal of Transitional Justice* (IJTJ) Vol.3, No.1 (2009) 5-27, at 19.

[2] Ruti G. Teitel, *Transitional Justice*, New York: OUP (2000) 5-8.

types of justice. Justice is often referred to as retributive, restorative or distributive, or even as economic or social transformation.'[3] He further notes that 'societies in transition need other instruments and other models in order to supplement one form of justice. ... In fact, advocating a holistic approach to transitional justice, which attempts to complement retributive justice with restorative justice, is of considerable benefit in the establishment of a just society.'[4] The implication is that a holistic approach would include the pursuit of 'socio-economic' justice as a legitimate aim of transitional justice. It is submitted here that such a holistic approach to transitional justice must necessarily also consider the utility of both the concept and legal tools for achieving 'environmental' justice as an additional means of achieving comprehensive justice within a transitional society.

[3] Alexander Boraine, 'Transitional Justice: A Holistic Interpretation', *Journal of International Affairs*, Vol. 60, No.1 (Fall/Winter, 2006) 17-27, at 18.

[4] *Ibid.*, at 19.

The term 'environmental justice'[5] is itself a relatively recent construct within national and international legal discourse,[6] despite being well-established within social, historical, and political discourse, for nearly a generation. 'Environmental justice' first emerged in the United States of America (USA) during the early 1980s, as a concept that encapsulated the opposition of Black, Hispanic and indigenous communities to the location of hazardous and polluting industries within their neighborhoods. It is generally acknowledged that within the USA, the 'environmental justice' movement took off in 1982 in Warren County, North Carolina, when residents demonstrated (ultimately unsuccessfully) against a new hazardous waste landfill site in their community. Six weeks of marches and non-violent street protests followed, and more than 500 people were arrested - the first arrests in U.S. history over the siting of a landfill. In fact, as Skelton and Miller note, ethnic minority communities had begun to

[5] According to the Environmental Protection Agency of the federal government of the USA, 'Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. EPA has this goal for all communities and persons across this Nation. It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.' Accessible from: http://www.epa.gov/environmentaljustice/

[6] For a collection of ground-breaking papers on environmental law and environmental justice within national and international law, see: Jonas Ebbesson & Phoebe Okowa (eds), *Environmental Justice and Law in Context*, Cambridge: CUP (2009) and Brad Jessup & Kim Rubenstein (eds.), *Environmental Discourses in Public and International Law*, Cambridge: CUP (2012)

organize themselves to oppose environmental threats since the 1960s.[7] The environmental justice movement was thus begun by individual groups, especially from poorer, ethnic minority communities, who protested against the inequity of environmental protection between their communities and richer, more well-established, majority communities. As such, at least within the USA, the environmental justice movement is intrinsically linked and indeed arose from the 1960's Civil Rights Movement. This movement brought together issues of social, economic, and political marginalization of minorities and low-income communities, with public health concerns over pollution hazards in their neighbourhoods and workplaces. It was the product of the intersection between the civil rights and environmental movements. In particular, Title VI of the 1964 (US federal) Civil Rights Act, prohibiting the use of federal funds to discriminate based on race, skin colour and national origin became an important legal basis for environmental justice litigation.[8]

The environmental justice movement has since grown over the past few decades in the USA and elsewhere around the world as a result of increased awareness of the disproportionately high impacts of environmental pollution on economically and politically disadvantaged communities. 'Environmental justice' is therefore part of the

[7] See: Renee Skelton and Vernice Miller, 'The Environmental Justice Movement'. (Last revised: March 17, 2016) Accessed from National Resources Defence Council website at: http://www.nrdc.org/ej/history/hej.asp

[8] *Ibid.* Pioneering academic studies on these issues were conducted by Bullard, see Robert Bullard (ed.), *Confronting Environmental Racism: Voices from the Grassroots*, Southend Press, Boston Mass (1990)

broader 'environmental movement(s)',[9] which is in itself now considered to be very much part of wider social and/or political movements.[10] 'Environmental justice' has thus become the subject of academic scholarship within these social and political contexts,[11] but has only relatively recently been subject to similar levels of attention from an academic legal perspective.[12] The present contribution examines the implications of the inclusion of 'environmental justice' within the legal conception of transitional justice. In this regard, 'environmental justice' raises issues of, *inter alia*, conceptualization, interpretation and application or implementation within different levels of international, regional and national or domestic jurisdiction. Certainly,

[9] See, for example, Christopher Rootes (ed), *Environmental Movements: Local, National and Global*, London: Frank Cass (1999)

[10] For an attempt to assess the challenge that the environmental justice movement presents to the wider environmental movement using a 'critical' pluralist perspective, see David Schlosberg, *Environmental Justice and the New Pluralism: The Challenge of Difference for Environmentalism*, Oxford: OUP (1999)

[11] Cutter has reviewed the early literature on environmental justice issues from these perspectives, see: Susan L. Cutter, 'Race, class and environmental justice', *Progress in Human Geography*, Vol.19, No.1 (1995) 111-122.

[12] In the United States, Foster's work has been instrumental in bringing an overtly legal perspective to the social and political analyses of environmental justice. See, for example, Sheila Foster, 'Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformational Politics of the Environmental Justice Movement', 86 *California Law Review* 671 (1998); Luke Cole and Sheila Foster (eds.), *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement*, New York University Press (2001); Foster, Environmental Justice in an Era of Devolved Collaboration', 26 *Harvard Environmental Law Review*, 459 (2002) and Michael B. Gerrard and Sheila R. Foster (eds.) *The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risk*, 2nd ed., American Bar Association (2008).

environmental 'justice' appears to have a wider scope for conceptualization and application than environmental 'law' itself, if only because of the possibility of achieving the goals of environmental justice through social and/or political means, apart from strictly legal means. As Cha notes, the term 'environmental justice' goes beyond merely that of access to courts and encompasses issues of social inequity in the context of exposure to harmful environmental effects.[13] In general terms, the notion of 'environmental justice' utilized in this analysis encompasses elements of access to information, participation and access to administrative and/or judicial means and remedies that allow members of public to ensure the effective implementation of relevant environmental principles, laws and standards.

What are the possible conceptual issues and practical problems that arise in relation to arguments in favour of promoting environmental justice in transitional societies? A pessimistic outlook on the prospects for environmental justice within the context of a transitional society such as Kosovo would be bound to regard such a notion as problematic. Viewed in this way, 'environmental' justice is yet another untenable proposition – is there any place within the already congested transitional justice agenda for resolving ethnic and social conflicts to consider the addition of 'environmental' justice. Is this a goal too far for 'transitional justice'? On the other hand, an optimistic perspective on the inclusion of environmental concerns within endeavours to achieve

[13] J. Mijin Cha, 'Access to Environmental Justice in the United States: Embracing Environmental and Social Concerns to Achieve Environmental Justice', in Andrew Harding (ed.) *Access to Environmental Justice: A Comparative Study*, Leiden: Martinus Nijhoff (2007) 317-354, at 319.

overall transitional justice may perceive environmental justice as an opportunity, rather than simply a further problem. In particular, it may be argued that a focus on 'environmental' justice can deflect, subsume and eventually even transcend entrenched social conflicts of inter-ethnic, religious and/or racial origin. The concept of 'transitional environmental justice' is therefore proposed and examined here with a view to its application in Kosovo. Can such a concept be of any assistance in resolving the apparently inextricable ethnic divisions that persist between different communities in Kosovo? The hypothesis is that the achievement of environmental justice goals, especially through the provision and application of environmentally-oriented procedural rights, can act to defuse and possibly even transcend continuing ethnic and social divisions within Kosovo. It is submitted that 'transitional environmental justice' is both conceptually viable and potentially successfully applicable. Moreover, it is argued that the current international and European institutional governance framework for Kosovo provides for the inclusion, integration and implementation of several significant environmental principles within the fledgling Kosovo legal system.

This paper will explore the notion that the legal provision and enforcement of procedural environmental rights are a (relatively) value-free means of tackling local ethnic/social differences between communities. To be sure, this will not result in all, or even most of, the accepted goals or outcomes of transitional justice, in so far as these goals are not irreconcilable with each other in any case.[14] However, if reconciliation

[14] Bronwyn Anne Leebaw, 'The Irreconcilable Goals of Transitional Justice', *Human Rights Quarterly*, Vol.30, No.1 (February, 2008) 95-118.

between previously violently antagonistic communities, who even today still perceive each other with deep suspicion, is among the accepted goals of transitional justice,[15] then the recasting of otherwise intransigent social disputes as essentially environmental in nature can be put forward as a viable alternative conflict resolution concept, along with its own (environmental law) tools for the achievement of transitional justice in situations like Kosovo. The goal of such efforts would be the prioritization of environmental justice, rather than its marginalization, as so often occurs in similar situations around the world. Through their ostensibly neutral application, high (and objectively applied) substantive environmental standards, coupled with the provision (and effective enforcement) of procedural environmental rights have the potential to overcome tensions between individual (minority) communities and public authorities dominated by the majority community in Kosovo.[16] The historic enmity between the two main ethnic communities, namely the Kosovo/Kosova Albanians and Serbs, continues to this very day, creating a menacing backdrop to any local dispute between them. Indeed, Mertus felt constrained to assert that: 'Kosova society is so firmly divided

[15] For example, the UN Secretary-General's Report on the 'Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', S/2004/616 (23 August, 2004) defines 'transitional justice' on p.4, as 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and *achieve reconciliation*.' (Section III.8, emphasis added)

[16] For an excellent exegesis of the opposing Serbian (sovereignty) and Kosovo Albanian (self-determination leading to independence) bases for their claims over this territory, see Vjeran Pavlakovic and Sabrina Petra Ramet, 'Albanian and Serb rivalry in Kosovo: Realist and universalist perspectives on sovereignty', in Tozun Bahcheli, Barry Bartmann and Henry Srebrnik (eds) *De Facto States: The Quest For Sovereignty*, London: Routledge (2004) 74-101.

between Albanians and Serbs that one cannot address religious freedom, or any other social issue, without examining two sets of separate laws and policies: the official law and institutions of the state of Kosova and the law and institution of the pockets of Kosova-ethnic Serbs who refuse to treat Kosova as a state.'[17]

This proposal to examine the means for transitional environmental justice within Kosovo should also be considered within the context of received wisdom that the most effective community reconciliation programmes promote reconciliation only indirectly, through shared activity conducted within inter-ethnic environments such as the construction of dwellings by members of one community for individual members of the other community.[18] Boraine however sounds a cautionary note on the pursuit of reconciliation for the wrong ends: 'When reconciliation calls for mere forgetting or for concealing, then it is spurious.'[19] He concludes that: 'If reconciliation is to succeed, it must have an impact on the life chances of ordinary people. If genuine coexistence is to take place, then the building of trust is indispensable. If trust is absent, citizens will not be prepared to invest their energies in the consolidation of democracy. Ultimately,

[17] Julie Mertus, Chapter 12: 'Human rights and religion in the Balkans, in Peter Cumper and Tom Lewis (eds.) *Religion, Rights, and Secular Society: European Perspectives*, Edward Elgar (2012) 233-250, at 241.

[18] Erin Daly and Jeremy Sarkin, *Reconciliation in Divided Societies: Finding Common Ground*, Philadelphia: Pennsylvania Press (2007) at 89, citing a UNDP Kosovo Conflict Prevention and Reconciliation Initiative, accessible at:

http://www.kosovo.undp.org/Projects/CPR/cpr.htm

[19] Boraine (2006) *op. cit.*, at 22.

reconciliation, both as a process and a means of seeking an often elusive peace, must be understood through the lens of transitional justice.'[20] Thus, we should be wary of recasting deeper, more intrinsic social or ethnic conflicts as environmental issues simply to promote a superficial form of reconciliation that does not result in both the effective and final resolution that transitional justice ultimately requires.

The relevant environmental principles and procedural environmental rights derived from international and European environmental law, as well as the jurisprudence of the European Court of Human Rights (ECtHR), will be traced to their possible application within the re-constructed Kosovo legal system. However, institutional and individual limitations of the Kosovo judicial and law enforcement authorities can still prevent these procedural environmental rights from being exercised and enforced against public authorities or private actors. As a European Union Rule of Law Mission in Kosovo (EULEX) report observed: 'The performance of the Kosovo justice system is still showing signs of weakness. Interference at different levels and in a variety of forms was observed. ... The massive number of pending issues, particularly of a civil nature, indicates that local judges and prosecutors were unable to progress in tackling this urgent problem. ... The Kosovo criminal justice system capacity to move forward in the reforms agenda remained very fragile and inconsistent. The lack of progress in establishing the basic mechanisms of co-operation and co-ordination between prosecutors and Kosovo Police, as envisaged by the law, remain a factor of

[20] *Ibid.*, at 23.

concern. Furthermore, prosecution efforts are undermined by poor management and lack of support staff.'[21]

II. International and EU Efforts toward the Socio-Economic Reconstruction of Kosovo: Implications for Transitional Environmental Justice

There is hardly another entity around the world today that exhibits so many of the classical features of both a transitional society and a fledgling state as that of present day Kosovo.[22] Yet Kosovo's international legal status still raises vexed questions that undermine efforts at final answers.[23] This has not deterred certain scholars from writing about Kosovo almost as if it is already an independent state.[24] Nor is the 2010 ICJ Advisory Opinion likely to yield a definitive resolution of the international legal issues

[21] EU Rule of Law Mission in Kosovo (EULEX) Programme Report 2010, at 25. Accessible from EULEX website, at: http://www.eulex-kosovo.eu/en/

[22] According to the official, Kosovo government, Ministry of Foreign Affairs website, 111 countries from around the world now recognize an independent Republic of Kosova. Accessible at: http://www.mfa-ks.net/?page=2,224 (last visited on 16 October, 2016)

[23] For a comprehensive study of the international community's response to Kosovo's unilateral bid for independence and Statehood, see Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence*, Oxford: OUP (2009)

[24] See Henry Perritt, Jr., *The Road to Independence for Kosovo: A Chronicle of the Ahtisaari Plan*, Cambridge: Cambridge University Press (2010). The 'Ahtisaari Plan' is the shorthand term used to describe the Comprehensive Proposal for the Kosovo Status Settlement, contained in an Addendum to a Letter dated 26 March 2007 from the UN Secretary-General addressed to the President of the UN Security Council, S/2007/168/Add.1 Accessible at:
http://www.unosek.org/unosek/en/statusproposal.html

arising from the Kosovo situation.[25] For example, on the question of whether a unilateral declaration of independence falls within the ambit of international law to resolve, Vidmar suggests that this depends on the identity of the authors of the declaration. He also argues that the legality (or illegality) of such a declaration is not determined solely by its unilateral character, concluding that international law neither endorses nor prohibits unilateral declarations of independence. He cautions that this is not to say that international law does not regulate unilateral declarations of independence at all, merely that such declarations of independence are not always issued in an international legal vacuum.[26] Important questions therefore remain to be answered as to what the possible resolution of these legal issues on Kosovo informs us about the development of international law on these matters, generally.[27] The analysis in this paper proceeds with a keen awareness of the still unresolved nature of many of the continuing international legal and practical issues in Kosovo, in particular those concerning the governance of the northern, Serbian-dominated districts of this territory.

[25] ICJ Advisory Opinion on the Question of the 'Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo', 22 July, 2010. The Court held by ten votes to four that Kosovo's declaration of independence adopted on 17 February 2008 did not violate international law. Accessible at:

http://www.icj-cij.org/docket/index.php

[26] Jure Vidmar, 'Conceptualizing Declarations of Independence in International Law' 32(1) *Oxford Journal of Legal Studies* (2012) 153–177.

[27] Bernhard Knoll, 'Kosovo's Endgame and Its Wider Implications in Public International Law', *Finnish Yearbook of International Law*, Vol. XVIII (18) 2007 (2009) 155-194.

On the other hand, for the different ethnic communities within Kosovo today, the practical issue of how to live together in an atmosphere of continuing uncertainty and distrust assumes paramount importance. Thus, we will focus on current environmental justice issues in Kosovo and how these might prospectively be addressed to assist in the achievement of overall transitional justice, irrespective of the uncertain international legal status of Kosovo itself. Within this context, the recent 15-point 'First Agreement of Principles Governing the Normalization of Relations', brokered by the EU,[28] and initialized by the Prime Ministers of both Serbia and Kosovo on 19 April, 2013 arguably represents a progressive development towards the stabilization of this transitional society. This Agreement provided, *inter alia*, for the organisation of local elections in Kosovo on 3 November 2013,[29] the establishment of an association of

[28] This Agreement represents a significant personal diplomatic achievement for the EU High Representative for External Relations, Baroness Catherine Ashton, under whose auspices the Agreement was negotiated over two years of talks, spanning ten meetings. See: Toby Vogel, 'Text of historic agreement between Serbia and Kosovo', Friday 19 April, 2013, accessible from European Voice website at:

http://www.europeanvoice.com/page/3609.aspx?&blogitemid=1723

[29] Article 12 of the Agreement states: 'Municipal elections shall be organized in the northern municipalities in 2013 with the facilitation of the OSCE in accordance with Kosovo law and international standards.' These elections, which were the first that Serbs in northern Kosovo have participated in since the 2008 Republic of Kosovo declaration of independence, took place over the course of November and December 2013, with the final one, a (re-)election for the Mayor's office of North Mitrovica, taking place on 23 February, 2014. Although a number of disruptive incidents occurred during these elections, they have been officially reported as generally fairly organised and representative. See, for example, European Network of Election Monitoring Organizations (ENEMO) International Election Observation

Kosovo-Serb majority municipalities, and the progressive integration of justice and police structures in northern Kosovo into Kosovo's legal and administrative framework. This Agreement was swiftly followed on 22 May, 2013 by a comprehensive Implementation Plan,[30] and then in October, 2013 by a European Commission announcement allocating additional funding to Kosovo under the EU's Instrument for Pre-Accession (IPA) to support the implementation of the 'First' Agreement.[31] These additional funds will address the needs of Serb majority municipalities throughout Kosovo, with a specific emphasis on those in northern Kosovo. Funding will focus on municipal infrastructure, public administration, rural and regional development, employment and *environmental protection*. (emphasis added) Several key points of the 2013 Agreement pertaining to the longer term viability of domestic Kosovo institutions will be addressed in appropriate sections of this paper. Perhaps predictably, however, the pace of change imposed by the successive First Agreement, Implementation Plan and additional EU funding decisions have been viewed as preemptive by certain sections of the Serbian communities within Kosovo, especially where they are still the majority community in the northern part of this jurisdiction. Thus, successive reports

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Mission, Kosovo Local Elections 2013, 'Preliminary Statement on repeated 1st round of Elections at three poling centers in North Mitrovica', accessible at:

http://www.enemo.eu/press/Kosovo2013/RERUN_ENG.pdf

[30] The text of the Implementation Plan is accessible from the EU Observer website, as follows: http://euobserver.com/media/src/0807580ad8281aefa2a89e38c49689f9.pdf

[31] See: 'Additional EU funding in support of the normalisation of relations between Kosovo and Serbia', European Commission Press Release, Brussels, IP/13/1011, 31 October 2013. Accessible at: http://europa.eu/rapid/press-release_IP-13-1011_en.htm

have recently noted both a slowdown and the piecemeal implementation of the scheme laid down by the First Agreement.[32]

Much also depends on continuing institutional efforts to address and resolve generic rule of law issues within the current system of political governance in Kosovo.[33] In particular, this will require the re-establishment of a robust legal system for dispensing justice, including environmental justice. Any discussion of the institutional framework for the provision of financial and technical assistance in the post-conflict, social and economic reconstruction of Kosovo must take into account the efforts of international bodies (such as the UN and World Bank) and regional organizations (such as the European Union) to assist Kosovo government institutions in this regard. Within

[32] See *The Implementation of Agreements of Kosovo-Serbia Political Dialogue*, Policy Paper, No. 4/13 (July, 2013) Kosovo Institute for Political Research and Development (KIPRED), prepared by: Ilir Deda and Ariana Qosaj-Mustafa, 24pp. Accessible at:
http://www.kipred.org/advCms/documents/22356_The_Implementation_of_Agreements_of_Political_Dialogue.pdf
and *State of Play in Implementation of the Brussels Agreements*, Report submitted to the EU/European External Action Service, by the Government of the Republic of Kosova, Prishtina, 16 January 2014, 31pp. Accessible at:
http://www.peacefare.net/wp-content/uploads/2014/02/Kosovo-Report-on-implementation-state-of-play-of-the-Brussels-Agreements-160114-signed-2.pdf

[33] A 2010 World Bank report identified weaknesses in the rule of law, especially in the form of endemic corruption, as a major constraint to the contribution of the private sector to economic growth in Kosovo. World Bank, *Kosovo: Unlocking Growth Potential: Strategies, Policies, Actions,* A Country Economic Memorandum, Report No.53185-XK (29 April, 2010) para.2.11, at 20.

this context, the following questions are pertinent from the perspective of the promotion of environmental justice within this transitional society/economy: Are socio-economic interests being prioritized within Kosovo to the detriment of environmental protection, as is usually the case within transitional societies and developing countries in similar situations? Is the potential for 'sustainable development',[34] including the integration and implementation of well-known and accepted principles for environmental protection, being lost or subsumed in the face of more pressing targets for economic growth?

The dominant narrative that describes jurisdictions in similar circumstances is usually one involving a low priority being accorded to environmental protection. Thus, socio-economic reconstruction/development is apparently unable to take place without some form of concomitant environmental degradation. As Mushkat has observed in the context of the transition to a market economy in the post-Mao era in China: The 'relentless quest for economic maximization has not been without adverse consequences. ... The most serious repercussions of unbalanced expansion, however, have been witnessed in the ecological domain.'[35] Even if environmental damage need not always occur, private economic actor involvement in socio-economic

[34] 'Sustainable development' was authoritatively defined as: 'development that satisfies the needs of present generations without compromising the ability of future generations to meet their own needs', by the World Commission on Environment and Development (WCED) led by Gro Harlem Brundtland, the former Norwegian Prime Minister. WCED, *Our Common Future*, Oxford: OUP (1987) at 43.

[35] Roda Mushkat, 'Implementing International Environmental Law in Transitional Settings: The Chinese Experience', *Southern California Interdisciplinary Law Journal*, Vol.18, No.1 (2008) 45-94, at 46.

reconstruction efforts is often perceived as being either a corrupting, or otherwise exacerbating, influence on the tendency of transitional societies to de-prioritize environmental protection when re-constructing their economies.[36] Miller, for example, notes that a current feature of transnational (economic) production and exchange within 'developing countries', which he defines in wide enough terms to include Kosovo, gives 'substance to a charge of exploitation.'[37]

III. The International and EU Governance Frameworks for Kosovo

Kosovo today is governed by a complex and arguably confusing amalgam of global and regional institutions including the UN,[38] and the EU,[39] along with NATO in the form

[36] Sandra O. Archibald, Luana E. Banu and Zbigniew Bochniarz, 'Market Liberalization and Sustainability in Transition: Turning Points and Trends in Central and Eastern Europe', in JoAnn Carmin and Stacy D. VanDeveer (eds) *EU Enlargement and the Environment: Institutional Change and Environmental Policy in Central and Eastern Europe*, London: Routledge (2005) 266-289, at 284.

[37] Richard W. Miller, *Globalizing Justice: The Ethics of Poverty and Power*, Oxford: OUP (2010) at 3.

[38] UN Security Council (UNSC) Resolution 1244/99, *inter alia*, establishing the UN Mission in Kosovo (UNMIK) is still the governing international law over Kosovo. Accessible at: http://www.unmikonline.org/misc/N9917289.pdf

[39] The EU presence in Kosovo has been organised according to a three-way division of labour, encompassing a political commitment (the EU Special Representative in Kosovo) accessible at: http://www.eusrinkosovo.eu/; the operational commitment (the EULEX Kosovo) accessible at: http://www.eulex-kosovo.eu/; and the reform-driving commitment (the European Commission Liaison Office in Kosovo) accessible at:
http://www.delprn.ec.europa.eu/

of the KFOR,[40] and the World Bank,[41] respectively, providing military and financial support. The United Nations Security Council (UNSC) Resolution 1244 of 10 June 1999 provided for an end to the hostilities in Kosovo, supervision thereupon by an international security force (KFOR), and the creation of an interim administration known as the UN Mission in Kosovo (UNMIK). UNMIK was set up as a temporary form of governance during negotiations for the final status of Kosovo. At the time, the Security Council was internally divided. Russia supported Serbian opposition to the attempted secession of Kosovo from Serbia by the Kosovo-Albanians. Serbia saw Kosovo as integral to its territory. As Vanderfeesten observes: 'Serbian municipalities in Kosovo, especially those north of the river Ibar, recognize (UNSC) resolution 1244 as the sole legitimate document explaining the rules of the game. As such they do recognize UNMIK but do not recognize the ICO (International Civilian Office) and EULEX. These municipalities run parallel institutions that are congruent to Belgrade policy and law.'[42] Certain Western countries, notably the USA and the UK, were more

[40] For information on the Kosovo Force (KFOR) role and activities within Kosovo, see the KFOR/NATO website at: http://www.nato.int/kfor/

[41] Kosovo was admitted into World Bank (formally known as the International Bank of Reconstruction and Development, IBRD) on 29 June, 2009. In addition to becoming a member of IBRD, Kosovo joined the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). Kosovo's ICSID membership became effective on July 29, 2009. Press Release No: 2009/448/ECA, accessible at:

http://go.worldbank.org/97H44AA7P0

[42] Frans Vanderfeesten, *Kosovo and the Question of Transitional Justice*, Research Paper (2009) at 6. Accessible at:

sympathetic to the Kosovo-Albanian independence movement. UNSC Resolution 1244 was therefore a compromise between these Security Council members. The Resolution gave UNMIK the mandate to exercise civilian administration over Kosovo but without a clear end date for the Mission.

UNMIK *de jure* operates as the interim civil administration in Kosovo. It established a working approach of four pillars to carry out its overall civil administration tasks. These are: 1. Police and justice; 2. Civil administration; 3. Democratization and institution building; 4. Reconstruction and economic development. Initially, as de Wet notes, 'UNMIK itself was primarily responsible for restoring the health, educational, and other public services; exercising police functions in the short term and developing the Kosovar Police Service in the long term; and rebuilding the judicial and correctional system (Pillar I). The Organization for Security and Co-operation in Europe (OSCE) undertook the tasks of promoting democratization and human rights, as well as capacity building in these areas (Pillar II). The UN High Commission for Refugees (UNHCR) assumed responsibility for the coordination of humanitarian assistance to the many displaced Kosovars (Pillar III). Finally, the European Union (EU) took charge of economic reconstruction, including the coordination of international financial assistance and the reorganization of trade, currency, and banking matters (Pillar IV).'[43] Over time, however, UNMIK delegated

http://www.contemporaryrelations.eu/wp-content/uploads/2009/05/vanderfeesten-kosovo-the-question-of-transitional-justice.pdf

[43] Erika de Wet, 'The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of EULEX', *American Journal of International Law* (*AJIL)*, Vol.103, No.1 (Jan., 2009),

more aspects of its overarching civil administrative authority to the EU and other international institutions. For example, the International Steering Group (ISG) established the International Civilian Representative for Kosovo (ICR), supported by the International Civilian Office (ICO). The ICR was the 'final authority in Kosovo regarding interpretation' of the 2007 Ahtisaari Plan and had the 'ability to annul decisions or laws adopted by Kosovo authorities and sanction and remove public officials whose actions he/she determined to be inconsistent' with the Plan.[44] As an indication of the growing EU role in the international civil administration of Kosovo, it is notable that the post-holder of the International Civilian Representative (ICR) is in fact the European Union Special Representative (EUSR) for Kosovo (appointed by the Council of the European Union), who is re-appointed by the ISG as the ICR, under Article 12(1) of the Ahtisaari Plan. The International Steering Group had its final meeting on 10 September 2012.[45]

The EU Rule of Law Mission in Kosovo (EULEX) is now responsible for most of the policing and judicial tasks under pillar one,[46] while the UNHCR and the OSCE

83-96, at 84, citing Michael J. Matheson, United Nations Governance of Postconflict Societies, 95 *AJIL* 76-85, (2001) at 79-80.

[44] Article 12(3) and para.11 of Annex to the Ahtisaari Plan (2007) noted above, respectively.

[45] See 'Ending of supervised independence 10 September 2012', International Civilian Office. Accessible from http://www.ico-kos.org.

[46] The EULEX mandate was established by the Council (of the EU) Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo. See Official Journal of the EU, L 42/92, 16 February, 2008. Accessible at:

continue to lead on pillar two and three activities, and the European Commission Liaison Office now deals with pillar four issues. According to de Wet, '(t)he first explicit indication of an attempt to transfer power from UNMIK to EULEX appeared in the report of June 12, 2008, in which the secretary-general declared his intention to enhance the operational role of the European Union pertaining to the rule of law under the overall authority of the United Nations.'[47] However, the EULEX role in this context has been disputed by Russia at the UN Security Council, and its authorization under international law for these tasks has been questioned by commentators. For example, de Wet initially observes that paragraph 10 of UNSC Resolution 1244 vests the UN Secretary-General with the power to establish a civil administration in Kosovo, as well as authorizing him to delegate certain administrative functions in this regard to other international organizations, such as the EU. However, de Wet concludes that '(s)crutiny of the EULEX mandate reveals that it was not authorized by the Security Council, even though paragraph 1 of the preamble to the EU Council's Joint Action creating EULEX expressly refers to paragraph 10 of resolution 1244.'[48]

As significant and influential as these international institutions are, the fact is that the domestic political bodies within Kosovo have now taken over much of the day-to-day government. As de Wet notes, '…since 2001 and in particular since 2004, UNMIK has systematically transferred powers to local institutions, which has led to a

http://www.eulex-kosovo.eu/en/info/docs/JointActionEULEX_EN.pdf

[47] de Wet, *AJIL* (2009) above, at 88, referring to the Report of the Secretary-General on UNMIK, UN Doc. S/2008/354 (June 12, 2008) para.16 & Annex I.

[48] de Wet, *AJIL* (2009) above, at 88.

scaling down of its international personnel.'[49] Despite the lack of international consensus (noted above) on their legitimacy,[50] and the uncertain geographical reach of their jurisdictional authority, especially north of the Ibar river, these domestic Kosovo political institutions arguably fulfil a fundamental aspect of the UNMIK mandate as envisaged in UNSC Resolution 1244/99, namely, 'the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo.'[51] The adoption of UNMIK regulation 2001/9 of 15 May 2001 on a Constitutional Framework for Provisional Self-Government, defined the responsibilities relating to the administration of Kosovo between the Special Representative of the Secretary-General and the Provisional Institutions of Self-Government of Kosovo. This Constitutional Framework began the process of transferring powers to Kosovo's newly created institutions of self-government. Following the 2008 Declaration of Independence, work commenced on a constitution, which was adopted by the Assembly on 9 April 2008, and came into force on 15 June 2008.[52]

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[49] de Wet, *AJIL* (2009) above, at 84.

[50] Commentators have also been divided as to the international legitimacy of these domestic political institutions in so far as they have been implicitly or explicitly endorsed by UNMIK in relation to the extent of governing authority vested in UNMIK by UNSC Resolution 1244/99. See, for example, the rejoinder by Kirgis to Matheson *AJIL* (2001) above, in Frederic L. Kirgis, 'Security Council Governance of Postconflict Societies: A Plea for Good Faith and Informed Decision Making', *AJIL*, Vol. 95, No. 3 (July, 2001) 579-582.

[51] UNSC Res 1244/99, at para.11(a), cited in Matheson (2001) at 81.

[52] The text of the 2008 Constitution of the Republic of Kosovo is accessible from the website Constitutional Court of Kosovo, at:

http://www.gjk-ks.org/repository/docs/Kushtetuta_RK_ang.pdf

The main domestic Kosovo political institutions comprise, *inter alia*, of a representative Assembly,[53] a Presidency and an executive central Government, composed of a Prime Minister and relevant Ministers within a Cabinet.[54] Equally significant are the local (regionally-based) municipal authorities elected to administer individual regions within the UN-designated Kosovo jurisdiction. Summarizing these national and local institutional developments, Vanderfeesten notes that 'Kosovo is a fascinating case of transitional justice, where multiple structures exist and overlap. It is difficult to establish how the transition is dealing with continuity.'[55]

The 2013 'First' Agreement has established a further tier of local government aimed at securing the representation of Serbian communities alongside the now majority Albanian communities within Kosovo, in the form of 'an Association/Community of Serb majority municipalities in Kosovo. Membership will be open to any other municipality provided the members are in agreement. The Community/Association will be created by statute. Its dissolution shall only take place by a decision of the participating municipalities. Legal guarantees will be provided by applicable law and constitutional law (including the 2/3 majority rule). The structures of the Association/Community will be established on the same basis as the existing

[53] Information about the (Republic of) Kosovo legislative authorities can be accessed at: http://www.assembly-kosova.org/

[54] Information on the domestic Kosovo government institutions can be accessed at: http://www.kryeministri-ks.net/

[55] Vanderfeesten (2009) *op. cit.*, at 6.

statute of the Association of Kosovo municipalities e.g. President, vice President, Assembly, Council. In accordance with the competences given by the European Charter of Local Self Government and Kosovo law the participating municipalities shall be entitled to cooperate in exercising their powers through the Community/Association collectively. The Association/Community will have full overview of the areas of economic development, education, health, urban and rural planning. The Association/Community will exercise other additional competences as may be delegated by the central authorities. The Community/Association shall have a representative role to the central authorities and will have a seat in the communities' consultative council for this purpose. In the pursuit of this role a monitoring function is envisaged.'[56] The recent report submitted to the EU by the Kosovo government on the implementation of the Brussels Agreements states that good progress has been made, *inter alia*, through the successful completion of the local elections in Kosovo, as well as the official inauguration of all new municipal authorities, in particular of the northern municipalities in accordance with the Kosovo law and Brussels Agreement.[57]

All of these recent domestic *political* institutional developments should now meet at least some of the shortcomings previously identified by international bodies, such as the UN Development Programme (UNDP), which in its Rule of Law Programme for Kosovo 2007-10, required continuous efforts to assist the current

[56] Articles 1-6 of the 2013 Agreement, *op. cit.*

[57] See: Kosovo government report to the EU on the 'State of Play in Implementation of the Brussels Agreements' (2014), *op. cit.* at 4.

Kosovo government institutions, *inter alia*, through provision of policy advice and linking the concept of 'transitional justice' to conflict prevention, socio-economic development, and other justice-related issues.[58] Within this context, an equally important requirement for the construction of a successful framework for achieving justice within a transitional society is institutional *economic* reform, as a further underpinning of democracy. As Barnes notes, '(e)specially in postconflict transitions, successful economic growth anchors the chances for democratic government. … Anyone seeking to build a stable democratic regime, especially after civil war, cannot ignore the issues of both economic growth and social justice as probable necessary conditions for successful democratization.'[59] Moreover, as Boraine observes, 'institutional structures must not impede the commitment to consolidating democracy and establishing a culture of human rights. It follows that approaches to societies in transition will be multifaceted and will incorporate the need for consultation to realize the goal of a just society. ... Indeed, institutional reform is needed in all States that have failed and are in transition. In deeply divided societies where mistrust and fear still reign, there must be bridge-building and a commitment not only to criminal justice, but also to economic justice.'[60] These opinions make the link between *socio-economic* institutional reform and the promotion of transitional justice in societies emerging from post-conflict situations like Kosovo, through the medium of economic justice. What is

[58] See UNDP, Rule of Law Programme for Kosovo 2007-2010, Project Document, at 6. Accessible at: http://europeandcis.undp.org/environment/kosovo/show/391E5241-F203-1EE9-B8551E1764A1CE3D

[59] Samuel H. Barnes, 'The Contribution of Democracy to Rebuilding Postconflict Societies', *AJIL*, Vol.95 (2001) 76, at 81.

[60] Boraine (2006) *op. cit.*, at 23-24.

notable here is the centrality of the notion of justice, whether political, social, economic, or as argued here, *environmental* justice within any post-conflict democratization project. The arguments put forward below aim to establish 'environmental justice' as a further 'necessary condition' for democracy in Barnes' terms, alongside the other necessary conditions of political, economic and social justice.

Drawing together both the recent domestic *political* institutional developments and institutional *economic* reform to complement these developments, we can observe at least two significant *international* institutional developments that form the backdrop to the overall socio-economic reconstruction of Kosovo. In summary, these are as follows: (1) Kosovo's World Bank Group membership and its implications for both the public and private financing of socioeconomic reconstruction/development projects; and (2) the growing EU presence in most civil administration matters within Kosovo. The overall goal prioritization and policy prescriptions of the international and European institutions operating within Kosovo tend to reflect the liberal, market economy-based approaches of the member states of these institutions. This in turn represents the 'internationally managed state-building' approach of the Western peace thesis,[61] which holds that liberal democracies are unlikely to be involved in violent conflict. On the basis of this assumption, international state-building projects aim to 'build' liberal democracies in places defined as security risks,[62] such as Kosovo. As

[61] R. Knudsen, *Privatization in Kosovo: The International Project 1999–2008*, NUPI report, Norwegian Institute of International Affairs, Oslo, 2010, p.9.

[62] For a summary of the liberal (democratic) peace thesis, see M. Doyle, 'Three pillars of the liberal peace', 99 *American Political Science Review* 463-466 (2005), responding to a critical assessment of this

Sorensen observes in relation to these Western-centric liberal democratic efforts within the former communist/socialist transitional economies, '[t]he policy prescriptions are liberalization, privatization and structural adjustment.'[63]

These post-conflict social and economic reconstruction efforts in Kosovo have consistently aimed to create the legal conditions and social climate for a market economy. The agents in this process are typically envisaged to be small and medium-scale enterprises, but larger infrastructure and capital-intensive projects are also being undertaken.[64] Evidence on the ground suggests that both economic, and to a certain extent social, reconstruction efforts are underway in Kosovo.[65] While Kosovo's economic transition is largely managed by the World Bank and its sister agencies, the reconstruction of Kosovo's political, social, and legal, infrastructures are being coordinated by the EU. Both these international and EU institutional frameworks for

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thesis by S. Rosato, 'The Flawed Logic of Democratic Peace Theory', 97 *American Political Science Review* 585– 602 (2003).

[63] Jens Sorensen, *State Collapse and Reconstruction in the Periphery: Political Economy, Ethnicity and Development in Yugoslavia, Serbia and Kosovo*, Berghahn, New York (2009) at 54.

[64] Sorensen (2009) above, at 11.

[65] According to an early World Bank assessment, there has been a recovery of economic activity and positive growth since 2000. However, this initial economic growth performance was driven by a post-conflict boom financed by official aid flows and prognosticated as unlikely to be sustainable. See World Bank, *Kosovo: Economic Memorandum*, Report No.28023-KOS, Poverty Reduction and Economic Management Unit, Europe and Central Asia Region, World Bank, 17 May 2004. Accessible at: http://siteresources.worldbank.org/INTKOSOVO/Data%20and%20Reference/20243120/KEM-5-17-2004%20with%20amendments.pdf.

financial and technical assistance will be examined with a view to assessing their roles in providing for transitional environmental justice within Kosovo.

A. Kosovo and Public International Finance Institutions: Alternative Accountability Mechanisms

Despite its still uncertain international legal status, Kosovo has been able to join the World Bank. This is an important legitimacy signifier of Kosovo's arrival within the international community and is regarded as such by its leadership.[66] The value of World Bank membership as a catalyst for economic re-construction efforts within Kosovo, whether in the public or private sectors of the economy, cannot be underestimated. So too the wider social implications of this membership for either the reconciliation or re-trenchment of the different communities within Kosovo. The role of the World Bank in post-conflict, transitional societies like Kosovo is envisaged by the premise accepted by the UN that '(e)conomy recovery is essential to fulfilling the ultimate UN goal of preventing and resolving conflicts'[67], thus requiring, according to the UN Millennium Declaration, 'greater policy coherence and better co-operation between the United Nations, its agencies, the Bretton Woods Institutions and the World Trade

[66] See Appendix: Interview with Dr Fatmir Sejdiu, President of the Republic of Kosovo, in Aidan Hehir (ed) *Kosovo, Intervention and Statebuilding: The international community and the transition to independence*, London: Routledge (2010) at 197-198: As President Sejdiu asserts '(t)he fact that many of the countries who have not recognized Kosovo voted in favour of Kosovo's membership of the IMF and World Bank is a strong, positive signal in the right direction.'

[67] Allan Gerson, 'Peace Building: The Private Sector's Role', *AJIL* Vol.95, No.1 (January, 2001) 102-119, at 103.

Organization, as well as other multilateral bodies, with a view to achieving a fully coordinated approach to the peace and development.'[68]

Apart from the UN and its agencies, the World Bank is arguably the most significant multilateral institution for Kosovo's socio-economic regeneration. It provides assistance, *inter alia*, through investment loans, technical assistance, institutional development loans and credits, and partnerships. The International Finance Corporation (IFC) – the private sector arm of the World Bank Group - assists business corporations operating within risky settings. The long-term aim of the World Bank and its sister organizations such as the European Bank of Reconstruction and Development (EBRD) is to stimulate private individual or institutional foreign investment into Kosovo, whether from non-Kosovar sources, or the K-Albanian diaspora. While leaders of post-conflict states have strong incentives for trying to attract international investments, multinational corporations (MNCs) may view these states as high-risk since the reoccurrence of violence in the aftermath of civil conflict is common. Consequently, leaders of post-conflict states desperate to receive foreign direct investments to help ignite their stalled economies must convince MNCs that their state is a stable and secure place to invest in. Appel and Loyle argue that post-conflict justice (PCJ) institutions can help post-conflict states attract such international investment. The domestic and reputational costs associated with implementing PCJ allow states to send a credible signal to international investors about the state's willingness to pursue the successful reconstruction of the post-conflict zone. Under these conditions, uncertainty is lessened and foreign investors can feel more confident about making investments. Statistical

[68] UN Millennium Declaration, GA Res 55/2 (18 September, 2000), at para.9.

tests confirm the relationship between post-conflict justice institutions and FDI from 1970-2001. Post-conflict states that implement restorative justice processes in the post-conflict period receive higher levels of FDI than those countries that refrain from establishing these post-conflict institutions, or do not implement a restorative justice process.[69]

An example of this type of public international financial institution-induced international investment strategy in Kosovo can be seen in the financial and especially the technical support provided by the World Bank group and its related agencies for the privatization of the previously public/socially-owned Kosovo energy power-generating company, known locally as KEK. On the other hand, the international public accountability mechanisms available to both KEK workers and members of the general public as a result of the participation of World Bank group institutions within this project serve to highlight the absence of similarly effective domestic institutional accountability mechanisms within Kosovo at the present time.

The KEK case study is as follows: An initial USD$5 million International Development Association (IDA) grant was made to the UN Mission in Kosovo (UNMIK) in late June, 2007 to support the KEK and domestic Kosovar authorities clean-up a gasification plant to enhance Kosovo's long-term power development and

[69] Benjamin J Appel and Cyanne E Loyle, The economic benefits of justice: Post-conflict justice and foreign direct investment, *Journal of Peace Research*, Vol. 49, No. 5 (September 2012) 685-699.

electricity supply and mitigate an urgent health risk to public health and environment in Kosovo. Following this clean-up operation, International Finance Corporation (IFC) Advisory Services were deployed in 2009 to assess and prepare KEK for the possible unbundling and privatization of the electricity distribution functions of KEK via private sector participation (PSP) *i.e.*, the private economic actors involved in this project. However, in August 2011, a confidential complaint was made to the Compliance Advisor/Ombudsman (CAO) of the IFC. Previously, the IFC has summarized its justification for the role and function of the CAO in general terms as follows:

'Recognizing the importance of accountability and that the concerns and complaints of project-affected people should be addressed in a manner that is fair, objective, and constructive, a mechanism has been established through the CAO to enable individuals and communities affected by IFC projects to raise their concerns to an independent oversight authority. The CAO is independent of IFC management and reports directly to the President of the World Bank Group. The CAO responds to complaints from those affected by IFC-financed projects and attempts to resolve them through a flexible problem-solving approach, and to enhance the social and environmental outcomes of projects. In addition, the CAO oversees audits of IFC's social and environmental performance, particularly in relation to sensitive projects, to ascertain compliance with policies, guidelines, procedures, and systems. Complaints may relate to any aspect of an IFC-financed project that is within the mandate of the CAO. They can be made by

any individual, group, community, entity, or other party affected or likely to be affected by the social or environmental impacts of an IFC-financed project.'[70]

Following the publication of the updated, 2012 edition of the IFC's Sustainability Framework,[71] the language on the CAO within the IFC's Policy on Environmental and Social Sustainability has arguably been tightened-up, as noted below:

'IFC supports its clients in addressing environmental and social issues arising from their business activities by requiring them to set up and administer appropriate mechanisms and/or procedures to address related grievances and complaints from 'affected communities'. In addition to these mechanisms and procedures, the role of administrative and/or legal procedures available in the host country should also be considered. Nonetheless, there may be cases where grievances and complaints from those affected by IFC-supported business activities are not fully resolved at the business activity level or through other established mechanisms.'[72] The CAO responds to

[70] Source: International Finance Corporation's Policy on Social & Environmental Sustainability (2006), Section 4, accessible from: http://www.ifc.org/sustainability. More information on the CAO can be accessed at:

http://www.cao-ombudsman.org/

[71] The updated 2012 edition of IFC's Sustainability Framework applies to all investment and advisory clients whose projects go through IFC's initial credit review process after January 1, 2012. Accessible at: http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/sustainability+framework/sustainability+framework+-+2012/framework_2012

[72] IFC Environmental and Social Sustainability Policy, 1 January, 2012, Chapter/Section on the Compliance Advisor/Ombudsman (CAO), at para.54.

complaints from those affected by IFC-supported business activities with the goal of enhancing environmental and social outcomes on the ground and fostering greater public accountability of IFC. As mentioned above, the CAO works to resolve complaints using a flexible problem-solving approach through the CAO's dispute resolution arm. Moreover, through its compliance arm, the CAO oversees project-level audits of IFC's environmental and social performance in accordance with the CAO's operational guidelines.[73]

More generally, the IFC has established the following generic principles as intrinsic to individual project-level grievance mechanisms involving private companies investing/operating in emerging markets. These are listed here as follows:

'1. Proportionality: Scaled to risk and adverse impact on affected communities

2. Cultural Appropriateness: Designed taking into account culturally appropriate ways of handling community concerns

3. Accessibility: Clear and understandable mechanism that is accessible to all segments of the affected communities at no cost

4. Transparency and Accountability: To all stakeholders

5. Appropriate Protection: A mechanism that prevents retribution and does not impede access to other remedies.'[74]

[73] *Ibid.,* at para.56.

[74] IFC Good Practice Note, *Addressing Grievances from Project-Affected Communities: Guidance for Projects and Companies on Designing Grievance Mechanisms*, No.7 (September, 2009) 44pp., at p.3.

With regards to the IFC role in the KEK privatization project, the Kosovar complainants contended that access to information regarding the privatization was inadequate to allow people to address potential adverse impacts of the process, and failure to conduct an appropriate Social and Environmental Assessment, which did not take into account project impacts on relevant members of the community and workforce, as well as the environment. In September, 2011 the CAO found the complaint eligible for further assessment and CAO's Ombudsman team conducted two field trips to Pristina, Kosovo, in November that year. Numerous stakeholders affirmed their willingness to engage in a collaborative process to address the issues raised in the complaint. However, following a thorough discussion of the CAO mandate, functions, services, and processes, the complainants informed CAO that they considered their interests (and those of the Kosovar public) would be best served by CAO's compliance function. The CAO Ombudsman concluded its involvement and the case was formally transferred to CAO's compliance team in January, 2012. Following an appraisal of the IFC's role in this project, the CAO concluded in April, 2012 that an audit of IFC's advisory services for the project was merited. Accordingly, the CAO drew-up Terms of Reference for an investigation into the scope of the IFC's social and environmental due diligence review for this project. However, the CAO will not audit IFC clients, *i.e.*, the Private Sector Partners (PSPs), as it considers only issues related to the IFC performance in this exercise. Therefore, the CAO did not pass any judgment on the performance of IFC's client in the KEK privatization process. The provision of an international and ostensibly independent individual grievance mechanism, especially within a transitional society such as Kosovo, where confidence in local administrative and judicial systems is nascent and still riven with communal divisions, represents a

positive sign in favour of such international financial institutional intervention, despite continuing fears such grievance/complaint mechanisms only apply in these finance/economically-oriented circumstances.

Apart from the World Bank and its associated institutions, a number of EU Member States, public (and private) International Finance Institutions (IFIs), other organisations and bilateral donors are also active in Kosovo. Previously, both public and private IFI involvement in Kosovo is limited, for reasons related to the Kosovo status issue. More recently, however, and especially since the adoption of the 2013 Brussels Agreement brokered by the EU between the Serbian and Kosovo governments, the pathways towards Kosovo membership of the European-based public international finance institutions have been smoothed over. Thus, Kosovo has been able to further develop its relations with major international financial institutions. For example, it has continued to successfully implement the 20-month €105 million Stand-By Arrangement (SBA), negotiated with the International Monetary Fund (IMF) in April 2012. In December 2012, Kosovo became a member of the European Bank for Reconstruction and Development (EBRD) and in June 2013, Kosovo signed a Framework Agreement with the European Investment Bank (EIB), which allows the EIB to finance projects in Kosovo.[75]

[75] See: Kosovo 2013 Progress Report, Commission Staff Working Document, *Accompanying the document* Communication from The Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges, 2013-2014 {COM(2013) 700 final} European Commission, Brussels, SWD(2013) 416 final, 16.10.2013. Accessible at:
http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/ks_rapport_2013.pdf

Regular coordination meetings with EU Member States and other donors present in Kosovo are called and chaired by the European Commission's Liaison Office (ECLO). This is a further indication of the leading role played by the EU in the overall co-ordination of the financial and technical assistance efforts of the international community and its individual members. The overarching international governance role played by the EU within the Kosovo context cannot be underestimated and will be enlarged upon in the following section of this paper. The Kosovo government has also established the (Kosovo) Agency for Coordination of Development and European Integration to assist with EU co-ordination of all these international assistance efforts. Close coordination and division of tasks with other donors should be ensured under the Instrument for Pre-Accession (IPA) programme, described below. The main bilateral cooperation partners of the European Commission are Germany, Switzerland, Norway, Sweden, the Netherlands, UK and the USA. The fact that many of these donor countries are Organization for Economic Co-operation and Development (OECD) members has not gone unnoticed. Kang and Meernik contend, *inter alia,* that both the national attributes of the conflict nations and the characteristics of the conflicts from which they have emerged explain the amount of economic assistance that states provide. Their findings reveal that such national attributes as humanitarian need, economic openness, and regime transition, as well as conflict characteristics such as military intervention

and conflict issues affect international aid levels. Foreign aid levels also tend to increase after conflicts, but then begin to level off after several years.[76]

What is also notable from these international and bilateral donor funded/supported activities above is the lack of environmental initiatives. As the UNDP in Kosovo's Programme on 'Democratic Governance and Environment' notes, the 'environment' generally and environmental protection in particular has not been high on the agenda for the Kosovo government.[77] During the transition period from a socialist into a market economy, environmental issues were constantly neglected in Kosovo. However, environmental degradation is closely linked to the issues of human health and sustainable development, hence making it an extremely important issue that needs to be addressed. The Kosovo government is equipped with most of the necessary legislation on environmental protection. Yet, there is a continuing lack of institutional and human resource capacity regarding its implementation and enforcement. Environmental awareness is very low among the general public, which is an obstacle for the effective implementation of environmental projects. On the other hand, environmental protection is an important criterion for fulfilling the European integration agenda. Achieving the standards established by international environmental conventions will therefore be important for Kosovo. However, many of the general

[76] Seonjou Kang and James Meernik, Determinants of Post-Conflict Economic Assistance, *Journal of Peace Research*, Vol. 41, No. 2 (March, 2004) 149-166.

[77] Accessible at: http://www.ks.undp.org/

findings of a 2009 UNDP workshop pertaining to Kosovo's shortcomings in this regard are still applicable today, as follows:

• Kosovo is not a Party to any of the UN environmental conventions, and thus is not able to participate in international meetings, or to receive funding through their financial mechanisms;

• Kosovo is striving to follow the EU environmental standards and *Acquis Communautaire*;

• There exists incomplete application of EU environmental legislation and insufficient implementation of the already applied legislation;

• There is a need for wide-ranging donor support in all environmental activities in Kosovo;

• There are no defined sectoral action plans (programmes) in place for addressing environmental issues;

• There is weak administrative capacity within the institutions involved in environmental protection; this is a problem at all levels, including central government and municipal regions;

• There is insufficient communication between the ministries, as well as between other stakeholders;

• There is a lack of institutional capacities for developing and implementing environmental policies at all levels;

• The lack of expertise and knowledge of the administrative staff and the lack of training programmes acts as a barrier;

• Environmental monitoring and data gathering systems are non-existent, which leads to unavailability of crucial data;

• There are insufficient economic instruments for incentivizing environmental protection;

• Lack of knowledge and awareness of environmental issues and lack of participation from the general public and NGOs in decision-making both hinder progress;

• Kosovo is at the initial stage of joining the international efforts in the environmental protection sphere and should start with essential steps, such as formulation of strategic policies, building the necessary legal and institutional frameworks, and developing expertise and capacity within the administrative institutions in line with EU requirements; and

• Alongside development of the necessary policy and legislative framework, there is a need to continue the implementation of environmental projects.[78]

The above findings both reinforced, and reiterated in more detail, the conclusions of an earlier, 2006 UNDP report, on 'Developing capacity in Kosovo to become a Party to the Rio Conventions', which outlined the need for the following issues to be addressed: Designation of a Convention's National Focal Point; development of compliance assessment/plans; development of a Convention Action Plan; identification of financial assistance; development of an investment plan; increasing awareness of decision-makers on environment-related issues; developing capacity of the (Kosovo) Ministry for Environment and Spatial Planning (MESP),

[78] See Report on UNDP Environment Workshop (following a Climate Change Conference), 1-2 May 2009, at 19. Accessible at:

http://www.ks.undp.org/repository/docs/UNDP_workshop_EV.pdf

municipalities and other stakeholder organisations; and establishing an environmental monitoring system.[79] Following on from these reports, UNDP Kosovo's major objectives and strategic priorities for 2010-2011 were established as, *inter alia*, assisting Kosovo to meet the commitments of the major global environmental conventions in the areas of climate change and biodiversity conservation. These commitments were to be met through the following means: Enhanced institutional commitments and ownership of environmental concerns, through building capacities of the MESP to develop policies and coordinate activities in the areas of climate change and renewable energy, biodiversity conservation, industrial pollution and contamination, and water governance.[80] The following section will detail how far the deficiencies found in both institutional and substantive areas of Kosovo's environmental law have been addressed through its engagement with the EU under the EULEX mission and the EU Pre-Accession Programme.

B. Kosovo and the European Union: Harmonizing Standards Prior to Possible Accession

As for the EU role within the Kosovo governance framework, with a mandate until 14 June 2014,[81] EULEX is the largest civilian mission ever launched under the EU's

[79] See 2009 UNDP Report *ibid.*, at 20.

[80] Accessible from UNDP Kosovo website at:

http://www.ks.undp.org/index.php?cid=2,160

[81] Council Decision 2012/291/CFSP of 5 June 2012 amending and extending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo. Accessible at: http://www.eulex-kosovo.eu/docs/LexUriServ-2012.pdf

Common Security and Defence Policy (CSDP).[82] The central aim of EULEX is to assist and support the Kosovo authorities in the rule of law area, specifically in the police, judiciary and customs services. Yet the EULEX mission is not in Kosovo to govern or rule. It is a technical mission which, in co-operation with the European Commission Assistance Programmes, will implement its mandate through monitoring, mentoring and advising (MMA) roles, while retaining certain executive powers and responsibilities. EULEX works under the general framework of UNSC Resolution 1244/99 and has a unified chain of command to Brussels. EULEX assists the Kosovo judicial authorities and law enforcement agencies in their progress towards sustainability and accountability. It will further develop and strengthen an independent and multi-ethnic justice system and a multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices.[83] A previous report on prospective EU members had also observed that the Kosovo government has demonstrated commitment to Kosovo's European perspective, including through sustained efforts in areas such as visa and trade and the establishment of a National Council for EU Integration, with the Kosovo parliament passing the relevant legislation for launching key reforms. However, the report also noted that much more still needs to be done to tackle organised crime and corruption. Public administration is weak and the

[82] EULEX employs around 2,000 international and local staff and the annual budget is around 111 million Euros.

[83] Vedran Džihić and Helmut Kramer, 'Kosovo After Independence: Is the EU's EULEX Mission Delivering on its Promises?', *International Policy Analysis*, Friedrich Ebert Stiftung, Berlin (July, 2009) 28pp. Accessible at: <http://www.fes.de/ipa>

implementation of judicial reform remains a challenge,[84] although Kosovo has apparently completed its vetting process of judges and prosecutors.[85]

The ethnic composition of the local police forces and judicial authorities is an especially thorny issue in the northern parts of Kosovo where Serb-majority municipalities are situated. In this regard, the recent, 2013 First Agreement on Normalization of Relations between Kosovo and Serbia has provided, *inter alia*, as follows:

'7. There shall be one police force in Kosovo called the Kosovo Police (KP). All police in northern Kosovo shall be integrated in the Kosovo Police framework. Salaries will be only from the KP.

8. Members of other Serbian security structures will be offered a place in equivalent Kosovo structures.

9. There shall be a Police Regional Commander for the four northern Serb majority municipalities (Northern Mitrovica, Zvecan, Zubin Potok and Leposavic). The Commander of this region shall be a Kosovo Serb nominated by the Ministry of Interior from a list provided by the four mayors on behalf of the Community/Association. The composition of the KP (Kosovo Police) in the north will reflect the ethnic composition of the population of the four municipalities. (There will be another Regional Commander for the municipalities of Mitrovica South, Skenderaj and Vushtrri). The

[84] See: (EU) Enlargement Strategy and Main Challenges 2011-2012, Communication from the Commission to the European Parliament and the Council, Brussels, 12.10.2011, COM(2011) 666 final, at p.17.

[85] *Ibid.*, at 5.

regional commander of the four northern municipalities will cooperate with other regional commanders.

10. The judicial authorities will be integrated and operate within the Kosovo legal framework. The Appellate Court in Pristina will establish a panel composed of a majority of K/S judges to deal with all Kosovo Serb majority municipalities.

11. A division of this Appellate Court, composed both by administrative staff and judges will sit permanently in northern Mitrovica (Mitrovica District Court). Each panel of the above division will be composed by a majority of K/S judges. Appropriate judges will sit dependant on the nature of the case involved.'

Following-up these provisions in the 'First Agreement' between Kosovo and Serbia, the Implementation Plan agreed to establish separate working groups for the implementation of Articles 7-9 and Article 10. These 'Police' working groups were tasked with developing detailed plans and agreed timelines for the integration of both Serbian security personnel and their judicial authorities into their corresponding Kosovo structures, both of these to be undertaken with the assistance of EULEX. The recent report by the Kosovo government to the EU on these issues states, *inter alia*, as follows: On policing issues, limited progress has been made, including limited progress on the integration of Serb police in the Kosovo police the appointment of an acting regional police director and the establishment of a directorate for the Mitrovica region by Kosovo, and closure of MUP offices by Serbia.[86] However, the report also noted that

[86] See: Kosovo government report to the EU on the 'State of Play in Implementation of the Brussels Agreements' (2014), *op. cit.* at 5.

there was no progress on the closure of so-called 'civil protection' structures, a sort of Serb paramilitary structure which has operated in Kosovo since the end of the conflict in 1999. In spite of the Brussels Agreement calls for closure of all parallel security structures and, continuous requests by the Kosovo side to address this issue, the Serbian side has rejected any discussions about this.[87] On judicial institutional issues, the Kosovo government report observed that progress has been made in that Serb parallel courts ceased to receive new cases, but no progress has been made in integrating Serb judges and prosecutors in the Kosovo judicial institutions. In December 2013, an important breakthrough towards a unitary justice system for Kosovo as a whole took place, whereby a single Basic Court and Basic Prosecution Office for the Mitrovica region, was established. On the other hand, the Kosovo government report noted that the integration of Serb judges and prosecutors in the Kosovo judicial institutions has not yet commenced, with further progress is being hampered by Serbian demands on the ethnic composition of these courts.[88]

On the financial front, all the EU assistance to countries with prospects for EU membership – including 'candidate countries' such as Turkey and others in the Western Balkans region, as well as Kosovo as a 'potential candidate' – has been brought under the auspices of a single measure: the Instrument for Pre-Accession Assistance (IPA).[89]

[87] *Ibid.*

[88] *Ibid.*

[89] Council Regulation (EC) No.1085/2006 of 17 July, 2006 establishing an Instrument for Pre-Accession Assistance (IPA). Kosovo is listed in Annex II to this Regulation. Article 6 (1) requires that assistance shall be provided on the basis of multi-annual indicative planning documents (MIPD), established in

The IPA came into force from the beginning of 2007. IPA is to provide nearly €11.5 billion Euros to all the designated 'candidate' and 'potential candidate' countries over the period 2007-2013. Over a five year period (2007-2012), EU financial assistance to Kosovo directly amounted to €565.1 million Euros. The projects the IPA will support are geared to bringing candidates and potential candidates (such as Kosovo) *into line with EU standards.* (emphasis added) In particular, it will assist candidate countries to fully implement the EU legislation (collectively known as the 'Community *acquis*') at the time they become EU Member States. As the Commission notes, '(t)he *acquis* is the body of common rights and obligations that is binding on all the EU member states. It is constantly evolving and comprises: the content, principles and political objectives of the (EU) Treaties; legislation adopted pursuant to the Treaties and the case law of the Court of Justice; declarations and resolutions adopted by the Union; instruments under the Common Foreign and Security Policy; international agreements concluded by the Union and those entered into by the member states among themselves within the sphere of the Union's activities. Candidate countries for potential EU membership have to accept the *acquis* before they can join the EU and make EU law part of their own national legislation. Adoption and implementation of the *acquis* are the basis of the EU accession negotiations.'[90]

close consultation with the national authorities. On 14 August 2008, the Commission adopted the MIPD 2008-2010 for Kosovo. This was followed by a further Commission Decision of 2009 on an MIPD for 2009-2011 for Kosovo.

[90] See 'Acquis: European Commission - Enlargement – Acquis', accessible from the EU Commission website at: http://ec.europa.eu/enlargement/policy/glossary/terms/acquis_en.htm

Potential candidates such as Kosovo are assisted to align themselves progressively with the EU legislation. These measures aimed at the progressive harmonization of standards within Pre-Accession States with prevailing EU standards assume a particular resonance for Kosovo. In this regard, progress towards both fully independent Statehood and membership of the European Union has arguably been enhanced by the recent 2013 Agreement between Serbia and Kosovo, which provides, *inter alia*, in Article 14, as follows: 'It is agreed that neither side will block, or encourage others to block, the other side's progress in their respective EU path.' On this point, even the Serbian government led by Aleksander Vucic, a former nationalist whose Serbian Progressive Party (SNS) won the Serbian national elections on 16 March, 2014 by a clear majority, has espoused a pro-European policy since 2008.[91]

International territorial administration is now an accepted technique for enforcing international legal obligations and, according to Stahn, 'a means to implement international legal standards and further commonly defined community interests.'[92] The previous UNSC/UNMIK strategy of pursuing 'Standards before Status'[93] on broader issues of democratic government has arguably been modified more

[91] See: 'Serbia's election: A zealot in power', in *The Economist*, UK weekly news magazine, Vol.410, No.8879, 22-28 March, 2014, at 40.

[92] Carsten Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond*, Cambridge: CUP (2008) at 154.

[93] The Kosovo Standards Implementation Plan (KSIP) agreed between the Kosovo government and UNMIK adopted on 31 March, 2004 sets out the actions and policies to achieve the 'Standards for

recently by the EULEX to one of 'Standards and Status', meaning that EU standards (including those for environmental protection) should be complied with as soon as possible, while negotiations continue on Kosovo's status in the foreseeable future. Indeed, as Spernbauer observes presciently, the Community/Union *acquis* alignment strategy is designed to ultimately achieve a 'standards beyond status' goal, thus ensuring the approximation of domestic standards to that of the EU, whether or not Kosovo ever becomes a fully-fledged EU Member state.[94]

Within this context, a further EU Commission Decision of 2009 had *inter alia*, identified *environmental considerations* as one of the major cross-cutting issues to be tackled in Kosovo, along with good governance, the provision of equal opportunities and the non discrimination of minority and vulnerable groups, as well as recognition of civil society organizations. All of these issues were duly reflected in IPA-financed activities during 2009-2011, in addition to specific actions dedicated to the environment, in particular as concerns environmental impact assessments. This is particularly relevant where there is potentially a high environmental impact, such as co-financing of investments and new legislation.[95] The EU's Kosovo Progress Report for

Kosovo', published in Pristina on 10 December 2003 and subsequently endorsed by the UN Security Council on 12 December, 2003. Accessible at: http://www.unmikonline.org/standards/

[94] Martina Spernbauer, 'EULEX Kosovo: The Difficult Deployment and Challenging Implementation of the Most Comprehensive Civilian EU Operation to Date', *German Law Journal,* Vol.11, No.8 (2010) 769-802, at 788.

[95] See Annex 4: Cross-cutting issues, of EU Comm Decision (2009) on a Multi-Annual Indicative Planning Document (MIPD) Kosovo (under UNSCR 1244/99) 2009-2011, at 26.

2013,[96] observed that, *inter alia*, alignment of Kosovo's environment legislation has been limited to the adoption of the law on water and adoption of a number of administrative instructions on waste and industrial pollution. The 2014 Progress Report followed this by noting that '(o)verall, Kosovo has not progressed beyond the very initial stages of harmonisation with the *acquis* in these areas. There has been little progress on new legislation and implementing existing laws. Environment and climate need to become government priorities. The quality of environmental reporting needs to improve to better inform government policies.'[97] More recently, the latest EU Progress Report for Kosovo (2015) concludes generally that: 'Legislation to address increasing environmental challenges in Kosovo has not yet been fully harmonised with the *acquis* or implemented. As regards horizontal legislation, environmental impact assessments and strategic environmental assessments need to be better implemented, especially locally. Public participation and consultation need strengthening.'[98]

[96] Kosovo Progress Report 2013, *ibid.*, at 39-40, accessible at: http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/ks_rapport_2013.pdf

[97] European Commission, Staff Working Document, Kosovo 2014 Progress Report, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, Enlargement Strategy and Main Challenges 2014-2015, COM(2014) 700 final, Brussels, 8.10.2014 SWD(2014) 306 final, 58pp., at 42. Accessible at: http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-kosovo-progress-report_en.pdf

[98] European Commission, Staff Working Document, Kosovo 2015 Progress Report, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, on the EU Enlargement Strategy, Brussels, 10.11.2015 SWD(2015) 215 final, 68pp, at 48. Accessible at: http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_kosovo.pdf

IV. Applying Transitional Environmental Justice in Kosovo

A. Conceptual Prospects and Practical Examples

Returning to the aim of this paper in emphasizing the achievement of transitional environmental justice as an alternative means to achieve overall transitional justice, the legal baseline for environmental protection consists of the commonly shared experience of all the different communities within Kosovo in their continuing enjoyment of the surrounding 'natural' environment in which they live and work. As Keinänen observes, environmental concerns are important even in Kosovo, not necessarily for the improvement of the physical state of the (natural) environment in and of itself but, 'first and foremost, for the well-being of the local people.'[99] How might the recasting of potentially divisive inter-community disputes as environmental, rather than as prevalent types of ethnic, social or religious issues, promote reconciliation in the current Kosovo situation? For Teitel, the re-construction of law and specifically the rule of law within a transitional society must be viewed through the lenses of at least three mediating concepts: 1) the social reconstruction of the rule of law as an intrinsic cultural aspect of the reconstruction of the transitional society itself; 2) the role of international law as a continuing and transcending presence within the domestic legal system as it is re-shaped; and 3) the acceptance of the rule of law as a limit to politics, especially the ethnically-based politicking that can so easily

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[99] Katja Keinänen, 'International Law and the Interests of Liberal Market Economy: The Non-Issue of Environmental Protection in the Kosovo International Administration', *Finnish Yearbook of International Law*, Vol. 18, 2007 (2009) 9-31, at 12.

(re-)divide communities within a transitional society.[100] Applying these mediating concepts to the Kosovo situation, it will be seen that the relatively strong, influential and continuing presence of the international community in Kosovo, especially in the form of the UN and more recently, the EU, has resulted in both the inclusion and putative application of relevant international human rights law and environmental principles within the Kosovo constitution and relevant domestic laws.

However, the two other mediating concepts proposed by Teitel for enabling transitional justice, namely, the cultural establishment of the rule of law and its role as a final limit on inter-communal politicking in Kosovo are yet to be fully discerned.[101] This is especially pertinent in the case of the re-establishment, and perhaps more importantly, the re-legitimization, of an effective domestic (Kosovo) judicial system, which still has a long way to go. Chesterman has observed that Kosovo demonstrates some of the most difficult aspects of administering justice under international administration, arguing that a clearer distinction between an initial period of martial law (to deal with Kosovo Albanian reprisals against Serbs) and subsequent judicial reconstruction (ideally under the supervision of internationally-appointed judges) might have ameliorated some (though not all) of the problems.[102] Within this context, much

[100] Teitel (2000) *op. cit.,* 18-22.

[101] Stevens Report, 'Filling the Vacuum: Ensuring Protection and Legal Remedies for Minorities in Kosovo', M.R.G. International (26 May, 2009)

[102] Simon Chesterman, *Justice under International Administration: Kosovo, East Timor and Afghanistan*, International Peace Academy Report, Project on Transitional Administrations (September, 2002) 16pp., at 5-6. Accessible at:

of what is needed has to do with changing the psychology of the judges and other important government officials involved in the Kosovo legal system through re-training and professional development.[103] In this regard, the Kosovo Judicial Council (KJC) is now operational and its capacity to develop institutional competence will continue to be subject of Monitoring, Mentoring and Advising (MMA) actions by the EULEX. The KJC has a pivotal role in ensuring the independence and efficiency of the judicial system. It is a fully independent institution that seeks to ensure the independency of the courts, their professional and impartial role, and fully reflect the multi-ethnic nature of Kosovo following the principles of gender equality.[104] Also imperative is the provision of significant capital investment to improve the physical conditions under which the judges and lawyers work. As de Greiff has observed, '(transitional) justice practitioners … must also face tough questions about the costs of implementing justice, particularly in contexts characterized by chronic scarcity.'[105]

The value of re-conceptualizing otherwise intransigent social, cultural, religious and/or ethnic conflicts within a society in transition as environmental disputes is

http://www.jsmp.minihub.org/Resources/2002/IPA%20-%20JUSTICE_UNDER_INTL.pdf

[103] See, for example, the EULEX Programme Report 2010, which highlights the continuing deficiencies of Kosovo courts in this respect. Accessible at: http://www.eulex-kosovo.eu/docs/tracking/EULEX%20Programme%20Report%202010%20.pdf

[104] EULEX Programme Report 2010, *ibid.*, at 25.

[105] Pablo de Greiff, 'Articulating the Links Between Transitional Justice and Development: Justice and Social Integration', in de Greiff & Duthie (eds) *Transitional Justice and Development: Making the Connections* (2009) 28-75, at 30.

highlighted in the following examples from Kosovo.[106] Under the Ahtisaari Plan for the social reconstruction of post-conflict Kosovo, Orthodox churches and monastery sites are protected as they are deemed to be an intrinsic element of the (minority) ethnic Serbian community in Kosovo.[107] The Kosovo Progress Report 2013 paints a generally positive picture of continuing efforts to ensure their security and safety, noting that only the Visoki Dečani Monastery remains under KFOR protection and that protection of the Peć Patriarchate was has been transferred from KFOR to Kosovo police. Nevertheless, petty theft and vandalism incidents involving Orthodox churches and Muslim cemeteries, as well as the periodic widespread desecration of Orthodox cemeteries, reveal the vulnerability of sites of value to the Serbian community in Kosovo during times of political strain.[108]

[106] The examples relied upon here are based on actual situations within Kosovo that have been anonymized due to confidential nature of the OSCE internal reports from which the facts of these cases are drawn from.

[107] The Comprehensive Proposal for the Kosovo Status Settlement, also known as the 'Ahtisaari Plan' *op. cit.*, contains proposals of detailed measures aiming at: (a) ensuring the promotion and protection of the rights of communities and their members (with special attention to the protection of Serb minorities); (b) the effective decentralization of government and public administration (so as to encourage public participation); (c) the preservation and protection of cultural and religious heritage. The ultimate goal is the formation and consolidation of a multi-ethnic democratic society, under the rule of law, with the prevalence of the fundamental principle of equality and non-discrimination, the exercise of the right of participation in public life, and of the right of equal access to justice by everyone. See especially, 'Annex V: Religious and Cultural Heritage' of the Ahtisaari Plan.

[108] Kosovo Progress Report 2013, *op. cit.*, at 15.

Until recently (with the changes introduced to the composition of the Kosovo police force by the 2013 Agreement), the lack of Serb representation within the K-Albanian dominated Kosovo police force also contributed to the sense of disengagement and alienation felt by the Serbian community. As Mertus notes, '(T)he confidence of minority groups plummets as assaults directed against the Serbian Orthodox community continue and the (Kosovo) police fail to offer protection. ... Successful prosecutions for attacks on religious minorities are rare in Kosova. Weak administrative and judicial systems compound the problem, posing major obstacles to the realisation of the rights of religious minorities.'[109]

A further source of friction is caused when the (mainly) Kosovo-Albanian controlled municipal authorities have licensed the establishment of business enterprises and other commercial activities in the surrounding areas immediately beyond the grounds of these protected religious sites.[110] These activities are (mainly) owned and operated by members of the K-Albanian community and mostly consist of light and medium-sized industries, agri-business enterprises and farming concerns. Disputes have arisen over allegations that these activities are impinging on the sanctity of protected Orthodox religious sites, especially the need for minimum interference to their activities of worship, meditation and prayer. On the face of it, this type of dispute

[109] Mertus (2012) *op. cit.*, at 242, citing US State Department, 'Kosovo, international religious freedom report 2009', filed on 26 October, 2009 at:

http://www.state.gov/j/drl/rls/irf/2009/127318.htm.

[110] Under the Ahtisaari Plan *ibid.*, such activities would in all probability either be proscribed or restricted under (Paragraph) 4.1.1.

has all the hallmarks of a classical inter-ethnic/religious confrontation: An important aspect of ethnic Serbian (religious) culture is being subjected to intolerable interference by activities undertaken by K-Albanians and permitted by K-Albanian-controlled municipal councils, on adjacent properties to previously sacrosanct Orthodox Christian sites. Vice versa, the K-Albanian community could/would argue that the Orthodox church and Serbian community demands for an extended area of sanctuary, arguably going beyond the actual boundaries of the religious sites established under the Ahtisaari plan constitutes an unacceptable imposition on the regulatory autonomy and jurisdiction of the municipal authorities. For K-Albanians this issue goes beyond simply ensuring sensitivity for places of worship and religious tolerance generally. It harks back to the period prior to the NATO intervention in Kosovo, which they would characterize as a time of abject subjugation of their community/race to the Serbian community, supported by the (then) Serbian-dominated federal government of Yugoslavia and exemplified by the presence of Orthodox church icons found in many parts of Kosovo.

How can this apparently intractable situation be resolved? The suggestion here is that a closer examination of the types of interferences alleged by the Orthodox church as impinging on the sanctity of its protected sites can be re-cast as an environmental, rather than inter-ethnic/religious, issue. Thus, what is being objected to here by the Orthodox church is simply the fact that the activities permitted by the municipal authorities constitute an environmental nuisance due to the noise pollution or toxic fumes generated by these activities. As we shall see below, these claims can be substantiated by reference to legal developments in the jurisprudence of the European

Court of Human Rights (ECtHR) when interpreting and applying the European Convention on Human Rights, 1950.[111] The 2008 Kosovo constitution now provides for the direct application of, *inter alia*, the ECHR within the domestic, Kosovo legal system, and moreover, requires that the human rights guaranteed by this Constitution shall be interpreted consistently with the court decisions of the European Court of Human Rights.[112] The application of a legal standard of protection against serious environmental interferences currently being developed through the Strasbourg Court's jurisprudence on Article 8 of the ECHR is especially pertinent to the type of dispute that is prevalent in Kosovo today. This jurisprudential development is both in line with, and reflecting of, wider developments in favour of procedural environmental rights within international environmental law, which are also being implemented within the EU legal system.

The transformative element of the re-classification of this type of dispute from 'ethnic/religious' to 'environmental' bears further scrutiny, if only because of its potential to render legal protection on an arguably more value-neutral, and thereby non-discriminatory, basis. As Mertus observes presciently, 'Kosova is not a case of institutional malfunction or failure. Rather, it is a case of not creating institutions that all residents use uniformly.'[113] Similar legal arguments can be made in the context of

[111] Both the Convention texts and case law of the Strasbourg Court are accessible from the ECHR website at: http://www.echr.coe.int/Pages/home.aspx?p=home

[112] See Articles 22 and 53, respectively, of the 2008 Kosovo Constitution.

[113] Mertus (2012) *op. cit.* at 242.

several local authority-permitted excavations being performed on private properties, which allegedly may result in damage to important archaeological sites proposed for protection by the relevant bodies involved. Close to yet another historic (castle) site, a mining company has received authorization by the local municipality to begin conducting explosions, which might negatively affect this historic site. Again, the issue is really one of assessing and if necessary regulating the potential environmental impacts of such permitted activities, rather than viewing these activities simply as examples of the unequal treatment of cultural artefacts belonging to the minority (Serb) community due to the political dominance of the majority (Kosovo Albanian) community represented in these permitting local authorities. As we will see below, both the prior assessment and regulation of such inherently dangerous activities for the surrounding environment is now amply provided for within applicable domestic, Kosovo environmental laws, which are themselves based on well-known and accepted international environmental principles and standards.

Finally, another dispute involving the Orthodox church, but one that represents a neat reversal of the victim-perpetrator roles in the previous disputes noted above, is the construction and maintenance of perimeter walls around the periphery of certain Orthodox church sites, as well as new wings to monasteries.[114] The construction of these walls and additional buildings is objected to by the mainly K-Albanian neighborhoods surrounding these church/monastery sites. Here, the non-discrimination

[114] For example, the construction of a new wing to the Visoki Decani monastery, see: 'Kosovo and Serbia: A little local difficulty', *The Economist* (UK) news magazine, August 6-12, 2011, at 31.

principle underlying the objective application of environmental protection standards in the form of minimum (pollution) threshold levels for noise and dust, for example, can just as easily be applied *against* the Orthodox church as in its favour in the previous case (above). This last example can be put forward against the view that favouring environmental concerns/sensitivity issues over underlying and continuing ethnic/social discord is merely a smokescreen for a positive discrimination policy in favour of minority communities and implicitly against the majority community. Without needing to pronounce on either the value or legitimacy of pursuing positive discrimination policies for minority communities, we can see that the neutral/objective application of relevant environmental standards cuts both ways in terms of the protection afforded by these standards being enforceable against any activities that allegedly are in breach of them, regardless of the ethnic identity of the perpetrators involved.

It should also be noted that ECHR Article 8 rights do not depend on property ownership. On this basis, residents of 'temporary' refugee camps (which are prevalent in the northern part of Kosovo) mainly populated by another minority community – the Roma – can arguably also complain against environmental interferences to their privacy, family life and homes, even when these are temporary accommodations.[115]

[115] Since the end of the Kosovo conflict in 1999, exposure to lead contamination among the displaced Roma community currently still living in camps in northern Mitrovica is one of the biggest medical crises in the region, according to a Background Report on 'Lead contamination in Mitrovicë/Mitrovica affecting the Roma community', prepared for the OSCE Mission in Kosovo (February 2009) Accessible at:

http://www.osce.org/kosovo/36234?download=true

While they are apparently unable to apply directly to the Strasbourg court due to formal uncertainty surrounding Kosovo's international legal status,[116] they will be able to make such claims before local courts as the ECHR and the Strasbourg court jurisprudencenow forms part of domestically applicable Kosovo law, as provided within the 2008 Kosovo constitution. (See further below, in Part IV)

B. Transitional Environmental Justice as a Constraining Factor in Kosovo's Economic Reconstruction

Moving from our initial arguments re-casting certain ethnic/social conflicts as transitional environmental justice issues, at least one further way in which arguments for environmental justice can gain entry into the transitional justice camp is by latching on to the ongoing debate as to whether the goals of transitional justice should expressly include the socio-economic reconstruction of a society in transition, in addition to the more well-known aims of transitional justice. Here, there can be little doubt that the international institutional agenda for transitional justice now explicitly takes on board

[116] On 20 February 2006, the European Roma Rights Centre (ERRC) - an international public interest law organisation working to combat anti-Romani racism and human rights abuse of Roma - filed an application with the European Court of Human Rights on behalf of 184 Romani residents of camps for Internally Displaced Persons (IDPs) in northern Kosovo. On 21 February 2006, the Court faxed a letter to the ERRC declining to review the case stating that it did not have jurisdiction to do so. Specifically, the Court claimed it was not competent to review the case since the United Nations Mission in Kosovo (UNMIK) is not party to the Convention. See: 'European Court of Human Rights Has No Jurisdiction in Kosovo Lead Poisoning Case', 3 April 2006, accessible from ERRC website at: http://www.errc.org/article/european-court-of-human-rights-has-no-jurisdiction-in-kosovo-lead-poisoning-case/2568

socio-economic reconstruction/development as a vital element in the pursuit of transitional justice.[117] Already in 2001, the then UN Secretary-General, Kofi Annan had proposed moving away from the reactive mentalities and practices adopted during the Cold War and toward a 'culture of prevention' that requires 'the deep-rooted socioeconomic, cultural, *environmental*, institutional and other structural causes that often underlie the immediate political symptoms of conflicts' to be addressed. (emphasis added) This approach incorporates short and long-term methods that encompass political, diplomatic, humanitarian, human rights, developmental, institutional and other measures by the international community, in cooperation with local actors. In this way, he argued, 'conflict prevention and sustainable and equitable development are mutually reinforcing activities.'[118]

Core transitional justice proponents have perhaps understandably been slow to embrace this scope-widening exercise that potentially leads the transitional justice debate into troubled waters, preferring instead to stay within the relatively calm waters of traditional transitional justice concerns such as, *inter alia*, fact-finding, establishing personal and collective accountability and responsibility for past atrocities, reparations

[117] UN Secretary-General's Report (2004) *op. cit.* Also: Pablo de Greiff and Roger Duthie (eds) *Transitional Justice and Development: Making Connections*, International Center for Transitional Justice, Social Science Research Council, New York (2009), Graciana del Castillo, *Rebuilding War-Torn States: The Challenge of Post-Conflict Economic Reconstruction*, Oxford: Oxford University Press (2008) and the *IJTJ* Special Issue on 'Transitional Justice and Development', Vol.2, No.3 (2008).

[118] *Prevention of Armed Conflict: Report of the Secretary-General*, UN Doc. A/55/985-S/2001/574 (7 June 2001) at para.11.

and reconciliation. These doctrinal notions of the scope of activities (and their attendant legal regimes) that transitional justice should entail have come under criticism due to their perceived exclusionary effects for other equally significant issues and actors in transitional societies. Nagy has noted that transitional justice is typically constructed to focus on specific sets of actors for specific sets of crimes. She argues that this results in a fairly narrow interpretation of violence within a somewhat artificial time frame and to the exclusion of external actors.[119] There is growing evidence of late that even die-hard transitional justice practitioners are uncovering latent and underlying socio-economic, as well as racial, religious, and political roots for ethnic and social conflicts within States, leading them to re-examine the role of 'development' in relation to transitional justice. Mani highlights four areas of inquiry that both transitional justice and development specialists must consider if either field is to achieve its intended goals. Two of these questions are pertinent here: First, can transitional justice afford not to concern itself directly with social injustice and patterns of inequality, discrimination and marginalization that were underlying causes of a conflict and that inflicted major suffering and victimization on vast swathes of a population? How can (or should) transitional justice have a more direct impact on reducing social and economic inequality? Second, does transitional justice represent a trade-off of sorts between justice *or* development, rather than promoting development *with* justice? Mani is of the

[119] Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections', *Third World Quarterly*, Volume 29, Issue 2 (March, 2008) 275 – 289.

view that transitional justice will lose credibility if its scholars and practitioners do not address these questions within the (usually) impoverished societies they operate in.[120]

Thus, even if transitional justice should never be thought of as simply being part of a wider, socio-economic (re-)development strategy, transitional justice should be, at a minimum, 'development sensitive'.[121] A development-sensitive approach would require transitional justice practitioners to be aware of the different links that may exist between transitional justice and development, and to consider pursuing synergies with development work and directly addressing development-related issues. Duthie proposes four levels at which this relationship exists: transitional justice and development efforts can complement each other; inadvertently affect each other; be coordinated in order to generate positive synergies; and directly address each other. He therefore argues that transitional justice measures should be designed and implemented in ways that are 'development sensitive.'[122] Pasipanodya however goes further, arguing that in places like Nepal transitional justice mechanisms should not continue to neglect economic and social justice issues when it was injustice on these fronts that was both a root and a product of conflict.[123] Powell echoes this sentiment from a South African perspective,

[120] Rama Mani, 'Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development', *IJTJ* (2008) 2(3): 253-265, at 253-254.

[121] Roger Duthie, 'Toward a Development-Sensitive Approach to Transitional Justice', *IJTJ* (2008) 2 (3): 292-309.

[122] Duthie (2008) *ibid.,* at 309.

[123] Tafadzwa Pasipanodya, 'A Deeper Justice: Economic and Social Justice as Transitional Justice in Nepal', *IJTJ* (2008) 2(3): 378-397.

holding that early conceptions of justice in transition which tried to exclude: 1) socio-economic injustice from its list of actionable wrongs; and 2) redistributive justice from the valid aims of democratic transition, would neither be able to explain nor redress the problems of racial injustice or political transition in South Africa.[124] In this regard, Miller highlights three areas of general concern, namely, (1) the economic roots and consequences of the conflict that transitional justice institutions seek to narrate, prosecute and overcome; (2) the economic liberalization that accompanies political transition in many transitional contexts, often constituting a lack of significant socio-economic redistribution of resources in the post-conflict state; and (3) the connected development plans of the new government for the future.[125]

Transitional justice mechanisms must therefore be part of a broader set of policies for socio-economic development and reconciliation, with sustainable human development principles underlying many of the objectives of these transitional justice mechanisms.[126] However, the form, implementation and outcome of such mechanisms are influenced primarily by the political will, capacity and resources available to local, national and international institutions.[127] These mechanisms tend to neglect the active

[124] Derek Powell, 'The Role of Constitution Making and Institution Building in Furthering Peace, Justice and Development: South Africa's Democratic Transition', *IJTJ,* Vol.4 (2010) 230-250, at 231.

[125] Zinaida Miller, 'Effects of Invisibility: In Search of the 'Economic' in Transitional Justice, *IJTJ*, (2008) 2(3): 266-291, at 267.

[126] Patrick Vinck and Phuong Pham, 'Ownership and Participation in Transitional Justice Mechanisms: A Sustainable Human Development Perspective from Eastern DRC', *IJTJ* (2008) 2(3): 398-411.

[127] *Ibid.,* at 410.

involvement of the affected population in the planning and implementation phases of socio-economic development. The implicit danger is of the negative consequences of uneven socio-economic reconstruction as a result of the unconditional inclusion of simplistic notions of 'development' within the goals/objectives of a transitional society. Laplante highlights grass roots level conflict world-wide that is based on growing socio-economic disparities within communities, rather than the more usual forms of ethnic, religious and/or political divisions found in transitional societies.[128] Significantly, she includes environmental pollution caused by extractive industries within the notion of socioeconomic grievances.[129] Finally, Castillo explicitly links post-conflict socio-economic reconstruction with the need to establish appropriate legal and institutional frameworks providing for market-oriented but broad-based economic growth, which she defines as 'growth that is sustainable, creates employment, brings about poverty alleviation and greater opportunity for the majority, and *protects the environment.*'[130] She makes the further point that this type of sustainable economic growth is 'particularly important in post-conflict countries, where economic reconstruction must contribute to *national reconciliation.*'[131] (emphasis added)

All of these prescriptions clearly apply to present day Kosovo. The negative effects of unmitigated pursuit of economic growth are especially detrimental from an

[128] Lisa J. Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework', *IJTJ* Vol. 2 (2008) 331–355.

[129] Laplante (2008) *ibid.,* at 332.

[130] Castillo (2008) *op. cit.,* 224-225.

[131] *Ibid,* at 225.

environmental perspective. As Keinänen has noted, environmental protection has so far been a 'non-issue' in the international administration of Kosovo, its foundational role for a stable society and competitive economy ignored because of complex and overarching issues involving disputed property ownership, poor resource management, and a lack of protection of basic human rights.[132] Thus, we can see the potential for the introduction of environmental justice mechanisms to constrain potentially unequal economic development between communities in ways that may ultimately be detrimental to the achievement of overall transitional justice within a still relatively vulnerable polity. Within this context, it should be unsurprising that principles and tools for environmental justice are now prescribed by international environmental law and increasingly, international development law, especially as an important aspect of international finance, technical and technology assistance rendered by and through both public and private IFIs.[133] Unlike other transitional States such as East Timor or Cambodia, for example, Kosovo also benefits in this regard from its institutional links with the EU, especially through its Pre-Accession status.

A further argument for the explicit inclusion of environmental considerations and criteria within the otherwise prioritized economic reconstruction of Kosovo is the acknowledged universality of baseline human environmental needs, as compared with more contested notions of (re-)distributive socio-economic justice within this

[132] Keinänen (2009) *op. cit.,* at 12-13.

[133] See, for example, the Equator Principles for social and environmental impact assessment and mitigation that are voluntarily accepted by Project Finance providing banks. Accessible at:

ethnically-divided transitional society. Measures to promote a liberal market economy can be politically controversial in ex-socialist model economies and then founder on wealth re-distribution goals, thereby entrenching already prevalent socio-economic inequalities. On the other hand, basic human requirements for clean water, air and uncontaminated soil, as well as sufficient and untainted food supplies, have been elevated by the human rights and development communities to that of imperative goals when tackling poverty in less developed countries, whether transitional or not.

For example, the UN's Millennium Development Goals (MDGs) include ensuring environmental sustainability as Goal No.7, alongside *inter alia* the eradication of poverty and hunger (Goal No.1) of the eight MDGs that according the UN Development Programme 'provide a framework for the entire international community to work together towards a common end – making sure that human development reaches everyone, everywhere.'[134] Securing such basic environmental needs for the entire population of Kosovo should therefore be an unchallengeable proposition as a basis for the introduction of transitional environmental justice mechanisms. Replacing the MDGs in 2015, the UN-sponsored Sustainable Development Goals (SDGs)[135] combining economic development, environmental sustainability and social

[134] See: 'What are the Millennium Development Goals?', accessed at the UNDP MDG website: http://www.undp.org/mdg/basics.shtml

[135] See: 'Sustainable Development Goals: 17 Goals to Transform Our World', accessible at: http://www.un.org/sustainabledevelopment/sustainable-development-goals/

inclusion,[136] represent an even more pertinent set of aims for Kosovo's post-conflict, socio-economic reconstruction that includes environmental protection for its entire population.

A significant national (as opposed to local) example of the possible utilization of environmental justice tools to constrain otherwise unrestrained development initiatives can be seen in respect of central government decisions on the location of the route for a highway project running across Kosovo territory. In this regard, Kosovo is participating in the implementation of the 2004 Memorandum of Understanding on development of the South-East Europe Core Regional Transport Network,[137] beginning from the Albanian port of Durres on the Adriatic coast, through the middle of Kosovo to the frontier region with Serbia, linking-up with the Trans-European Network Corridor X in Serbia.[138] This transport infrastructure networking project is vital for improved communications between the land-locked, Balkan territories of Serbia and Kosovo, and the Mediterranean Sea. It is a major artery for international trade and investment to and from Kosovo. In line with this plan, the successful completion of

[136] Jeffrey D Sachs**, '**From Millennium Development Goals to Sustainable Development Goals', *Lancet,* Vol.379 (June 9, 2012) 2206–11, at 2206.

[137] Adopted by Albania, Bosnia and Herzegovina, Croatia, Macedonia, Serbia and Montenegro, the European Commission on behalf of the EU, and, the UN Interim Administration Mission in Kosovo (acting for the Provisional Institutions of Self Government) in Luxembourg, on 11 June 2004. Accessible at:

http://ec.europa.eu/ten/infrastructure/doc/2004_06_11_memorandum.pdf

[138] Para.3.11 of the World Bank's Kosovo Report (2010) *op. cit.*, at 40-41.

Route 7 Motorway 63.4-mile (102-kilometer) dual-carriage highway through Kosovo extending from Morinë, at the southwest border with Albania, to the north of Kosovo's capital, Pristina was announced in 2013. Route 7 now serves as the centerpiece of the Kosovo road transport system, helping to promote trade and economic development both within Kosovo and throughout the region as the trade route contributes to the economic integration of the countries of southeastern Europe, Western Europe, and beyond. The motorway traverses mountainous terrain and has 11 bridges, four interchanges and 22 overpasses and underpasses.[139]

However, several issues had arisen during the planning stage of this project. Notably, the construction of an initial section of this highway project within Kosovo known as 'Vermice-Merdare' sector of the overall Route 7 Motorway,[140] was controversial for a variety of reasons ranging, *inter alia*, from the lack of transparency over the initial Kosovo central government decision-making process to award the contractual tender for this project, to the location of an initial section of the highway in very close proximity to at least one ethnic Serbian community, and the apparent lack of a complete environmental impact assessment (EIA) prior to the commencement of works on this highway, at least in terms of the requirement for the consultation of local communities.[141] For example, a recent study by a local civil society organization on a

[139] See: 'Kosovo Motorway: Highway to the future', in Bechtel (USA) website, accessible at: http://www.bechtel.com/projects/kosovo-motorway/

[140] Kosovo Progress Report, 2013, *op. cit.*, at 40.

[141] Article 27(2) of the Kosovo Law on EIA, provides for 'Information and Public Participation' as follows: 'Concerned parties and the public shall participate in all phases of the EIA procedure, including

related Kosovo highway project, namely, Route 6 between Skopje and Pristina, has noted in a section entitled: 'Lessons Learned from the Route 7 Construction' that before the signing of the contract for "Route 7" construction, there was insufficient public discussion related to that (Route 7) project, nor had there been any feasibility study had been conducted.[142]

Local (Serbian) politicians have also highlighted the lack of meaningful consultation with their representative communities over the routeing decisions taken by central Kosovo government ministries involved. They present this issue as yet another example of the discrimination experienced by their minority community at the hands of the (Albanian) majority community-led central government. Within this context, it is at least arguable that the proper implementation of applicable EIA requirements under

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decision taken process.' More localized EIA exercises will apparently now be conducted immediately prior to each individual section of the highway project that will be worked on, according to a Kosovo Ministry of Environment and Spatial Planning notification. Ministry of Environment and Spatial Planning, Environmental Decision Approval for the project 'Construction of the Road 7 (highway) Vermice-Merdar', Nr. 672/10/1 – ZSP-116/10, dated: 23.04.2010. (Unofficial translation provided by Nadia Jurzac, OSCE Kosovo, Property Section.) However, this did not prevent the dislocating effects experienced by the Serbian community most directly affected by the initial routing decisions for the highway section passing very close to their homes and in some cases, dividing their farm lands.

[142] See: 'Route 6 Highway: Prishtina-Skopje', Study/report by the Institute for Development Research (RIINVEST) for the Kosovo Foundation for Open Society (KFOS), Kosovo: Pristina (2015) 39pp, at 13. (Originally written in Albanian) Accessible at: http://kfos.org/wp-content/uploads/2015/06/8.-AUTO-ROUTE-6-HIGHWAY-PRISHTINA-SKOPE.pdf

Kosovo law would have ensured that both minority (Serbian) and indeed, even majority (Albanian) communities whose properties also border the highway project site, were all subject to prior consultation and participation in the decision-making process on the proposed highway route. Thus, achieving environmental justice for all the affected communities, especially on a non-discriminatory basis between the majority and minority ethnic communities, would have gone a long way towards reducing the rising communal tensions over this project. Moreover, it would have allowed all the affected communities to focus on the economic development opportunities presented by the highway, a fact that all the communities involved - majority and minority - accept as a positive outcome of this infrastructure project. This was therefore a lost early opportunity for social reconciliation coalescing around a well-defined economic development goal and facilitated by the application of non-discriminatory principles providing for procedural environmental rights.

From the above case studies/examples, we can surmise at least two possible justifications for the inclusion of environmental justice as a further aspect or element in the overall conceptual make-up of transitional justice generally, such that the promotion of transitional environmental justice becomes a legitimate objective in and of itself, to ensure not merely the achievement of transitional justice in the longer term but also on an environmentally sustainable basis. These justifications for engaging with the notional premise of transitional environmental justice are as follows: First, as a means for the re-conceptualizing or re-casting otherwise intractable social/ethnic conflicts in a transitional society as 'environmental' disputes that are more susceptible to reconciliation on the basis of the application of environmental principles, notably

procedural environmental rights, in a neutral and non-discriminatory fashion. Second, as a means of tempering the excesses of full-blown efforts towards economic reconstruction/ development that threaten to re-trench and ultimately renew the deep social/ethnic divisions that may still persist within a particular transitional society.

V. Pathways to Environmental Justice within the Kosovo Constitutional and Legal Framework

The specific provision for environmental principles and procedural rights for achieving environmental justice will now be highlighted and assessed within the current Kosovo constitutional and legal framework. To begin with, as noted above, Articles 22 and 53 of the 2008 Kosovo Constitution provide for the direct application of ECHR provisions and moreover, as these rights and freedoms are interpreted by European Court of Human Rights (ECtHR) jurisprudence. Article 22 on the 'Direct Applicability of International Agreements and Instruments' provides as follows: 'Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions.' These include, *inter alia*, (1) Universal Declaration of Human Rights; and the (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.

Article 53 on the 'Interpretation of Human Rights Provisions' then establishes that: 'Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.'

Significantly, this provision goes much further than what is provided in the Ahtisaari Plan itself, which in Article 2.1 on 'Human Rights and Fundamental Freedoms' simply provides that Kosovo shall promote, protect and respect the highest level of internationally recognized human rights and fundamental freedoms, including, *inter alia*, the ECHR but without any specific allusion to the progressive developments in the interpretation of the Conventional rights and freedoms by Strasbourg Court in the intervening years since its establishment. Article 52 of the Kosovo Constitution on 'Responsibility for the Environment' then provides for responsibility for nature and biodiversity protection, as well as the first and second pillars of 1998 Aarhus Convention,[143] namely, the right to be informed and participate on environmental issues, and the Environmental Impact Assessment (EIA) principle.

Apart from the substantive provision of these important environmental principles and the procedural environmental rights derived from them, an equally significant structural aspect of the still fledgling Kosovo legal system is the presence of international judges in the Kosovo Constitutional Court to assist in the adjudication of legal issues that raise questions of interpretation of the ECHR in relation to Kosovo laws. The appointment and role of these international judges is provided by Kosovo Constitution as well as the Ahtisaari Plan. Article 152 of the Constitution on the

[143] UN Economic Commission for Europe (UN-ECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted: 25 June 1998, entered into force: 30 October, 2001. Currently, 44 States Parties. Serbia acceded to this Convention on 31 July, 2009. Text accessible at:

http://www.unece.org/env/pp/treatytext.htm

'Temporary Composition of the Constitutional Court' provides that: 'Until the end of the international supervision of the implementation of the Comprehensive Proposal for Kosovo Status Settlement, dated 26 March 2007, the Constitutional Court shall be composed as follows: 1. Six (6) out of nine (9) judges shall be appointed by the President of the Republic of Kosovo on the proposal of the Assembly. … 4. Three (3) international judges shall be appointed by the International Civilian Representative, upon consultation with the President of the European Court of Human Rights. The three (3) international judges shall not be citizens of Kosovo or any neighboring country.'

The presence of EULEX-appointed judges and prosecutors within the Kosovo jurisdiction is also established under a Kosovo Assembly Law.[144] Article 1 of this Law 'regulates the integration and jurisdiction of the EULEX judges and prosecutors in the judicial and prosecutorial system of the Republic of Kosovo.' On the basis of this legislation, Spernbauer notes that, 'European judges and prosecutors become an integral part of the Kosovo judicial and prosecutorial system at the level of the Supreme Court and the district courts with executive authority in both civil and criminal law where they either exercise compulsory or optional jurisdiction.'[145] Exceptionally, EULEX district court judges can also have jurisdiction for cases dealt with at municipal court level if the President of the Assembly of EULEX judges decides to assign such a case to EULEX in accordance with the modalities on case selection and case

[144] 'Law on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo', Law No. 03/L-053, *available at* www.eulex-kosovo.eu.

[145] Spernbauer (2010) *op. cit.*, at 791.

allocation.[146] This institutional development may have positive implications for the possible application of European environmental standards within Kosovo, whether these are derived from the ECtHR jurisprudence already alluded to and elaborated below, or relevant EU environmental law principles and standards that may be regarded as being part of the Community/Union *acquis* that the Kosovo government has agreed to strive towards under the EU Pre-Accession process.

The relevant provisions of the ECHR for environmental issues are as follows: ECHR Article 2 on the right to life; Article 8 on the right to respect for private and family life; and Article 1 of Protocol I on protection of property, the right to life and a home; and possessions, respectively. Of these provisions, the most significant is Article 8, which provides four categories of rights, namely, privacy, family life, home and correspondence, and has been interpreted according to relevant ECtHR jurisprudence to include prevention from (serious) environmental interferences.[147] As the Grand Chamber of the ECtHR observed in the *Hatton v the UK* case,[148] involving alleged noise pollution from night-time flights over Heathrow airport, there is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other forms of pollution, an issue may arise under Article 8. Previously, in *Powell and Rayner v the UK*, where the applicants had complained

[146] See Article 3.4 and 5 of Law No.03/L-053.

[147] Loukis Loucaides, 'Environmental Protection through the Jurisprudence of the European Convention on Human Rights', *British Year Book of International Law (BYbIL)*, Vol.75, 2004, Oxford: OUP (2005) 249-267.

[148] *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, ECHR 2003-VIII (8.7.03) at para.96.

about disturbance from daytime aircraft noise, the Court held that Article 8 was relevant, since 'the quality of [each] applicant's private life and the scope for enjoying the amenities of his home [had] been adversely affected by the noise generated by aircraft using Heathrow Airport.'[149] Similarly, in *López Ostra v Spain* the Court held that Article 8 could include a right to protection from severe environmental pollution, since such a problem might 'affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health'.[150] In *Guerra and Others v Italy*, which, like *López Ostra,* concerned environmental pollution, the Court observed that '[the] direct effect of the toxic emissions on the applicants' right to respect for their private and family life means that Article 8 is applicable.'[151] One of the more significant cases in this line of ECtHR Judgments is *Fadeyeva v. Russia*,[152] where the Court accepted the applicant's claim that her prolonged exposure to excessive pollution levels from a nearby steel plant had 'adversely affected the quality of life at her home' and therefore, that 'the actual detriment to the applicant's health and well-being reached a level sufficient to bring it within the scope of Article 8 of the Convention.'[153]

[149] ECtHR Judgment of 21 February 1990, Series A no. 172, p. 18, at para.40.

[150] ECtHR Judgment of 9 December 1994, Series A no. 303-C, pp. 54-55, para.51.

[151] ECtHR Judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 227, at para.57.

[152] *Fadeyeva v. Russia*, European Court of Human Rights, App. No.55723/00, Judgment of 9 June 2005, published on 30 November, 2005.

[153] *Fadeyeva v. Russia, ECHR* (2005) *ibid.*, at para.88.

These (and other) ECtHR judgments have expanded the application of Article 8 to cover environmental interferences that can cause serious health problems.[154] Moreover, it is possible to suggest that an ECtHR finding of a breach of the legal standard of protection under Article 8 is at least partly based on whether the applicant had been able to inform themselves sufficiently about the environmental health risks involved, participate in the decision-making process, and challenge any decision on the legal authorization of the hazardous activity concerned. This was the case in *Taşkin v. Turkey,* where the Strasbourg court considered that, by failing to take into account the results of a public consultation and environmental impact assessment (EIA) exercise which had been previously endorsed by a Turkish court,[155] the Turkish authorities had 'deprived the procedural guarantees available to the applicants of any useful effect,'[156] when they secretly authorised the continued operation of a gold mine. Turkey had thus failed to discharge its obligation under Article 8 of the Convention to guarantee the applicants' right to respect for their private and family life.

This line of ECHR case law bears close resemblance to the development of procedural environmental rights now well-established within international and regional

[154] This line of ECtHR Judgments has been confirmed by, *inter alia,* the following cases: *Giacomelli v Italy*, Judgment of 2 November, 2006. Case No.59909/00; *Tatar v Romania*, Judgment of 27 January, 2009. Application no.67021/01; and *Băcilă v. Romania*, Judgment of 30 March, 2010. Application no.19234/04. All accessible at: <http://www.echr.coe.int>

[155] *Taskin and Others v. Turkey*, ECtHR Judgment, 10 November 2004. Application no. 46117/99) paras. 118-125.

[156] *Ibid.*, at para.125.

(European) environmental laws. Boyle regards the *Taşkin v. Turkey* decision as not only demonstrating the Court's willingness to address the procedural aspects of environmental decision-making processes in human rights terms, but also going so far as to 'translate into European human rights law the procedural requirements set out in Principle 10 of the (1992) Rio Declaration (on Environment and Development) and elaborated in European environmental treaty law, despite the fact that Turkey is not a party to the Aarhus Convention.'[157] Principle 10 of the Rio Declaration provides that '(E)nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level.' It then goes on to highlight three aspects of this principle, beginning with access to environmental information, especially in respect of hazardous activities; moving on to opportunities for public participation; and finally, effective access to judicial or administrative proceedings to seek redress for any failings in respect of the first two aspects. All these elements are expanded in the 1998 Aarhus Convention (on access to information, public participation in decision-making and access to justice in environmental matters),[158] generally regarded as the most advanced international treaty on public participation in environmental issues so far. These procedural environmental rights have also become part of EU (environmental) law. They are clearly significant *procedural* requirements for the achievement of 'environmental justice'. At a practical level, the implementation of these principles is

[157] Alan Boyle, 'Human Rights or Environmental Rights? A Reassessment', *Fordham Environmental Law Review*, Vol. XVIII (2007) 471-511, at 497.

[158] Done at Aarhus, Denmark, 25 June 1998, entered into force: October, 2001. Currently: 47 parties. Accessible at: http://www.unece.org/env/pp/introduction.html

therefore of the utmost importance to ensure a local community not only has a voice but is confident that its voice will be heard.

These international environmental principles and their derived procedural rights are referred to in Article 52 of the Kosovo Constitution. They are also elaborated by further and more specific environmentally-related laws promulgated by the Kosovo Assembly, such as the 2009 Law on Environmental Protection,[159] and the 2009 Law on Environmental Impact Assessment.[160] Despite the progressive inclusion of these environmental principles and rights within the Kosovo constitution and laws, the overall domestic (Kosovo) institutional governance for the implementation of these environmental laws still needs to be improved, as is notable from the Vermice-Merdar highway project case study. Under the sub-heading of 'Transport Infrastructure', para.25 of Annex I provides that the construction of a new or widened two-lane road of more than 5km requires an EIA under Article 5, para.1 of the 2009 Law on EIA. However, the initial Kosovo government decision-making process to undertake this project did not include any environmental considerations as the Environment (and Spatial Planning) ministry was not part of this process. Only the Transport and Finance ministries were involved at this stage. This is despite that fact that according to the Article 7 of the 2009 EIA Law, an applicant should not be licensed for construction and

[159] Law No.03/L-025, approved by the Kosovo Assembly on 26.02. 2009, and promulgated by the Decree of the President of the Republic of Kosovo No.DL-007-2009, on 19.03.2009.

[160] Law No. 03/L-024, approved by the Kosovo Assembly on 26.02. 2009 and promulgated by the Decree of the President of the Republic of Kosovo No. DL-006-2009, on 19.03.2009.

may not commence of a planned project without having completed the EIA procedure and obtained the Environmental Consent from the relevant Ministry.

Following on from the above point and building on the fact noted above that under EULEX supervision, the Kosovo authorities are engaged in a long-term exercise to harmonize their legal standards on a range of issues, notably on environmental protection, we will also focus on specific EU law developments that afford opportunities for progress on environmental justice issues within Kosovo. These include the implementation of Aarhus Convention rights within EU Directives, as well as jurisprudence of the European Court of Justice (ECJ) and national (EU Member state) courts on the potential horizontal direct effect of Directives. Although these possible legal pathways for securing environmental justice are currently unavailable within the Kosovo jurisdiction, their potential application will be canvassed here on the assumption that the EULEX 'standards beyond status' strategy for Kosovo (noted above) will ultimately prove to be successful and result in the progressive integration of Kosovo within the EU policy and legal framework, if not quite EU membership in the foreseeable future. The following EU legislation forms the necessary standards of environmental justice that Kosovo will need to achieve in order to fulfil its Pre-Accession candidate status for possible future EU membership. First, the EC/U Decision on application of the Aarhus Convention was adopted on 17 February 2005.[161] Then in 2003, two Directives concerning the first and second 'pillars' of the Aarhus Convention – access to environmental information and public participation - were

[161] See Decision 2005/370/EC.

adopted.[162] Both these Directives also contain provisions on access to justice. Provisions for public participation are also found in a number of other Directives, notably, the 2001 Strategic Environment Assessment Directive, and the 2000 Water Framework Directive. Also, on 24 October 2003, the Commission presented a Proposal for a Directive on access to justice in environmental matters.[163]

Finally, ECJ jurisprudence has developed the doctrine of 'direct effect' of EC/U Treaty provisions and EC/U legislation, which is relevant to the application of these procedural environmental rights. When these EC/U measures are deemed precise, unconditional, and with any time limits for their implementation by the Member States having passed, they may be held to have legal effects such that individuals can rely directly on these provisions against public authorities within national courts. As Directives are binding only as to the result to be achieved, it was initially thought that they could not be relied upon directly by a private party against another private person. According to previous ECJ doctrine, EC/U Directives do *not* allow for legal effects against third-parties, besides the public authorities of the Member state. In the absence of domestic (Member state) implementing measures, Directives do not entail obligations for private legal individuals such as business corporations. They only have 'vertical' but not 'horizontal' direct effect and are legally effective only against public authorities. Thus, the question of the 'horizontal' direct effect of a Directive under EU law against another private individual is problematic even for EU Member States, let

[162] Directive 2003/4/EC of 28 January 2003, and Directive 2003/35/EC of 26 May 2003, respectively.

[163] COM(2003) 624. Accessible at: http://ec.europa.eu/environment/aarhus/

alone entities with only Pre-Accession candidate status such as Kosovo. However, in *Marshall v Southampton and South West Hampshire Area Health Authority*, it was held that art 5(1) of the Equal Treatment Directive (76/207/EEC) was directly effective, despite the Health Authority's objection that it was acting as an employer and not a 'public authority' when it acted against her. The ECJ held that although Directives have only 'vertical' rather than 'horizontal' direct effect, a Directive may nevertheless be relied on against the state 'regardless of the capacity in which the latter is acting, whether employer or public authority.'[164]

Both the ECJ and certain EU Member state domestic courts have interpreted the term 'public authority' broadly. Moreover, with so much that was previously in the public sector now having been privatised, some privatised utilities may still be considered to be part, or 'emanations', of the state and therefore falling within the definition of 'public authority' for the purposes of the application of an EC/U Directive. Emanations of the state are bodies which provide 'public services', and in doing so are able to exercise 'special powers' not usually available to private bodies, and which are still under the 'control' of the state. The seminal case of *Foster v British Gas* before the ECJ raised the possibility that privatized companies fulfilling public service functions such as utility (electricity, gas, and water) as well as waste treatment and disposal companies may be subject to EU law,[165] including EC/U environmental law Directives. In the case of *Griffin and others v South West Water Services Ltd. (SWW)*, argued before

[164] Case 152/84. [1986] *European Court Reports (ECR)* 723.

[165] *Foster v British Gas* [1990] ECR I-3313.

the English High Court,[166] it was held that SWW - a privatized water company - could be bound by EC employment directives, although the relevant provisions in the specific Directive concerned were ultimately not considered to be sufficiently clear, precise and unconditional to be relied upon for the purpose of direct effect.[167] According to Haigh, the High Court's finding that privatized water companies may be bound by the horizontal direct effect of employment Directives could equally well apply to environmental Directives.[168] As Kosovo is obliged to strive to meet the relevant EU environmental standards under the Pre-Accession Instrument (IPA), the possibility arises that once these EU environmental standards are promulgated within Kosovo laws, they too will be interpreted (for example, by EULEX appointed judges and/or prosecutors) as being applicable against any privatized entities permitted to run these services within Kosovo.

From the above discussion of the overall legal framework within Kosovo for the application of relevant environmental principles and rights, we can outline at least two separate legal avenues or techniques for ensuring the possible implementation of these rights. These are as follows:

1. The extended interpretation placed on ECHR Article 8 rights against serious environmental interferences by the ECtHR case law jurisprudence – both of these being

[166] [1995] IRLR 15.

[167] See paras.140-141 of *Griffin, op. cit.*

[168] See Nigel Haigh, *Manual of Environmental Policy: The EU and Britain*, Longman, loose-leaf volume.

explicitly referred to in the Kosovo constitution and relevant Kosovo Assembly legislation as being applicable in Kosovo jurisdiction;

2. The provision of procedural environmental rights under the 1998 Aarhus Convention and their incorporation into the European Union legal regime – a legal system that the Kosovo government will in turn need to import into its domestic law through its Pre-Accession Agreement with the EU. Following this, the potential direct and even 'horizontal' direct effect of EU Directives, according to ECJ case law jurisprudence, should also exert a normative pull on Kosovo public institutions, including privatized utilities, as Kosovo strives to meet its EU Pre-Accession candidate requirements.

Conclusions

Transitional environmental justice can play at least two important roles within the overall drive towards securing justice within a post-conflict society such as Kosovo. First, it can act as a means for conceptually recasting otherwise inextricable social conflicts in more nuanced terms, such that these underlying conflicts can be more practically mediated and eventually reconciled, even if never fully resolved. Second, as economic development generally, and socio-economic reconstruction in particular, is now seen as a vital element for the rejuvenation of societies in transition and thus increasingly included within the conceptualization of 'transitional justice', 'transitional environmental justice' can play a significant role in ensuring that an otherwise unremitting and unmitigated focus on economic reconstruction does not result in uneven levels of development that either entrench old ethnic/social divisions or create new socio-economic ones within already fragile transitional societies.

The potential for transitional environmental justice to become an essential element of the achievement of overall transitional justice within Kosovo has arguably been enhanced by the international and European institutional frameworks currently playing significant roles in Kosovo's governance. Moreover, there is evidence of the progressive integration of environmental justice principles and mechanisms within the Kosovo legal system itself. However, despite creating ostensible legal pathways for environmental justice, the capacity and especially the political will of Kosovo's domestic institutions to continue making progressive developments in this regard remains uncertain in the face of the competing socio-economic reconstruction imperative for this transitional polity.