

Uncharted Transition: the “Integration” of the Justice System in Kosovo

A briefing paper



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Cover photo: Bridge on the Ibar/Ibri river connecting North and South Mitrović/Kosovska Mitrovica, under refurbishment

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1. Preliminary considerations

This briefing paper follows a visit of a delegation of the International Commission of Jurists (ICJ) in Kosovo* from 1 to 4 November 2015, to make a first assessment of the process of transition of the judicial system in Kosovo from the Serbian to the Kosovo legal system. It preliminarily identifies key issues for access to justice and the protection of human rights through the justice system, which need to be addressed and monitored during the transition process.

The ICJ mission team was composed of Ketil Lund (ICJ Commissioner and former Supreme Court Justice of Norway), Róisín Pillay (Director of the ICJ Europe Programme), and Massimo Frigo (Legal Adviser of the ICJ Europe Programme). Massimo Moratti, a human rights consultant, also accompanied the mission and Emmylou Boddi from the Europe Programme assisted in its preparation. The ICJ held meetings with judges and lawyers, in Mitrovicë/Kosovska Mitrovica North, and, in Prishtina/Priština, with the Strengthening Department of EULEX; the President of the Kosovo Judicial Council, the Kosovo Bar Association, the Rule of Law Branch of OSCE, and representatives of civil society.

Given the specific and limited focus of this briefing paper, it does not present an exhaustive or detailed final analysis, either of the judicial and legal systems of Kosovo or the 'integration' (see below) of the judicial system serving the mainly Serb community in North Kosovo into the legal system of Kosovo.

1.1. Defining 'Kosovo'

Before its unilateral declaration of independence of 17 February 2008, Kosovo was one of the two Autonomous Provinces of the Republic of Serbia, more precisely the Autonomous Province of Kosovo and Metohija. It is currently considered as such by the Republic of Serbia and some other States.¹ Since the declaration of independence, the new authorities of Kosovo affirmed that the Republic of Kosovo is an independent State and, according to the Kosovo's Ministry of Foreign Affairs, 108 countries² across the world have recognized it as such.

This report will not aim to answer the controversial question of the international status of Kosovo. A brief introduction of the question is however necessary to understand the implications for the judicial system of its transitional process.

UN Security Council Resolution 1244(1999), approved under Chapter VII of the UN Charter,³ tasked the UN Secretary-General to establish an international civil presence in Kosovo (UNMIK) to "provide an interim administration for Kosovo".⁴ According to the resolution, UNMIK has to take "full account of annex 2 and of the Rambouillet accords", as should the political process to provide self-government for Kosovo.⁵ The Rambouillet Accords were a treaty solution proposed to avoid the conflict between the Kosovo Albanians and Serbia. They were not signed by then Serbian President Slobodan Milošević,⁶ and from an international law point of view, in the absence of one of the two counterparts' signatures, they are therefore not a treaty. They however assume a particular importance for the actions of the international presence in Kosovo via the international legal force of Resolution 1244.

* In accordance with the international approach, the designation of Kosovo is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

¹ The preamble to the 2006 Constitution of the Republic of Serbia reads that "the Province of Kosovo and Metohija is an integral part of the territory of Serbia, that it has the status of a substantial autonomy within the sovereign state of Serbia and that from such status of the Province of Kosovo and Metohija follow constitutional obligations of all state bodies to uphold and protect the state interests of Serbia in Kosovo and Metohija in all internal and foreign political relations." For example, five EU Member States do not recognize Kosovo: Spain, Slovakia, Greece, Cyprus and Romania.

² According to the Kosovo's Ministry of Foreign Affairs, <http://www.mfa-ks.net/?page=2,33>.

³ A resolution under Chapter VII of the UN Charter has binding character internationally and overriding power on other provisions of international law not of a peremptory character (article 103 UN Charter).

⁴ UN Security Council Resolution 1244(1999), *op. cit.*

⁵ *Ibid.*, Annex I, Annex 2(8).

⁶ *Rambouillet Accords—Interim Agreement for Peace and Self-Government in Kosovo*, 18 March 1999, available in UN Doc. S/1999/648, 7 June 1999, Annex, Preamble, 4 and 6: These accords recalled "the commitment of the international community to the sovereign and territorial integrity of the Federal Republic of Yugoslavia," while "[r]ecognizing the need for democratic self-governance in Kosovo, including full participation of the members of all national communities in political decision-making."

Resolution 1244, currently in force, effectively put the province of Kosovo under international protection. The Republic of Serbia does not exercise *de facto* sovereignty on the territory. The International Court of Justice has pointed out that the object and purpose of the resolution is "to establish a temporary, exceptional legal régime which, save to the extent that it expressly preserved it, superseded the Serbian legal order and which aimed at the stabilization of Kosovo, and that it was designed to do so on an interim basis."⁷

In 2007, after the failure of the UN-led negotiations on the status of Kosovo, the Special Envoy of the UN Secretary-General on the future status process for Kosovo, Martti Ahtisaari, presented a Comprehensive Proposal for the Kosovo Status Settlement ('the Ahtisaari Plan') to the UN Security Council, while coming "to the conclusion that the only viable option for Kosovo [was] independence, to be supervised for an initial period by the international community."⁸ In the absence of any acceptance by the Republic of Serbia or by the UN Security Council, the Ahtisaari plan is not legally binding on States as a general matter under international law. However, in Kosovo's unilateral declaration of independence,⁹ the drafters solemnly stated that "Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan."¹⁰

In 2010, the International Court of Justice did not address the question of the status of Kosovo, limiting itself to rule, in accordance with a strict reading of the General Assembly's request, that the Declaration of Independence of Kosovo had not breached international law. The Court of Justice stressed that it did not address "the legal consequences of that declaration . . . whether or not Kosovo has achieved statehood [or] the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State."¹¹

In its Advisory Opinion, the International Court of Justice ruled that the Declaration did not violate general international law,¹² nor Security Council Resolution 1244(1999),¹³ whose purpose is the establishment of an interim regime and not a permanent institutional



Signal on works financed by the European Union near the Ibar/Ibri bridge, Mitrovicë/Kosovska Mitrovica

⁷ *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, International Court of Justice (ICJ), Advisory Opinion, 22 July 2010, ICJ Reports 2010, p. 403, para. 100 (*ICJ Advisory Opinion*).

⁸ Report of the Special Envoy of the Secretary-General on Kosovo's future status, UN Doc. S/2007/168, 26 March 2007, para. 5.

⁹ The International Court of Justice provided a detailed description of the way in which the Declaration has been adopted: "The declaration of independence was adopted at a meeting held on 17 February 2008 by 109 out of the 120 members of the Assembly of Kosovo, including the Prime Minister of Kosovo and by the President of Kosovo (who was not a member of the Assembly). The ten members of the Assembly representing the Kosovo Serb community and one member representing the Kosovo Gorani community decided not to attend this meeting. The declaration was written down on two sheets of papyrus and read out, voted upon and then signed by all representatives present. It was not transmitted to the Special Representative of the Secretary-General and was not published in the Official Gazette of the Provisional Institutions of Self-Government of Kosovo," *ICJ Advisory Opinion, op. cit.*, para. 76.

¹⁰ Kosovo Declaration of Independence, 17 February 2007, para. 12.

¹¹ *ICJ Advisory Opinion, op. cit.*, para. 51. The Court further stressed that it did not rule "whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act—such as a unilateral declaration of independence—not to be in violation of international law without necessarily constituting the exercise of a right conferred by it." *Ibid.*, para. 56.

¹² *ICJ Advisory Opinion, op. cit.*, para. 84.

¹³ *Ibid.*, para. 119.



View of the Ibar/Ibri with North Mitrovicë/Kosovska Mitrovica

framework¹⁴ and does "not contain any provision dealing with the final status of Kosovo or with the conditions for its achievement."¹⁵ Finally, the declaration did not violate the interim administration's Constitutional Framework under Resolution 1244 because the declaration "was not issued by the Provisional Institutions of Self-Government, nor was it an act intended to take effect, or actually taking effect, within the legal order in which those Provisional Institutions operated."¹⁶

In this paper, references to "Kosovo", are therefore without prejudice to positions on its status or statehood. In the framework of the dialogue between the Serbia and Kosovo authorities under the aegis of the European Union, the term "Kosovo" is used with the caveat that it "is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence."¹⁷ This report adopts this approach.

1.2. Defining Kosovo's transition

In any judicial reform process in a situation of transition, the direction of the transition should ideally be clear. In the case of Kosovo, however, the uncertainties concerning the question of its status reflect deep differences as to the official goals of its transition. For the new authorities of Kosovo, the transition is towards a fully-fledged independent State, while, at present, for the Serbian Government, the reform should be towards a strong self-governance of part of Serbia's territory.

These competing official narratives, which have not been fully disentangled in the last seventeen years, have implications for various parties' views concerning the legal status of the Kosovo Constitution, of the Declaration of Independence, for their references to the Ahtisaari plan, and for the full independence of Kosovo's judicial system, at least *de jure*, from Belgrade. However, the situation on the ground, at least as regards the judicial system, shows a gradual transition towards an independent and sovereign judicial system in Kosovo.

For the purposes of analysing the challenges this transition poses for access to justice, in particular for the Serbian minority community in the North of Kosovo, this paper will work on the assumption of the legal validity of all the Kosovar internal laws, whatever Kosovo's status under international law. This assumption should not be understood to imply any conclusion by the ICJ about the actual legal status of Kosovo or the legislation; this approach is adopted in this report merely to assist in the analysis of the implications of proposed judicial reforms for the rule of law. The analysis and preliminary conclusions set out in this report would not in any event substantially differ were the same or similar legal framework and measures to be in place in a scenario where Kosovo was finally determined to be an autonomous part of Serbia.

¹⁴ *Ibid.*, para. 100.

¹⁵ *Ibid.*, para. 114.

¹⁶ *Ibid.*, para. 121.

¹⁷ EU, *Kosovo Progress Report*, EU Doc. SWD(2015) 215 final, 10 November 2015, p. 1.

2. Outline of the legal system in Kosovo

According to the Kosovo Constitution, the civil law legal system in Kosovo is to be based on the principles of separation of powers and of checks and balances.¹⁸ It recognizes the multi-ethnicity of Kosovo society and holds the respect for the rule of law as a core value of its legislative, executive and judicial institutions.¹⁹ The exercise of public authority is to be based on the principle of equality and respect for international human rights law.²⁰

The executive power is to be composed of the President, the Prime Minister and Ministers. The President is to be the head of State and represents the country internally and externally.²¹ The Prime Minister, his or her Deputy and Ministers are to form the Government.²² The Assembly is to exercise legislative power.²³ It is to be directly elected²⁴ and to be composed of 120 deputies, ten of its seats being reserved for representatives of the Serb community, and ten for representatives of other minority communities.²⁵ The judicial power, exercised by the courts, is to be independent.²⁶

Kosovo has a population estimated at 1,804,944 people, according to a 2011 census.²⁷ The European Centre for Minority Issues estimates, on the basis of several OSCE reports, that the Serb population in Kosovo amounts to 146,128 people, i.e. 7.8 percent of the overall population.²⁸ Other ethnic communities present in Kosovo, apart from the majority Albanian, include Bosniak, Roma, Ashkali, Egyptian, Turkish, Gorani, Montenegrin and Croat.²⁹

Importantly, the Constitution provides that both Albanian and Serbian are official languages of the Republic of Kosovo with equal status, while "Turkish, Bosnian and Roma languages have the status of official languages at the municipal level or will be in official use at all levels as provided by law."³⁰

The Kosovo Constitution provides for certain specific "Community" rights for members of national, ethnic, linguistic or religious groups, in addition to the individual human rights more generally enjoyed by each member of the group.³¹ The Constitution states that the Republic of Kosovo must "respect the standards set forth in the Council of Europe Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages."³² The Constitution enshrines the right of Communities to use "their language and alphabet in their relations with the municipal authorities or local offices of central authorities in areas where they represent a sufficient share of the population in accordance with the law. The costs incurred by the use of an interpreter or a translator shall be borne by the competent authorities."³³ Furthermore, "Communities and their members shall be entitled to equitable representation in employment in public bodies and publicly owned enterprises at all levels, including in particular in the police service in areas inhabited by the respective Community, while respecting the rules concerning competence and integrity that govern public administration."³⁴

¹⁸ Constitution of Kosovo, articles 1.1 and 4.1.

¹⁹ *Ibid.*, article 3.1.

²⁰ *Ibid.*, article 3.2.

²¹ *Ibid.*, article 83.

²² *Ibid.*, article 92.

²³ *Ibid.*, article 4.2.

²⁴ *Ibid.*, article 63.

²⁵ *Ibid.*, article 64.

²⁶ *Ibid.*, article 4.5.

²⁷ The 2011 census was boycotted by the Serb communities in the North of Kosovo so its findings cannot be considered as conclusive.

²⁸ ECMI, *Community Profile: Serb Community*, available at <http://www.ecmiKosovo.org/wp-content/uploads/2015/05/Serb-community1.pdf>.

²⁹ See ECMI website, at http://www.ecmiKosovo.org/?page_id=6441.

³⁰ Constitution of Kosovo, *op. cit.*, article 5.

³¹ Constitution of Kosovo, *op. cit.*, article 57. It should be stressed that, under the same article (para. 2): "Every member of a community shall have the right to freely choose to be treated or not to be treated as such and no discrimination shall result from this choice or from the exercise of the rights that are connected to that choice."

³² Constitution of Kosovo, *op. cit.*, article 58.2.

³³ *Ibid.*, article 59.6.

³⁴ *Ibid.*, article 61.

These constitutional provisions essentially reproduce text proposed by the Ahtisaari Plan.³⁵ The Rambouillet Accords also affirmed the right of national community members to "use their languages and alphabets".³⁶

2.1. Hierarchy of sources of law

The Kosovo Constitution states that it is to be the supreme law of the land. It provides that laws and other legal acts must be in accordance with the Constitution.³⁷ International agreements are to automatically become part of the internal legal system upon ratification and to be directly applicable.³⁸ According to the Constitution, both ratified international agreements and legally binding norms of international law have superiority over laws.³⁹ In this regard, the legal system contemplated by the Kosovo Constitution is monist.⁴⁰

Kosovo's Constitution explicitly recognizes the human rights and the fundamental freedoms guaranteed by the main international human rights treaties and declarations and it guarantees their direct application as well as their priority over internal laws in case of conflict.⁴¹ Among these are the *Universal Declaration of Human Rights* (UDHR), the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and its Protocols (ECHR), the *International Covenant on Civil and Political Rights* and its Protocols (ICCPR), the *Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) and the *Council of Europe Framework Convention for the Protection of National Minorities* (FCNM), which are directly relevant to this paper.⁴²

2.2. International actors

International actors play a particularly prominent role in Kosovo, operating under the framework of UN Security Council Resolution 1244.

The initial configuration of the international presence in Kosovo encompassed the NATO military presence (KFOR) to ensure security, and an international civilian authority under the aegis of the UN Mission in Kosovo (UNMIK), headed by the UN Special Representative of the Secretary-General in Kosovo. Under UNMIK leadership, UNHCR was in charge of humanitarian assistance (pillar I); the UN Mission of civil administration (pillar II), the Organization for Security and Co-operation in Europe (OSCE) of democratization and institution-building (pillar III); and the European Union (EU) of reconstruction and economic development. Since June 2000, the humanitarian task in pillar I has been phased out and its priority became rule of law building.

After the Declaration of Independence, UN Security Council Presidential Statement No. 44 of 26 November 2008⁴³ welcoming the Report of the UN Secretary General of

³⁵ *Comprehensive Proposal for the Kosovo Status Settlement*, Addendum to the Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2007/168/Add. 1, 26 March 2007 ('Ahtisaari Plan'), article 1.1: "Kosovo shall be a multi-ethnic society, which shall govern itself democratically, and with full respect for the rule of law, through its legislative, executive and judicial institutions."; Article 1.6: "[t]he official languages of Kosovo shall be Albanian and Serbian. The Turkish, Bosnian and Roma languages shall have the status of official languages at the municipal level or will be in official use in accordance with the law."; Article 3.2: "Kosovo shall guarantee the protection of the national or ethnic, cultural, linguistic and religious identity of all Communities and their members. Kosovo shall also establish the constitutional, legal and institutional mechanisms necessary for the promotion and protection of the rights of all members of Communities and for their representation and effective participation in political and decision-making processes."; Article 3.1(e) and (f) affirms that members of national communities have the right, individually or in community, to "use their language and alphabet freely in private and in public [and to use] their language and alphabet in their relations with the municipal authorities or local offices of central authorities in areas where they represent a sufficient share of the population in accordance with the law. The costs incurred by the use of an interpreter or a translator shall be borne by the competent authorities."

³⁶ *Rambouillet Accords*, *op. cit.*, chapter 1; Constitution, article VII (National Communities), para. 5(c).

³⁷ Constitution of Kosovo, *op. cit.*, article 16.

³⁸ *Ibid.*, article 19.1.

³⁹ *Ibid.*, article 19.2.

⁴⁰ *Ibid.*, article 19: "...They are directly applied except for cases when they are not self-applicable and the application requires the promulgation of a law..."

⁴¹ *Ibid.*, article 22.

⁴² Other treaties expressly incorporated by article 22 Constitution are *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW); the *Convention on the Rights of the Child* (CRC); and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

⁴³ Statement by the President of the Security Council, UN Doc. S/PRST/2008/44, 26 November 2008.



K-FOR vehicles patrolling the Southern side of the Ibar/Ibri, Mitrovicë/Kosovska Mitrovica

24 November 2008⁴⁴ gave competence in rule of law building in Kosovo to an EU-led mission (EULEX). The tasks of UNMIK remain promotion of security, stability and respect of human rights and OSCE has the task of building and monitoring the institutions of Kosovo and supporting Kosovo's minority communities.⁴⁵ KFOR is still present in Kosovo to ensure security.

EULEX has "the general aim of supporting Kosovo institutions, judicial authorities, and law enforcement agencies in developing an effective judiciary based on the rule of law and free from political interference."⁴⁶ Furthermore, *Kosovo Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo* gives EULEX judges and prosecutors jurisdiction over serious criminal offences and some civil cases to be tried in mixed panels of national and international judges with a majority of international judges. Since the reconfiguration and extension of the EULEX mandate in June 2014, the mixed panels require only a minority of international judges. Finally, EULEX has the duty to support the implementation of the Brussels Agreement (see below). EULEX confirmed to the ICJ that its mandate expires in June 2016.

Stakeholders met in North Mitrovicë/Kosovska Mitrovica informed the ICJ delegation that the presence of UNMIK and EULEX is important because, without it, ethnic tension would be exacerbated and the availability of and effective access to institutional services considerably reduced.

2.3. The judiciary in Kosovo

The Constitution, under article 102.2, unequivocally states that "the judicial power is unique, independent, fair, apolitical and impartial" and, under article 102.3, that courts "adjudicate based solely on the Constitution and the law".⁴⁷

The Supreme Court, seated in Prishtina/Priština, is the highest judicial authority under the Constitution.⁴⁸ There are seven basic courts that adjudicate cases at first instance. One court of appeals operates as a second instance court and decides on conflicts of jurisdiction between basic courts. It is seated in Prishtina/Priština and has territo-

⁴⁴ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/692, 24 November 2008 ('Secretary General Report').

⁴⁵ See, *Secretary General Report, op. cit.*, paras. 50–51.

⁴⁶ See the website of EULEX at <http://www.eulex-kosovo.eu/?page=2,44,197>.

⁴⁷ See, *Independence of the Judiciary in Kosovo: institutional and Functional Dimensions*, OSCE, 24 January 2012, pp. 10–11.

⁴⁸ Constitution of Kosovo, *op. cit.*, article 103.2.

rial jurisdiction on the whole Republic of Kosovo. It is composed of five departments: general, commercial matters, administrative matters, serious crimes and minors. The Constitutional Court is an independent institution. It is the final authority for the interpretation of the Constitution and the compliance of the laws with the Constitution. The Kosovo Judicial Council (KJC) oversees the self-governance of the judiciary, while the Kosovo Prosecutorial Council (KPC) oversees that of the prosecution service.

The most recent EU Progress Report, published on 10 November 2015, states that "Kosovo's judicial system is at an early stage of preparation. [It] remains prone to political interference. Further efforts are required to ensure independence in law and in practice, to prevent and fight corruption within the judiciary, to recruit and train more qualified staff and to allocate adequate resources."⁴⁹

The Constitution also provides that the legal profession is to be independent.⁵⁰ According to the 2014 OSCE Justice Monitor, there are 568 lawyers registered with the "Kosovo Chamber of Advocates"—or 32 lawyers per 100,000 residents.⁵¹ The Kosovo Bar Association informed the ICJ delegation that 8% of their members are members of the Serb community. The OSCE has recently estimated that 5% of the members of the Kosovo Bar Association are from non-Albanian communities.⁵²

⁴⁹ EU, *Kosovo Progress Report*, *op. cit.*, pp. 4–5.

⁵⁰ Constitution of Kosovo, *op. cit.*, article 111.

⁵¹ OSCE Mission in Kosovo, *Justice Monitor—1 January to 30 June 2014*, available at <http://www.osce.org/kosovo/125242?download=true>.

⁵² OSCE Mission in Kosovo, *Community Rights Assessment Report*, 16 December 2015, p. 12.

3. The Serbian community in North Kosovo and the "parallel justice system"

The Serbian minority in Northern Kosovo (Kosovo Serbs) is a small and compact community of 70,430 people⁵³ living in isolation from the rest of Kosovo since at least 1999.⁵⁴ The ICJ was told and was able to observe that the society in Kosovo is very much divided on ethnic and linguistic lines. Although it was common during the years of the Socialist Federal Republic of Yugoslavia for people to speak both Serbian and Albanian, young people now tend to speak only one of the two languages, refusing to learn or speak the other.

After the unilateral declaration of independence, fear of persecution led the Serbian minority in the North to isolate itself and to continue to maintain its ties with Belgrade, facilitated by the contiguity of the territory of North Kosovo with Serbia proper. In March 2008, while Kosovo established its own judicial system, Serbian protesters forcefully seized the courthouse in North Mitrovicë/Kosovska Mitrovica, refusing the jurisdiction of the Kosovo courts. The courthouse only reopened in October 2008, under the condition that only international judges and prosecutors would be placed in the court and provided they only applied UNMIK legislation issued under UN Resolution 1244. The Basic Court of Mitrovicë/Kosovska Mitrovica was *de facto* relocated to the South of the River Ibar/Ibri where the population is prevalently Albanian-speaking (Kosovo Albanians).

This led to the duplication of institutions: on one side the pre-existing State structures loyal to the Serbian State (called "the parallel system"), on the other side the institutions of the new self-declared Republic of Kosovo. Serbian parallel courts continue to exercise competence mostly in family law matters; in labour law cases between people living in the Serbian speaking part of Kosovo and working in or with Serbian companies; in cases of relating to companies based in Serbia; or contracts under voluntary jurisdiction. They also deal with cases of inheritance and real estate contracts. The criminal law section of the parallel system does not operate in practice and, as a consequence, it is basically impossible to ensure prosecution for criminal offences that are not within the remit of EULEX judges.

However, the existence of the parallel system allows in practice for adjudication on issues that, while under formal jurisdiction of the courts South of the Ibar/Ibri (Southern courts), would not be *de facto* within the reach of their powers for the purposes of enforcement of decisions. The ICJ delegation heard that lawyers choose to apply to the courts of one justice system or the other depending on the needs of the client and the chances of enforcement of the judgment. For example, a person working for the Post of Serbia, the only working post office in North Mitrovicë/Kosovska Mitrovica, would, the ICJ was told, find it more useful to have adjudication for his or her employment contract rights under Serbian labour law by courts in the parallel system. This is because the Post of Serbia headquarters in Belgrade would not execute judgments of courts of the Republic of Kosovo, since these are not recognized by Serbia.

The ICJ was told that this duality in judicial and legal systems created many uncertainties about equal access to, efficiency and fairness of justice. Reportedly, parallel courts were not operative in large numbers of cases. The same was said about Southern courts included within the Kosovo legal system.

However, effectiveness of the judiciary is not a problem affecting the North of Kosovo only. A recently published OSCE Community Assessment reported that in 2014, 67 per cent of non-Albanian Kosovars found that lack of trust in the judiciary of Kosovo was a serious obstacle in realizing their rights. It reported that "[a]ccess to justice challenges and problems with enforcement of cases by the authorities appear to drive this lack of trust, at least in part. The lack of equality in the justice system when cases do reach the court was cited by 68 per cent of non-Albanian respondents as a serious obstacle, and monitoring undertaken by the OSCE identified significant disparities in access to justice between Kosovo Albanian and non-Albanian communities."⁵⁵

⁵³ Estimate by ECMI, available at <http://www.ecmikosovo.org/wp-content/uploads/2015/05/Serb-community1.pdf>.

⁵⁴ See, International Crisis Group, *North Kosovo: Dual Sovereignty in Practice*, 14 March 2011, for background on this region.

⁵⁵ OSCE Mission in Kosovo, *Community Rights Assessment Report*, *op. cit.*, p. 11.

4. The process of "integration" of the judicial systems

The Kosovo Constitution contains detailed provisions to ensure the presence of ethnic minority groups in the judiciary (see box below). This requirement was already included in the Rambouillet Accords⁵⁶ and in the Ahtisaari Plan.⁵⁷ Indeed, the specific quotas and requirements included in the Constitution of Kosovo appear to have been taken practically verbatim from the Ahtisaari Plan.⁵⁸

In 2011, under the aegis of the European Union, a dialogue began between Serbia and the Kosovo authorities. On 19 April 2013, under the auspices of the European Union, and in particular of its High Representative for Foreign Affairs and Security Policy, the authorities of Serbia and those of Kosovo signed a *First Agreement of Principles Governing the Normalization of Relations* (hereinafter the '*Brussels Agreement*'), containing a set of agreed measures to effectively increase the self-government of Serbs and other minorities in Kosovo. The *Brussels Agreement* includes a requirement for the integration of the parallel system in North of Kosovo with the judicial system of the Republic of Kosovo. Once this is concluded, the parallel system is to stop functioning altogether.

The ethnic composition of the judiciary under the Kosovo Constitution

Article 103 of the Kosovo Constitution provides that at least fifteen percent of the judges of the Supreme Court, and, in any case, at least three must come from minority communities.⁵⁹ Furthermore, "[a]t least fifteen percent (15%) of the judges from any other court established with appeal jurisdiction, but not fewer than two (2) judges, shall be from Communities that are not in the majority in Kosovo."⁶⁰ Article 104 affirms that the "composition of the judiciary shall reflect the ethnic diversity of Kosovo and internationally recognized principles of gender equality"⁶¹ and the "composition of the courts shall reflect the ethnic composition of the territorial jurisdiction of the respective court."⁶²

Out of the thirteen members of the Kosovo Judicial Council, two members must be elected "by the deputies of the Assembly holding reserved or guaranteed seats for the Kosovo Serb community and at least one of the two must be a judge,"⁶³ while two other members must be chosen "by the deputies of the Assembly holding reserved or guaranteed seats for other Communities and at least one of the two must be a judge."⁶⁴ Finally, "[c]andidates for judicial positions that are reserved for members of Communities that are not in the majority in Kosovo may only be recommended for appointment by the majority of members of the Council elected by Assembly deputies holding seats reserved or guaranteed for members of communities that are not in the majority in Kosovo. If this group of Council members fails to recommend a candidate for a judicial position in two consecutive sessions of the Council, any Council member may recommend a candidate for that posi-

⁵⁶ See, *Rambouillet Accords, op. cit.*, Chapter 1, Constitution, Article V. Judiciary, para. 4. According to this provision, the defendant could choose the criminal court to which the case was assigned at the beginning of the procedure; that, if all defendants were members of one national community, all the judges of the panel should belong to the same national community; and that, if there is at least one defendant in the case of one different national community, he or she was entitled to have at least one judge in the panel belonging to the same national community.

⁵⁷ *Ahtisaari Plan, op. cit.*, Annex I, article 6.6. See also, Annex IV, articles 2.1, 2.2: with regard to the "recruitment, selection, appointment, promotion and transfer of judges and prosecutors, [the Ahtisaari Plan affirms that] the relevant Kosovo authorities shall ensure that the Kosovo judiciary and prosecution service reflect the multiethnic character of Kosovo and the need for equitable representation of all Communities in Kosovo, having due regard for internationally recognized principles of gender equality." See also, Annex II, article 4.2: "the appointment process of judges and prosecutors shall provide for specific modalities ensuring the participation of Communities and their members."

⁵⁸ See, *Ahtisaari Plan, op. cit.*, Annex IV, articles 1, 2, and 4.

⁵⁹ Constitution of Kosovo, *op. cit.*, article 103.3.

⁶⁰ *Ibid.*, article 103.6.

⁶¹ *Ibid.*, article 104.2.

⁶² *Ibid.*, article 104.3.

⁶³ *Ibid.*, article 108.6(3).

⁶⁴ *Ibid.*, article 108.6(4).

tion."⁶⁵ Finally, "[c]andidates for judicial positions within basic courts, the jurisdiction of which exclusively includes the territory of one or more municipalities in which the majority of the population belongs to the Kosovo Serb community, may only be recommended for appointment by the two members of the Council elected by Assembly deputies holding seats reserved or guaranteed for the Serb Community in the Republic of Kosovo acting jointly and unanimously. If these two (2) members fail to recommend a judicial candidate for two consecutive sessions of the Kosovo Judicial Council, any Kosovo Judicial Council member may recommend a candidate for that position."⁶⁶

As with regard to the prosecutor's office, while the Constitution establishes that the "State Prosecutor shall reflect the multiethnic composition of the Republic of Kosovo and shall respect the principles of gender equality,"⁶⁷ with regard to appointment of prosecutors it only affirms that the Kosovo Prosecutorial Council must "give preference for appointment as prosecutors to members of underrepresented Communities as provided by law."⁶⁸

Among the agreed measures, the Brussels Agreement states that "[t]he judicial authorities will be integrated and operate within the Kosovo legal framework. The Appellate Court in Prishtina/Priština will establish a panel composed of a majority of K/S judges to deal with all Kosovo Serb majority municipalities. . . . 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."⁶⁹

Because of a lack of agreement on implementation of the Brussels agreement, courts under the parallel system have continued to work on all cases except criminal cases, and EULEX judges have assumed competence for criminal cases in the Mitrovicë/Kosovska Mitrovica court. An independent NGO assessment stated, in December 2015, that the deadlines in the Agreement "were too ambitious: it foresaw that the unitary judiciary be fully functional by September 1, 2015."⁷⁰ Despite the announced deadlines, during the ICJ mission, the process of integration was still ongoing. The ICJ was told that at the time of the mission there were 65 judges and prosecutors, and around 200 public servants who are of Serb ethnicity. The mission was told that in recent months the speed of integration had slowed down.

Aside from the text of the agreement published by the authorities involved, the details of the integration process are not published in a single easily available document. However, through its research and meetings during its mission, the ICJ can present the following outline of the new system which is being established.⁷¹

A Basic Court will have jurisdiction over the entire region of Mitrovicë/Kosovska Mitrovica. Its seat will be in Mitrovicë/Kosovska Mitrovica North. It will be presided over by a Kosovo Serb judge. It will be divided in two premises and four branches (Zubin Potok/Potoku, Leposavic/Leposaviq, Skenderaj/Skënderaj and Vuçitrn/Vushtrri).

The premises in North Mitrovicë/Kosovska Mitrovica will host the criminal court and will have a majority of Kosovo Serb staff, namely 14 Kosovo Serb judges and 10 Kosovo Albanian judges. It will also host a section on serious crimes composed of four Kosovo

⁶⁵ *Ibid.*, article 108(9).

⁶⁶ *Ibid.*, article 108(10).

⁶⁷ *Ibid.*, article 109.4.

⁶⁸ *Ibid.*, article 110.2.

⁶⁹ First Agreement of Principles Governing the Normalization of Relations, 19 April 2013, articles 10 and 11. Find the versions included in the Serbian government website at <http://www.kim.gov.rs/eng/pregovaracki-proces.php>, and in the Kosovo government website at <http://www.kryeministri-ks.net/?page=2,252>. The Government of Serbia confirmed that integrated judicial institutions will apply Kosovo laws, see on the government website at <http://www.kim.gov.rs/eng/p06.php>, para. 1.

⁷⁰ BIRN, ACDC, *Internews Kosova, Big Deal: Civil Oversight of the Kosovo-Serbia Agreement Implementation*, December 2015, chapter 5, p. 45.

⁷¹ Apart from the direct meetings of the ICJ mission, this summary relies on documents disclosed by the Serbian government, available at <http://www.kim.gov.rs/eng/p06.php>; *Brussels Agreements Implementation State of Play: A Brief report on progress and challenges*, Ministry of Dialogue of the Republic of Kosovo, 25 November 2015; BIRN, ACDC, *Internews Kosova, Big Deal: Civil Oversight of the Kosovo-Serbia Agreement Implementation*, December 2015, chapter 5.



Mitrovicë/Kosovska Mitrovica: panel in the Serb community part, North of the Ibar/Ibri—flag and statue located immediately southern of the Ibar/Ibri

Serb judges and four Kosovo Albanian judges, with jurisdiction on Mitrovicë/Kosovska Mitrovica North, Mitrovicë/Kosovska Mitrovica South and Zvečan/Zvečan. The premises in Mitrovicë/Kosovska Mitrovica South will be competent for juvenile justice, civil cases, uncontested claims, and minor offences over the same territory. It will be composed of 14 Kosovo Albanian judges and 10 Kosovo Serb judges. The ICJ mission was told that the premises will be set up in a location near the bridge that connects North and South Mitrovicë/Kosovska Mitrovica, so as to allow Kosovo Serbs to easily reach the courtroom.

The Court of Appeals, which is based in Prishtina/Priština, will set up a division in Mitrovicë/Kosovska Mitrovica North, that will be presided by a Kosovo Serb judge. This division will be composed of five Kosovo Serb judges and two Kosovo Albanian judges. Finally, the Vice-President of the Court of Appeals in Prishtina/Priština will be a Kosovo Serb judge.

Overall the support staff will be composed of 79 Kosovo Serbs and 79 Kosovo Albanians. Additionally, the Basic Court's branches of Zubin Potok/Potoku and Leposavic/Leposaviq will have each several Kosovo Serb support staff.

The Basic Prosecution Office will be located in the ethnically mixed area of Bosnjacka Mahala and headed by a Kosovo Albanian prosecutor. It will be composed of nine Kosovo Serb prosecutors, nine Kosovo Albanian prosecutors and 24 support staff. The agreement with regard to the prosecution service differs from the one on the judiciary with regard to the presidency of the Office. Indeed, no provision appears to ensure that the vice-presidency will be held by a Kosovo Serb. It was suggested to the ICJ that this gap may be filled by the initiative of the Chief Prosecutor who would already have the power to appoint a vice head prosecutor from the Kosovo Serb minority, to sit in Mitrovicë/Kosovska Mitrovica.



View of the works on the Ibar/Ibri bridge from North Mitrovicë/Kosovska Mitrovica

In April 2015, Serbia published a progress report on the integration of the judiciary in Kosovo in accordance with the Brussels Agreement. In the report, it stated that in the Agreement for the Judiciary it was "agreed that job vacancies for judges and prosecutors would be published on 25 March 2015, with the deadline for applications expiring on 25 May 2015, and that judges and prosecutors would be appointed by 25 August 2015. The last day in office for the judges and prosecutors within the existing system would be 31 August 2015, whereas their first day in office in the Kosovo and Metohija legal framework would be 1 September 2015."⁷²

The Government of Kosovo has confirmed that it had opened vacancies for "48 Serb judges and 15 Serb prosecutors for entire territory of Kosovo. The selection process resulted in selection of 34 judges and 9 prosecutors. Kosovo will publish additional vacancies in order to complete the integration process, in a due course."⁷³

⁷² *Progress Report on the Dialogue between Belgrade and Pristina, op. cit., p. 8.*

⁷³ *Brussels Agreements Implementation State of Play: A Brief report on progress and challenges, op. cit., p. 8.*

5. International standards on judiciaries and ethnicity

Access to justice for everyone is an essential dimension of the right to a fair trial, enshrined in articles 10 of the *Universal Declaration of Human Rights* (UDHR), article 13 of the *International Covenant on Civil and Political Rights* (ICCPR) and article 6 ECHR, and of the right to an effective remedy for human rights violations, under article 8 UDHR, article 2.3 ICCPR, and article 13 ECHR.

The European Court of Human Rights has ruled that the right to a fair trial embodies the right to access a court⁷⁴ and linked it with the right to have an effective judicial remedy against rights violations.⁷⁵ It has stated that this right must be practical and effective and give any individual "a clear, practical opportunity to challenge an act that is an interference with his rights."⁷⁶ The UN Human Rights Committee takes a similar approach in interpreting the *International Covenant on Civil and Political Rights* when it states that the "right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law."⁷⁷

Furthermore, as widely recognized by major human rights instruments, where there is an arguable case that an individual's rights have been violated, he or she has the right to have access to an effective remedy at the national level.⁷⁸ The *UN Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law* affirm that States have an obligation to provide available, adequate, effective, prompt and appropriate remedies to victims of violations of international human rights law and international humanitarian law, including reparation.⁷⁹ Alleged victims should in principle be able to seek effective remedies from a judicial body, but if some non-judicial body is provided with competence over certain kinds of violations, that body must fulfil the requirements of effectiveness—i.e. the power to bring about cessation of the violation and appropriate reparation, including, where relevant, to overturn the expulsion order—of impartiality and independence.⁸⁰

Finally, the right to access courts under the right to a fair trial and the right to an effective remedy must at all times respect the principle of non-discrimination, enshrined in articles 2 and 7 UDHR, articles 2.1 and 26 ICCPR, and article 14 ECHR. The principle of non-discrimination does not admit any restriction or derogation.⁸¹

5.1. General standards on non-discrimination of ethnic minorities

The *Universal Declaration of Human Rights*, while affirming the prohibition of any forms of discrimination in the enjoyment of human rights, adds that "no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."⁸² Article 27 ICCPR states that "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group . . . to use their own language."⁸³

⁷⁴ *Golder v. United Kingdom*, ECtHR Application No. 4451/70, 21 February 1975, para. 36.

⁷⁵ See, *Beles and others v. the Czech Republic*, ECtHR, Application No. 47273/99, 12 November 2002, para. 49.

⁷⁶ *Bellet v. France*, ECtHR, Application No. 23805/94, 4 December 1995, para. 36.

⁷⁷ Human Rights Committee, *General Comment No. 32, article 14: Right to equality before courts and tribunals to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, section I.

⁷⁸ Article 8 UDHR; Article 2.3 ICCPR; Article 8.2 CPED; Article 13 ECHR; Article 25 ACHR; Article 25 Protocol to the ACHR on the Rights of Women in Africa.

⁷⁹ Articles 2 and 3 of the *UN Basic Principles and Guidelines on the right to a remedy and reparation*.

⁸⁰ See, ICJ, *Practitioners' Guide No. 2, op. cit.*, fn. 480, pp. 49–54.

⁸¹ See, article 4.1 ICCPR and article 15 ECHR.

⁸² Article 2, *Universal Declaration of Human Rights* (UDHR).

⁸³ Article 30, *Convention on the rights of the child* (CRC) reiterates this right for children: "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language." See, Human Rights Committee, *General comment No. 23: Article 27 (Rights of Minorities)*, UN Doc. CCPR/C/21/Rev. 1/Add. 5, 8 April 1994, para. 6.1: "a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party."

The Human Rights Committee affirms that "[t]he right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, . . . A situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated *de jure* or *de facto* runs counter to the guarantee of [the right to a fair trial]." ⁸⁴ It appears to interpret article 27 as including a right for linguistic minorities to use their own language in court proceedings. ⁸⁵

The *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* affirms that "[p]ersons belonging to national or ethnic, religious and linguistic minorities . . . have the right . . . to use their own language, in private and in public, freely and without interference or any form of discrimination [and] have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation." ⁸⁶

5.2. Specific standards on justice and minority groups

The UN Special Rapporteur on minority issues concluded in her 2015 report to the UN General Assembly on the rights of persons belonging to minority groups in the criminal justice process, that international law "prohibits discrimination in the administration of justice and creates positive obligations to ensure that justice systems are sensitive to, and facilitate effective participation of, minorities." ⁸⁷

The UN Special Rapporteur particularly stressed the importance of being able to use and receive information in one's own language for the right to a fair trial in criminal proceedings. ⁸⁸ She stressed that "[a]ccess to an interpreter is an essential fair trial guarantee for any person accused who does not understand the language in which the proceedings will be conducted," ⁸⁹ and that "[f]rom a minority rights perspective, every individual should also have the right, whether as accused or as witness, to use his or her native language in criminal proceedings, even if capable of communicating in a majority language. This is important both for the protection and promotion of identity and to ensure effective and informed participation." ⁹⁰

The UN expert considers that "[a]ctual measurable increase in the recruitment, retention and progression of minorities, including at most senior level, [in law enforcement agencies, judiciaries, prosecution services and legal professions] is essential" to reinforce the criminal justice process and to ensure that respect by such officials of the prohibition of discrimination under international law. ⁹¹

The Council of Europe's *Framework Convention for the Protection of National Minorities* affirms that "every person belonging to a national minority has the right to use freely and without interference his or her minority language, in private and in public, orally and in writing." ⁹² The Framework Convention is a treaty *à la carte*, i.e. States can choose which provisions to be bound by. However, the Kosovo Constitution directly and explicitly incorporates this Convention and would therefore appear to contemplate that all provisions of the Convention will be binding on Kosovo authorities.

⁸⁴ *General Comment No. 32, op. cit.*, para. 9.

⁸⁵ *General Comment No. 23, op. cit.*, 26 April 1994, para. 5.3 ("the right protected under article 27 should be distinguished from the particular right which article 14(3)(f) of the Covenant confers on accused persons to interpretation where they cannot understand or speak the language used in the courts. Article 14(3)(f) does not, *in any other circumstances*, confer on accused persons the right to use or speak the language of their choice in court proceedings" (emphasis added). See similarly *Explanatory Report to the Framework Convention for the Protection of National Minorities, op. cit.*, para. 95, discussed below.

⁸⁶ Article 2, *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, adopted by General Assembly Resolution 47/135 of 18 December 1992.

⁸⁷ UN Special Rapporteur on minority issues, *Annual Report to the General Assembly*, UN Doc. A/70/212, 30 July 2015, para. 10.

⁸⁸ *Ibid.*, paras. 31, 34.

⁸⁹ *Ibid.*, para. 41.

⁹⁰ *Ibid.*, para. 43.

⁹¹ *Ibid.*, para. 80.

⁹² Article 10.1, *Framework Convention for the Protection of National Minorities*, Strasbourg, February 1995, CoE Doc. H (95) 10.

To concretize the right to language of national minorities, the Framework Convention affirms that, "[i]n areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities."⁹³

In case of judicial authorities, the Framework Convention states as follows:

in respect of those judicial districts in which the number of residents using the regional or minority languages justifies the measures specified below, according to the situation of each of these languages and on condition that the use of the facilities afforded by the present paragraph is not considered by the judge to hamper the proper administration of justice [States have the obligation]:

a) in criminal proceedings:

- i) to provide that the courts, at the request of one of the parties, shall conduct the proceedings in the regional or minority languages; and/or
- ii) to guarantee the accused the right to use his/her regional or minority language; and/or
- iii) to provide that requests and evidence, whether written or oral, shall not be considered inadmissible solely because they are formulated in a regional or minority language; and/or
- iv) to produce, on request, documents connected with legal proceedings in the relevant regional or minority language, if necessary by the use of interpreters and translations involving no extra expense for the persons concerned;

b) in civil proceedings:

- i) to provide that the courts, at the request of one of the parties, shall conduct the proceedings in the regional or minority languages; and/or
- ii) to allow, whenever a litigant has to appear in person before a court, that he or she may use his or her regional or minority language without thereby incurring additional expense; and/or
- iii) to allow documents and evidence to be produced in the regional or minority languages, if necessary by the use of interpreters and translations;

c) in proceedings before courts concerning administrative matters:

- i) to provide that the courts, at the request of one of the parties, shall conduct the proceedings in the regional or minority languages; and/or
- ii) to allow, whenever a litigant has to appear in person before a court, that he or she may use his or her regional or minority language without thereby incurring additional expense; and/or
- iii) to allow documents and evidence to be produced in the regional or minority languages, if necessary by the use of interpreters and translations;

d) to take steps to ensure that the application of sub-paragraphs i and iii of paragraphs b and c above and any necessary use of interpreters and translations does not involve extra expense for the persons concerned.⁹⁴

The right of the accused to use his/her regional or minority language "goes beyond the right of the accused . . . to have the free assistance of an interpreter if he cannot understand or speak the language used in court [because] it is based on the consideration that even if speakers of a regional or minority language are able to speak the official language, when it comes to justifying themselves before a court of law, they may feel

⁹³ *Ibid.*, article 10.2. Article 10.3 extends this right to the right to liberty: "guarantee the right of every person belonging to a national minority to be informed promptly, in a language which he or she understands, of the reasons for his or her arrest, and of the nature and cause of any accusation against him or her, and to defend himself or herself in this language, if necessary with the free assistance of an interpreter."

⁹⁴ *Ibid.*, article 9. Specifically, this article applies "to those judicial districts in which the number of residents using the regional or minority languages justifies the measures concerned," *Explanatory Report to the Framework Convention for the Protection of National Minorities*, *op. cit.*, para. 90. It "implies, at any rate, that the relevant regional or minority language is used in the courtroom and in those proceedings in which the party speaking this language takes part," *Explanatory Report to the Framework Convention for the Protection of National Minorities*, *op. cit.*, para. 94.

the need to express themselves in the language which is emotionally closest to them or in which they have greater fluency."⁹⁵

The Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities considers that minorities language rights "apply also to areas where only a relatively small percentage of persons belonging to national minorities reside, provided that persons belonging to national minorities traditionally inhabit the areas concerned, that there is a request by these persons, and that such a request corresponds to a real need."⁹⁶

The right of national minorities to use their own language in judicial proceedings has been affirmed also by the *UNESCO Universal Declaration on Linguistic Rights*⁹⁷ and the *OSCE Oslo Recommendations Regarding the Linguistic Rights of National Minorities*⁹⁸ which states that it should be secured "in all stages of judicial proceedings (whether criminal, civil or administrative) while respecting the rights of others and maintaining the integrity of the processes, including through instances of appeal."⁹⁹

In order to realize this right, the Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities considers it "important to promote participation of persons belonging to national minorities in the judiciary and the administration of justice. Measures in this respect should be implemented in a way which fully guarantees the independence and the effective functioning of the judiciary."¹⁰⁰ The UN Committee on the Elimination of Racial Discrimination, in charge of the supervision of the respect of the UN *International Convention on the Elimination of All Forms of Racial Discrimination*, has also affirmed that States parties should "promote proper representation of persons belonging to racial and ethnic groups in the police and the system of justice [including] recruitment and promotion in the judicial system of persons belonging to various racial or ethnic groups."¹⁰¹

With regard to access to legislation, under article 9.2-3 Council of Europe's *Framework Convention for the Protection of National Minorities*, the Kosovo Constitution would appear to require authorities to "make available in the regional or minority languages the most important national statutory texts and those relating particularly to users of these languages, unless they are otherwise provided."¹⁰² The *UNESCO Universal Declaration on Linguistic Rights* affirms that "[a]ll language communities have the right for laws and other legal provisions which concern them to be published in the language specific to the territory. . . . Public authorities who have more than one territorially historic language within their jurisdiction must publish all laws and other legal provisions of a general nature in each of these languages, whether or not their speakers understand other languages."¹⁰³

⁹⁵ *Explanatory Report to the Framework Convention for the Protection of National Minorities*, op. cit., para. 95.

⁹⁶ Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities, *Thematic Commentary No. 3: The Language Rights of Persons Belonging to National Minorities under the Framework Convention*, adopted on 24 May 2012, Opinion No. ACFC/44DOC(2012)001 rev., para. 56.

⁹⁷ *UNESCO Universal Declaration on Linguistic Rights*, adopted at the World Conference on Linguistic Rights, Barcelona, Spain, 9 June 1996, article 20: "[e]veryone has the right to use the language historically spoken in a territory, both orally and in writing, in the Courts of Justice located within that territory. The Courts of Justice must use the language specific to the territory in their internal actions and, if on account of the legal system in force within the state, the proceedings continue elsewhere, the use of the original language must be maintained. . . . Everyone has the right, in all cases, to be tried in a language which s/he understands and can speak and to obtain the services of an interpreter free of charge."

⁹⁸ *Oslo Recommendations Regarding the Linguistic Rights of National Minorities & Explanatory Note*, February 1998, OSCE, paras. 18-19: "[i]n regions and localities where persons belonging to a national minority are present in significant numbers and where the desire for it has been expressed, persons belonging to this minority should have the right to express themselves in their own language in judicial proceedings, if necessary with the free assistance of an interpreter and/or translator [and] States should give due consideration to the feasibility of conducting all judicial proceedings affecting such persons in the language of the minority."

⁹⁹ *Oslo Recommendations Regarding the Linguistic Rights of National Minorities & Explanatory Note*, op. cit., para. 18.

¹⁰⁰ Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities, *Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs*, adopted on 27 February 2008, Doc. No. ACFC/31DOC(2008)001, para. 122.

¹⁰¹ UN Committee on the Elimination of Racial Discrimination (CERD), *General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, adopted at its 65th session, 20 August 2004, para. 5(d) and (i).

¹⁰² *Framework Convention for the Protection of National Minorities*, op. cit., article 9.2-3: It must not "deny the validity of legal documents drawn up within the State solely because they are drafted in a regional or minority language; or . . . not to deny the validity, as between the parties, of legal documents drawn up within the country solely because they are drafted in a regional or minority language, and to provide that they can be invoked against interested third parties who are not users of these languages on condition that the contents of the document are made known to them by the person(s) who invoke(s) it; or . . . not to deny the validity, as between the parties, of legal documents drawn up within the country solely because they are drafted in a regional or minority language."

¹⁰³ *UNESCO Universal Declaration on Linguistic Rights*, article 18.

6. Challenges in the implementation of the "integration" of the judiciary

The authorities in Serbia and Kosovo have different positions and perceptions with regard to the implementation of the Brussels Agreement and the "integration" of the judiciary.

In its progress report of April 2015, the Serbian Government has reported that several problems have been identified in the integration process: "legal problems; amount of future salaries for the employees; administrating pension insurance; overstaffing; possibility of employing approximately 30 court assistants; accommodating and equipping the premises of the courts; possibility that the court president could at the same time be a member of the Kosovo Judicial Council."¹⁰⁴

On 25 November, in its progress report, the Government of Kosovo did not refer to all of these issues and stated that the "implementation of Justice Agreement is in the process of finalization. The pending issue regarding premises and support staff are resolved, whereas abolishment of Serbia's judicial parallel structures in Kosovo is still pending [as this] requires legal adjustments to Serbian Law No. 116/2008 on Seats and Territorial jurisdictions of Courts and Prosecutors offices."¹⁰⁵ It also complained that "Serbia has not yet ended the tenure for the judicial personnel engaged in parallel judicial structures, as well as did not cease their salaries,"¹⁰⁶ although these effectively stopped operating in 2013.

6.1. Freedom of movement and physical access to courts

With regard to the practical implementation of the "integration" of Serbian courts into the Kosovo legal system, there appears to be hesitation from Kosovo Serbs to work south of the river Ibar/Ibri. It has been reported that Kosovo Serbs do not enjoy in practice full freedom of movement South of the Ibar/Ibri, nor Kosovo Albanians North of it. Currently, many Kosovo Serbs do not feel safe to travel to the Southern court of Vučitrn/Vushtrri, which is competent, under the Kosovo legal system, for the region. While they feel safe in the courtroom itself, they reportedly fear to be exposed to attacks on the journey to Vučitrn/Vushtrri. The same is true for Kosovo Albanians that would try to venture North of the Ibar/Ibri.

The mission was told that UNMIK had created a bus system that, five times a day, would transport people North-South free of charge. Today the service is discontinued. The mission was also told that Kosovo Serbs do not feel safe on public transport and prefer to travel by taxi, with the increased costs to access justice that that implies. The mission heard of episodes of violence and harassment against the Kosovo Serb population, including an episode of the stabbing of a teenager on the Ibar/Ibri bridge.

The ICJ considers that this situation represents a serious, effective and concrete obstacle to equal access to justice, based on grounds of ethnicity. The authorities responsible for guaranteeing access to justice in the North of Kosovo are under a positive obligation under the rights to a fair trial, to an effective remedy and the prohibition of discrimination to ensure that any person subject to their jurisdiction has access to courts regardless of their ethnic or linguistic group, whether the obstacle to access to justice comes from State or private actors. Finally, the ICJ stresses that, besides the essential impairment caused to access to justice, any person under the jurisdiction of Kosovo has a right under international law to freedom of movement¹⁰⁷ and that Kosovo authorities must respect, protect and fulfill this right.

6.2. Lack of Serbian speaking law students

Another problem is the lack of lawyers in Kosovo, in particular young lawyers, speaking the Serbian language, due to the fact that diplomas issued by the University of

¹⁰⁴ *Progress Report on the Dialogue between Belgrade and Pristina*, op. cit., p. 9.

¹⁰⁵ Brussels Agreements Implementation State of Play: A Brief report on progress and challenges, op. cit., chapter 5.

¹⁰⁶ *Ibid.*

¹⁰⁷ See, among others, article 13 UDHR, article 2 of Protocol 4 ECHR, and article 12 ICCPR.

Mitrovicë/Kosovska Mitrovica are not recognized within the legal system of the Republic of Kosovo nor are those of Kosovo universities recognized in the Serbian part of Kosovo or in Serbia.

Students can currently study law in Serbian only in Mitrovicë/Kosovska Mitrovica North or in Serbia, while the University of Prishtina/Priština teaches only in Albanian. The youngest lawyer exercising his profession within the Kosovo legal system in Mitrovicë/Kosovska Mitrovica North is in his forties. With regard to prosecutors, the Serb parallel system has not employed a single new prosecutor for the last fifteen years. The OSCE has pointed out that "[t]he average age of [non-Albanian] lawyers is 63 years old. Thus, the problem is likely to be exacerbated in the coming years as these lawyers retire if steps are not taken to increase the number of lawyers from non-Albanian communities."¹⁰⁸

Before the beginning of the "integration", it was possible to have a diploma from the University of Mitrovicë/Kosovska Mitrovica recognized in Kosovo through UNMIK. The Brussels Agreement contemplated the possibility of the mutual recognition of university diplomas by the Republic of Kosovo and the Republic of Serbia via the certification of the European University Association (EAU) based in Brussels. The Serbian Government, in its progress report, signaled that diplomas issued by the University of Mitrovicë/Kosovska Mitrovica "are not recognized by Priština, regardless of the EAU certificate."¹⁰⁹ The Government of the Kosovo Republic attributed the responsibility for failure of mutual recognition to the Serbian Government.¹¹⁰

The ICJ considers that effective access to justice without discrimination based on ethnic or linguistic grounds cannot be assured unless the Government of Kosovo ensures a continuous presence of competent and trained lawyers, judges, prosecutors and clerks able to speak and work in Serbian, including from the Kosovo Serb community. To reach this goal, the ICJ considers it essential that swift solutions are found to mutually recognize law degrees between the authorities of Serbia and Kosovo, in a way that ensures always the quality of the education of lawyers, judges, prosecutors and clerks.

6.3. The language barrier

A significant obstacle to effective "integration" is the huge linguistic divide that has developed between the Albanian and Serbian communities since the breakup of the Social Federal Republic of Yugoslavia. Reportedly, this is now reflected in the poor availability of quality interpreters. It was stressed that finding solutions for the linguistic problem, when referring to the integration of the courts in Kosovo, was central to ensure an effective and true access to justice, in particular for the Kosovo Serbs and the other linguistic and ethnic minorities. The ICJ was told that the quality of interpretation services in Kosovo was very low at all levels of the judiciary, including at the Supreme Court level. The only exception identified was in the EULEX courts. It was reported that this difference was mainly due to a recruitment process based on merit in EULEX as opposed to nepotistic practices in Kosovar courts. The other reason was found in the significant difference in the level of remuneration between the EULEX and other courts.

Translation of laws into Serbian was reported to be unsatisfactory. Minutes in Kosovar courts are usually written in Albanian and Kosovo Serb parties are requested to sign them after an oral translation. It was also told that court software is usually available only in Albanian. This was confirmed by an independent assessment by NGOs of the implementation of the Brussels Agreement of December 2015.¹¹¹

¹⁰⁸ *Community Rights Assessment Report, op. cit.*, p. 12.

¹⁰⁹ *Progress Report on the Dialogue between Belgrade and Pristina, op. cit.*, p. 15.

¹¹⁰ *Brussels Agreements Implementation State of Play: A Brief report on progress and challenges, op. cit.*, chapter 19. The *EU Progress Report 2015* affirms that "Kosovo needs to continue improving the employment of non-majority communities within the Kosovo civil service and public enterprises. A permanent solution to the issue of acceptance of diplomas of the University in Mitrovicë/Mitrovica must be found to enable members of the non-majority communities to better integrate, including through employment in government institutions. Significant challenges remain in access to services in official languages both at the central and municipal level, including languages used by minority communities," *EU Progress Report, op. cit.*, p. 25.

¹¹¹ BIRN, ACDC, Internews Kosova, *Big Deal: Civil Oversight of the Kosovo-Serbia Agreement Implementation, op. cit.*, chapter 5, pp. 46–47.

The OSCE has also confirmed that "a lack of translation services could also be a hindrance, in 61 per cent of OSCE-monitored cases involving non-Albanians where translation was required, translation was either not provided or was of poor quality. Moreover, while the Serbian language is an official language in Kosovo it is rarely used as a language of proceedings."¹¹² The Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities found, in its 2014 observations, that "the implementation of the language legislation remains sporadic due to a lack of resources and sometimes goodwill of municipal authorities, and translations often contain mistakes or 'Albanisations'. . . . The lack of proficiency in both official languages among civil servants must be addressed urgently and comprehensively, including through adequate measures in the education sphere."¹¹³

Some stakeholders expressed the opinion that the provision for dual official languages under the Kosovo Constitution, currently understood as an obligation to provide translation upon request, should instead ensure a truly bilingual system.

In order to satisfy Kosovo's obligations to secure everyone's effective access to justice under the rights to a fair trial and an effective remedy, the ICJ considers it vital that efforts be made to improve the quality of training and qualification of interpreters and translators versed in legal language. There is a need for a long-term policy to establish a bilingual system as foreseen in the Constitution, where Albanian and Serbian are official languages with equal position. Ideally this should include measures to promote bilingualism among judges, prosecutors and defence lawyers, and court staff. Meanwhile, it must be ensured that all other linguistic minorities in Kosovo are not impaired in their access to courts.

6.4. General obstacles to access to justice in the Kosovo legal system

Throughout the whole of Kosovo, the justice system is affected by a very significant backlog, especially in civil cases. The OSCE reported that "[n]egligence and delay in dealing with cases by relevant justice institutions was considered to be a major obstacle in the realization of rights by the great majority of non-Albanian and Albanian respondents to [an] OSCE survey."¹¹⁴ The Advisory Committee on the Framework Convention for the Protection of National Minorities found that "the criminal justice sector generally is viewed as biased and unprofessional, as the backlog of pending court cases remains tremendous and no comprehensive solution has been found to a range of complex issues related to the properties of persons belonging to minority communities."¹¹⁵ The NGO's independent assessment of the implementation of the Brussels Agreement reported that, up to December 2015, the backlog was "of half a million court cases in all of Kosovo, 8,000 of which are involve northern Kosovo. The Serbian judicial institutions largely ceased operating in mid 2013, pursuant to the agreement. Remaining parallel courts handle only civil cases like divorce and marriage. Only EULEX is in place to deal with criminal activities, though its mandate is set to end in June 2016, and it only conducts high profile war crimes, organized crime, or corruption cases."¹¹⁶

Lawyers told the ICJ that, when appeals are brought, courts will seek all means to dismiss them in order not to increase their nominal backlog, and that priority cases are selected by courts in an arbitrary fashion. For example, it was reported that courts would deal with detention cases only when the complainant was actually in detention at the time of the consideration of the case, but they would put it in the backlog and be unlikely ever to consider it if the person had been released. The ICJ mission was told by several stakeholders that appeals courts have a practice of remitting cases back to the first instance courts without deciding on the merits themselves. This significantly contributes to the increase of the case backlog in the lower courts.

¹¹² *Community Rights Assessment Report, op. cit.*, p. 12.

¹¹³ Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities, *Conclusions on UNMIK*, Resolution CM/ResCMN(2014)13 on the implementation of the Framework Convention for the Protection of National Minorities in Kosovo, adopted by the Committee of Ministers on 26 November 2014 at the 1213th meeting of the Ministers' Deputies.

¹¹⁴ *Community Rights Assessment Report, op. cit.*, p. 12.

¹¹⁵ Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities, *Conclusions on UNMIK, op. cit.*

¹¹⁶ BIRN, ACDC, Internews Kosova, *Big Deal: Civil Oversight of the Kosovo-Serbia Agreement Implementation, op. cit.*, chapter 5, pp. 46-47.

With regard to execution of judgments, the police, a relatively respected authority throughout Kosovo, will generally secure enforcement of criminal judgments; however, there are more obstacles in ensuring execution of civil judgments. For example, the execution of a judgment in favour of a member of an ethnic group to take place in a village dominated by the other ethnic group would prove very difficult to ensure. This incapacity in executing judgments was pointed out as one of the main causes of the justice system's backlog. The mission also heard that, since 2014, the whole enforcement procedure (except for family cases) has been outsourced to private bailiffs, who require to be paid in advance before executing the decisions. It is not clear how many of them speak Serbian. This raises concerns with regard to the potential discrimination in access to justice based on grounds of language and wealth.

The ICJ was told that witnesses are generally in a situation of risk in Kosovo. In such a small community, where everybody knows each other, is very difficult to ensure protection, anonymity, let alone to build new lives if under threat. The ICJ was told that, even when not directly threatened, witnesses often feel the pressure of society.

The ICJ recalls that deciding cases without undue delay and ensuring effective execution of court rulings are fundamental tenets of the right to a fair trial. Both article 6 ECHR and article 14 ICCPR require judicial proceedings to be conducted within a reasonable time.¹¹⁷ Legal systems must be organized in such a way so as to fulfill these obligations.¹¹⁸ The same is true for execution of judgments, as significant delays or inadequacies in such execution deprives the right to access courts of concrete effect.¹¹⁹ Finally, the ICJ stresses that, as affirmed by the *Recommendation of the Council of Europe's Committee of Ministers to member states on the protection of witnesses and collaborators of justice* "[a]ppropriate legislative and practical measures should be taken to ensure that witnesses and collaborators of justice may testify freely and without being subjected to any act of intimidation [and, while] respecting the rights of the defence, the protection of witnesses, collaborators of justice and people close to them should be organized, where necessary, before, during and after the trial."¹²⁰

The ICJ therefore urges the authorities of Kosovo to undertake all necessary steps to ensure that judicial proceedings are not unduly prolonged, for example by ensuring that more decisions on the merits are taken at the appeal level when there are no reasons to remand; that judicial rulings are effectively executed; and that witnesses are adequately and effectively protected.

¹¹⁷ *General Comment No. 32, op. cit.*, paras. 27 and 35.

¹¹⁸ See among others, *Scordino v. Italy (No. 1)*, ECtHR, Grand Chamber, Application No. 36813/97, 29 March 2006, para. 224.

¹¹⁹ See, *Burdov v. Russia*, ECtHR, Application No. 59498/00, 7 May 2002, paras. 34 and 37.

¹²⁰ *Recommendation Rec(2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice*, adopted by the Committee of Ministers on 20 April 2005 at the 924th meeting of the Ministers' Deputies, General Principles 1 and 2.

7. Concluding observations

This paper does not aspire to provide a detailed final analysis of the Kosovo's legal system, its overall ability to provide access to justice for all to ensure the enjoyment of human rights, or of the proper path to an effective transition or "integration" process. The paper only provides preliminary conclusions, on the basis of the ICJ's discussions during its initial mission to Mitrovicë/Kosovska Mitrovica and Prishtina/Priština.

A process of transition of the judicial system in Kosovo is underway and is now at the point of no return. All courts in Kosovo are now on course to be part of a unified legal and judicial system for Kosovo. A key determinant of the success of this transition must be the effective protection of access to justice for all in Kosovo that must be provided by an independent, impartial and effective judicial system, assisted by independent, impartial and effective legal profession and prosecution service.

A legal system's effectiveness in guaranteeing access to justice is demonstrated by the capacity of the most disadvantaged or marginalized groups to have vindication for the enjoyment of their human rights through its court system. The respect, protection and fulfillment of all conditions of access to justice of the non-Albanian minorities is therefore a key benchmark against which the success of this transition or "integration" must be assessed. This is especially true for the Serb community in North Kosovo. Indeed, all founding documents of the Kosovo legal system—the declaration of independence, the Rambouillet Accords, the Ahtisaari Plan, the Constitution—stress the centrality of the multi-ethnic character of the Kosovo society.

Even during its short mission, the ICJ delegation could observe that the Kosovo legal system does not yet meet the requirements of the Kosovo Constitution to respect international human rights law and standards and, in particular, the right of minorities, including under the Council of Europe's Framework Convention. Its shortcomings include:

- the reported lack of security for Kosovo Serb and Kosovo Albanians to access courts in areas dominated by the other ethnicity, with a clear obstructive effect on access to justice;
- the dramatic incapacity of the Kosovo legal and education system to ensure generational continuity for the Serb community in the legal profession with future stark consequences for the ethnic composition and competence of the judiciary, prosecution service and legal profession;
- the lack of equality in practice between Albanian and Serbian languages in judicial proceedings and unreliable quality of the drafting and translation of its legislation;
- the existence of a deep divide between the laws as written, which often recall or refer to international standards, and the implementation of the laws on the ground.

These obstacles are exacerbated by the legal system's general incapacity to reduce its case backlog and the difficulty in executing judgments, issues that affect the whole of Kosovo. Finally, the purported phasing out of the mission of EULEX in June 2016 effectively deprives the "integration" process of a strong international observation and assistance presence.

During its meetings in North Mitrovicë/Kosovska Mitrovica, the ICJ delegation was told that the priority for the people living in the North of Kosovo is having access to an effective and functioning judicial system and that, in light of this principle, the integration of the judicial systems would not be opposed by the Kosovo Serb community. It was also suggested that Kosovo Serbs would rather give up the parallel system than continue to have a dysfunctional one. It was argued that the "integration" of the justice system should be only the beginning of the proper "integration" process and should go beyond the current mono-ethnic and mono-linguistic approach.

Although the Kosovo legal system has benefited from intensive international support, and could continue to benefit from a gradually-reduced EULEX role, the dominance of international influence has led to stresses and tensions and to a high, unsustainable

degree of dependence on the international community. This support has not, as yet, led to a functioning rule of law society.

The ICJ considers that the efforts of the international and national actors, and of all stakeholders involved, should strongly prioritize access to justice for the minority communities. A transition or "integration" that would come at the expense of Kosovo's minorities' enjoyment of human rights and access to justice would be a sound defeat for the rule of law.

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