

SPECIAL REPORT

KOSOVO AFTER THE ICJ OPINION

Ronald A. Brand

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SPECIAL REPORT

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Ronald A. Brand, Report Editor*

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* Professor and Director, Center for International Legal Education, University of Pittsburgh School of Law. The Report that follows, as with the conference on which it is based, reflects the substantial good work of Cynthia Yializis.

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INTRODUCTION

Ronald A. Brand

The Conference Context

In its Advisory Opinion issued on July 22, 2010, the International Court of Justice (ICJ) addressed the question posed by the General Assembly, “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”¹ The Court answered the question in the affirmative, holding that the declaration was not prohibited by general international law or any other source of international law.² The Court was careful to delineate what it was not asked, and thus what it did not answer:

The question posed by the General Assembly . . . does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State.³

Nevertheless, Kosovo has moved forward on the basis of the declaration and has created the framework of a state. That process began before the February 17, 2008 Declaration of Independence. The ICJ noted the importance of “the factual context which led to its adoption.”⁴ This context included Security Council Resolution 1244, which authorized the Secretary-General, in response to the conflict between Kosovo and Serbia, to establish a presence in Kosovo in order to provide “an interim administration for Kosovo . . . which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions.”⁵ The Secretary-General established the

¹ Accordance with International Law of the Unilateral Declaration of Independence of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 49 (July 22) [hereinafter Kosovo Opinion].

² For a good brief overview of the Advisory Opinion, see Bart M.J. Szewczyk, *Lawfulness of Kosovo's Declaration of Independence*, 14 ASIL INSIGHTS (Aug. 17, 2010), available at <http://www.asil.org/insights/volume/14/issue/27/lawfulness-kosovos-declaration-independence>.

³ Kosovo Opinion, *supra* note 1, ¶ 51.

⁴ *Id.* ¶ 57.

⁵ S.C. Res. 1244, U.N. Doc. A/RES/1244 (June 10, 1999).

United Nations Interim Administration Mission in Kosovo (UNMIK) in 1999, headed by a Special Representative of the Secretary-General, who took on all executive and legislative authority for Kosovo, including supervision of the judiciary.⁶ UNMIK regulation 2001/9 of 15 May 2001 provided a “Constitutional Framework for Provisional Self-Government” of Kosovo.⁷ This regulation was followed by rounds of unsuccessful negotiations at which Serbia and Kosovo considered the status of Kosovo.⁸ Nonetheless, the situation moved forward with elections for an assembly of Kosovo in 2007 and the Declaration of Independence on February 17, 2008. The Republic of Serbia rejected the Declaration, stating that it “represented a forceful and unilateral secession of a part of the territory of Serbia, and did not produce legal effects either in Serbia or in the international legal order.”⁹

The Conference

On October 22–25, 2012, judges, government officials, and scholars from Kosovo and the United States gathered at the University of Pittsburgh for a conference on “Kosovo after the ICJ Opinion.” The conference was organized by the Center for International Legal Education (CILE) at the University of Pittsburgh School of Law, and the University of Prishtina Faculty of Law. It was co-sponsored by the Ministry of Justice, Kosovo; the Ministry of Foreign Affairs, Kosovo; the Forum for Civic Initiatives, Kosovo; the American Society of International Law (ASIL); and the Center for Russian and Eastern European Studies at the University of Pittsburgh Center for International Studies.

While the Advisory Opinion influenced much of the discussion, the principal purpose of the conference was not to consider the Advisory Opinion or the issues of international law it both addressed and has generated. Rather, the principle purpose was to discuss the current state of affairs in Kosovo after the ICJ Opinion, and the challenges and opportunities faced by the people of Kosovo. Each participant brought expertise and experience to the issues discussed. These issues were arranged around four general themes: 1) the constitutional and legal framework of Kosovo; 2) economic development; 3) cooperation and effective reform in the judiciary and legal education; and 4) opportunities for long term

⁶ Kosovo Opinion, *supra* note 1, ¶¶ 60–61.

⁷ *Id.* ¶ 62.

⁸ *Id.* ¶¶ 64–69.

⁹ *Id.* ¶ 77.

development, particularly in light of the broader implications of the ICJ opinion. In addition to the four panels, the Honorable Enver Hasani, President of the Constitutional Court of Kosovo, delivered the 20th Annual McLean Lecture on World Law as part of the Conference.

The conference was organized in order to provide as much time for group discussion as for the presentation of papers. Thus, the Report which follows is not a common printing of papers that were prepared for the conference. Neither is it organized in the order that issues were presented at the conference. It is rather an effort to turn the discussion from the conference into a coherent review of important issues facing Kosovo as it moves forward after the Advisory Opinion.

The Report

The Report that follows uses the words of the conference presenters, taken from their papers, but seeks coherence and concision in order to provide a review of multiple issues in a readably brief format. Each section of the Report reflects the conference discussion through a modification of the paper originally prepared by the author listed for that section.

Part I of the Report, “Getting to Independence: The Advisory Opinion and Beyond,” provides a brief review of the Opinion as well as opinions and reflections on the difficulties of emerging statehood. Professor Fred Morrison focuses on both recognition and the Opinion. The question of recognition was an important theme throughout the conference, acknowledging that Kosovo’s future is closely tied to how other states respond, both formally and informally, to its declaration of independence. Professor Robert Hayden follows by challenging us to think about the difficult issues of territorial partition, secessionist movements, and continued ethnic conflict. Professor Henry Perritt, Jr. picks up the problem of ethnic relations and minority rights, providing a useful and informative list of the problems (and resulting opportunities) Kosovo faces as a nascent state.

While Part I of the Report provides perspectives from outside Kosovo, Part II presents the view of those involved in the day-to-day internal process of state-building. Professor Iliriana Islami presents a useful survey of constitutional development, providing us with the twenty-first century international context that defines both the opportunities and limitations of the basic law of any new state. Her survey is a reminder that the application of international law did not end with the Advisory Opinion, but continues to influence the constitutional framework that will define Kosovo. Zana Zeqiri Rudi provides the view from the Kosovo Ministry of Foreign Affairs, helps us negotiate Kosovo’s unique path from supervised international administration to constitutional state, again emphasizing the importance of the foreign relations function. Vjosa Osmani, a Member of the Kosovo Parliament, provides further indication of the importance of external relations to constitutional framework, defining the important role of “Parliamentary

Diplomacy,” in demonstrating legitimacy of the new Kosovo state within the international community. Her contribution both challenges traditional theory of separation of powers in the realm of foreign affairs and explains the real politic of Kosovo after the Declaration of Independence.

Part III of the Report includes views from both inside and outside Kosovo. It begins with Katerina Ossenova’s informative and cogent presentation of the current economic environment for development in Kosovo. As one would expect from someone at the Commercial Law Development Program of the U.S. Department of Commerce, her review is both substantive and challenging. This external view of the development needs of Kosovo is followed by a review of the Privatization Agency of Kosovo by three of its officials: Arben Limani, Naim Avdiu, and Mrika Tahiri. They help us move from the forest of issues to the individual trees, reminding us of the problems of day-to-day efforts to achieve the types of goals set out by Ossenova. This focus on the economy is followed by consideration of the legal system, with Judge John R. Tunheim sharing observations on the Kosovo judiciary gained from personal involvement in efforts at reform. Dean Bajram Ukaj adds a useful review of the reform of the criminal laws of Kosovo, demonstrating that development requires detail. This review is followed by three sections emphasizing the importance of education—and, more importantly, cooperation in the education process. Wes Rist and I provide sections reviewing the influence of legal education and describing specific cooperation between the University of Pittsburgh School of Law (through its Center for International Legal Education) and the University of Prishtina Faculty of Law. This partnership led to the conference, and it is appropriate to describe more of that relationship and its role in Kosovo’s development. The Report concludes with Professor Martin Weiss’s review of educational cooperation in support of the development of the telecommunications sector in Kosovo, providing additional detail to the larger framework.

A number of themes flow throughout the following Report. These include the importance of

- the relationship between international law and a new state
- the process of international recognition and what recognition means
- how a new constitution affects and is affected by questions of recognition by other states
- the role of both affirmative rights and limitations in a constitution
- the relationship between legal reforms and economic development
- the concept of Supervised Independence
- the concept of Parliamentary Democracy
- the role of Europe in Kosovo’s past and future

- the relationship between general development and specific laws (e.g., a criminal code)
- the consideration of whether the Kosovo experience is *sui generis*
- the relationship between education and legal reforms

The challenges faced by Kosovo include challenges in foreign relations, constitutional development, economic development, judicial reform, and educational reform. Kosovo also has its advantages: a young, and increasingly educated, population;¹⁰ efforts at respect for human rights;¹¹ and support from many members of the international community. Our hope here is that this Report will serve both to advance the discussion of how those challenges may be met utilizing those advantages and to inform not only those involved in that process, but also those desiring a better understanding of the process.

¹⁰ Demographic and economic data is available through the publications of the Agjencia e Statistikave Të Kosovës [Kosovo Agency of Statistics], available at <http://esk.rks-gov.net/eng/publikimet>.

¹¹ See *infra* Part II.D. See also Kushtetuta e Republikës së Kosovës [Constitution of the Republic of Kosovo] arts. 22–62.

PART I—GETTING TO INDEPENDENCE: THE ADVISORY OPINION AND BEYOND

A. *Recognition, the Advisory Opinion, and the Future of Kosovo*

Fred L. Morrison*

1. Introduction

The disputed status of Kosovo is the story of two issues of international law. One issue is of the law of state recognition. When does a new state emerge? What are the criteria? The other issue concerns the role of the International Court of Justice and, in particular, its opinion in the Kosovo independence case.¹² Kosovo's status is also a story about two approaches to international law. One of them is a narrow, fixed and inflexible approach, bound to the past. The other is an approach that seeks substantial justice for all, looking to the future.

In both regards, Kosovo's story demonstrates that the law has moved beyond the inflexible and mechanical approaches of the 19th and early 20th centuries. International law has adapted to accommodate the modern international community's desire for justice, rather than simply providing for mechanical jurisprudence.

2. Self-determination and territorial integrity

Kosovo's claim to independence is based primarily on the principle of self-determination enunciated in Article 1 of the United Nations Charter.¹³ Kosovo asserts that its citizens are a "people" as defined in this principle and that they are thus permitted to determine their own government. This claim is supported by an argument that Serbia had so mistreated the people of Kosovo during the conflict that it has lost any legal or moral claim to resume control of the territory.¹⁴

Serbia's opposition to that claim is based on the principles of territorial integrity and domestic jurisdiction, which are found in Article 2 of the United

* Popham, Haik, Schnobrich/Lindquist & Vennum Professor of Law, University of Minnesota Law School.

¹² Kosovo Opinion, *supra* note 1.

¹³ U.N. Charter art. 1, ¶ 2.

¹⁴ Accordance with International Law of the Unilateral Declaration of Independence of Kosovo, Advisory Opinion, Written Contribution of the Authors of the Unilateral Declaration of Independence, at 60–69 (Apr. 17, 2009), available at <http://www.icj-cij.org/docket/files/141/15678.pdf>.

Nations Charter.¹⁵ Serbia claims that territorial changes can only be made with the consent of the state from which the territory is being taken, a consent that it is unwilling to give.¹⁶ Under the Serbian view, Kosovo was an integral part of Serbia, and that Serbia's territorial integrity cannot be altered without its free consent. Serbia also claims that its relationship with the "province" is a matter of domestic concern.

The interplay between these two principles has been a matter of ongoing controversy for decades. Since the end of de-colonialization in Africa in the 1970's, many countries have resisted the application of self-determination in other contexts, because they fear that it might encourage separatist movements. Prominent among the states that oppose statehood for Kosovo are states in which there are significant separatist independence movements.¹⁷ These states see acceptance of the principle of self-determination as weakening their own claims to national unity. At most, the states opposing Kosovo's statehood see self-determination as providing some more limited form of autonomy.

3. Recognition

Recognition is the act by which an existing state acknowledges that another international entity is a state. International law is (or, at least traditionally, was) primarily about the relationships between sovereign states. Formal recognition was traditionally afforded great importance. Recognition was an indication that the recipient state of the recognition had become a member of the club of sovereigns in the eyes of the recognizing state(s).

There are two competing theoretical approaches to recognition. One is that recognition is constitutive, that only by the acts of other states conferring the status does the new state emerge and thus become entitled to participate in the international legal community.¹⁸ Under this approach, recognition of independence

¹⁵ U.N. Charter art. 2, ¶¶ 4, 7.

¹⁶ Accordance with International Law of the Unilateral Declaration of Independence of Kosovo, Advisory Opinion, Written Statement of the Government of the Republic Serbia, at 147–243 (Apr. 15, 2009), available at <http://www.icj-cij.org/docket/files/141/15642.pdf>.

¹⁷ Among the states that have declined to recognize Kosovo are Cyprus, in which there is a separatist Turkish area, and Spain, which faces claims of independence from the Basque region and from Catalonia.

¹⁸ Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L L. 605 (1941); 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 109 (1905); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 30–31 (6th ed. 1855).

by the prior sovereign has a critical role to play in the acceptance of the new state. The other approach is that statehood exists on the basis of specific facts, regardless of formal recognition.¹⁹ The actions of other states in granting recognition are only declaratory of the existence of those facts. This more modern theory is buttressed by more modern international standards.

The most succinct statement of standards for recognition can be found in the Montevideo Convention on the Rights and Duties of States,²⁰ an Inter-American treaty adopted in 1933. Although this treaty was originally intended only for use in the Western hemisphere, it has become a touchstone for the standards to be applied in other regions. Under it a new state must have “(a) a permanent population, (b) a defined territory, (c) government, and (d) the capacity to enter into relations with the other states.”²¹

Applying these standards to Kosovo in 2008, a strong case could be made for the existence of statehood. An even stronger case can be made today. Kosovo has a defined territory. It has a distinct population. Its laws are routinely applied and enforced throughout most of its territory. Its formal recognition today by half of the states, including the United States and most of the states of Western Europe, shows broad acceptance of it as a participant in international affairs. The Court, however, did not reach this issue, because of the way that the question posed to it in the request for an advisory opinion was worded. It only addressed the question of whether the declaration issued on February 17, 2008 was legal.

Some states, especially Serbia and Russia, may continue to contest Kosovo’s legitimacy. That opposition has consequences. Serbia’s opposition means that there are no normal diplomatic relations with an immediate neighbor, although the European Union has sought to improve relations between the two entities. Russian opposition means that Kosovo cannot obtain membership in the United Nations, because it can use its Security Council veto to reject an application for membership.²²

¹⁹ JAMES BRIERLY, *THE LAW OF NATIONS* 81–85 (1928); 1 JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW* 72–74 (1906); TI-CHIANG CHEN, *THE INTERNATIONAL LAW OF RECOGNITION* (1951).

²⁰ Montevideo Convention on the Rights and Duties of States, 165 L.N.T.S. 19, 49 Stat. 3097, T.S. 881, 3 Bevens 145 (1933).

²¹ *Id.* art. 1.

²² U.N. Charter, art. 4, ¶ 2. *See also*, Advisory Opinion Regarding Admission to the United Nations, 1950 I.C.J. 2.

My own view of recognition, as expressed in my 1967 paper, was functional.²³ In dealing with actions within the territory of Kosovo, members of the international community now understand that they must deal with the authorities in Pristina, not those in Belgrade, to accomplish results. The nations of Europe have joined together to maintain regional peace. The recognition by many of them of Kosovo as an independent state should stand as a barrier to any effort to violate the territorial integrity of that new state. By any functional analysis, Kosovo now has sufficient relations with other members of the international community that it is entitled to respect for its independence.

4. The Advisory Opinion

In its effort to counter the growing recognition of Kosovo's independence, Serbia sought a ruling from the International Court of Justice that the declaration was illegal. Unable to initiate an ordinary contentious case against Kosovo, Serbia urged the General Assembly to ask the Court for an advisory opinion on the legality of Kosovo's declaration of independence.

In seeking to resolve the Kosovo issue, Serbia faced a logical problem. Since only states can be parties to contested cases before the Court,²⁴ it could not sue Kosovo directly in the Court; to do so would admit that Kosovo was a state, which would be self-defeating. Instead, Serbia requested the General Assembly of the United Nations to seek an advisory opinion from the Court. Unlike a judgment, an advisory opinion is not binding, although it is highly persuasive.²⁵ The Court has discretion to decline the request in an advisory case, whereas in a judgment, the Court must give a decision.²⁶ Unlike contentious cases, in which only the adverse parties and those that formally intervene have a right to submit arguments,²⁷ all members of the United Nations are entitled to submit their views to the Court for

²³ Fred L. Morrison, Comment, *Recognition in International Law: A Functional Reappraisal*, 34 U. CHI. L. REV. 857 (1967).

²⁴ Statute of the International Court of Justice, art. 34(1).

²⁵ *See id.* art. 59.

²⁶ *Id.* art. 65.

²⁷ International Court of Justice, Rules of Court, art. 81.

consideration in an advisory opinion case.²⁸ Additionally, the Court can also invite the views of interested non-state parties,²⁹ and frequently does so.

According to the Statute of the Court, it is to respond to the question that the organization has posed for it.³⁰ In this case, the question asked was simple. The General Assembly asked: Is the unilateral declaration of independence by the Provisional Institution of Self-Government of Kosovo in accordance with international law?

The International Court of Justice delivered its opinion on July 22, 2010.³¹ The Court devoted much of its reasoning to defining and refining the question. After noting that it was not being asked whether the Declaration was effective in making Kosovo independent, but only whether the declaration itself was illegal,³² the Court found that there had been declarations of independence during the preceding centuries, some of them had resulted in new states, so it could not be said that declarations of independence were *per se* illegal.³³ Then, the Court turned to the question of whether the declaration was prohibited by the terms of the authority granted to the Assembly of Kosovo as one of the Provisional Institutions of Self-Government established by the United Nations.³⁴ The Court found it unnecessary to answer that question definitively by observing that the body that had passed the resolution was a body of elected leaders of Kosovo, but was not formally the Assembly of Kosovo; *i.e.*, it was not the official Provisional Institution of Self-Government, but rather an assembly of local notables who were expressing their views about independence.³⁵ Since the declaration wasn't an official action by the official Assembly, the declaration of independence could not be contrary to any

²⁸ Statute of the International Court of Justice, art. 66.

²⁹ In this case, the Court issued an order inviting the authors of the Declaration of Independence of Kosovo to submit their views. Accordance with International Law of the Unilateral Declaration of Independence of Kosovo, Order 2008 I.C.J. 409, 410 (Oct. 17).

³⁰ Statute of the International Court of Justice, art. 65.

³¹ Kosovo Opinion, *supra* note 1.

³² *Id.* ¶ 51.

³³ *Id.* ¶ 79.

³⁴ *Id.* ¶¶ 80–121.

³⁵ *Id.* ¶¶ 102–109.

limitation in Security Council resolution 1244³⁶ on the actions of official bodies, and therefore was not illegal.³⁷

Thus, the Court reached the conclusion, by a vote of 10 to 4, that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law.³⁸ Note that this conclusion does not quite match the question asked, which was whether the declaration was “in accordance with international law.” The Court held that the declaration “did not violate international law,” but the Court also made clear that it was not deciding whether the declaration had any operative effect.³⁹ The four dissenters primarily emphasized the importance of retaining the stability of existing states.⁴⁰

The advisory opinion was a victory primarily for the Court. The opinion had threaded its way between the demands of Serbia—that the Declaration of Independence be declared illegal—and the demands of the authors of the Declaration—that the independence be recognized. The Court managed to redefine the question into a form that was largely, but not totally, meaningless, and then answered that question ambiguously. For Serbia, the opinion was indeed a major loss, but for Kosovo, it was not a signal victory. Kosovo received only the benefit of a judicial declaration that its Declaration of Independence was not a violation of international law, but not a decision that the declaration was effective.

5. The Path Forward

If the rules of recognition are evolving, and the advisory opinion is ambiguous, what is the path forward for Kosovo? Kosovo must recognize the traditional role of recognition, but also capitalize on the changing perception of how recognition is granted. To this end, Kosovo has to focus its efforts for achieving recognition into three spheres of policy.

The first imperative is to maintain order and stability in Kosovo, and to protect the human rights of all of its residents. Above all, Kosovo must protect the rights of minority groups both conspicuously and transparently. One of the later

³⁶ S.C. Res. 1244, U.N. Doc. S/Res/1244 (June 10, 1999).

³⁷ Kosovo Opinion, *supra* note 1, ¶¶ 109–121.

³⁸ *Id.* ¶ 123 (On the preliminary question of whether to give the advisory opinion, the vote was 9 to 5. Judge Keith would have preferred to decline to issue an opinion, but then concurred with the majority on the merits of the issue).

³⁹ *Id.* ¶ 56.

⁴⁰ The dissenting opinions are appended to the advisory opinion.

decisions of the Badinter Commission in evaluating the claims of the Yugoslav states to independence examined those states' respect for human rights.⁴¹ Those standards enumerated by the Commission would presumably apply here too. It is not enough that minority rights are protected. In order to obtain credibility in the world community, Kosovo must be seen by the rest of the world as actively protecting minority rights. There must be transparency in that respect. Protection of religious and cultural sites of importance to the Serbian minority in Kosovo, and to the population of Serbia itself, is also important in this regard.

The second imperative is to strengthen the economic viability of an independent Kosovo. The economy of Kosovo over the past decade has required massive infusions of external funds, both to support the international administrative and military structures, and to support redevelopment assistance programs in the aftermath of the conflict. The nations of Europe are growing weary of extensive subsidization of their poorer cousins, as the recent Euro crisis demonstrates.

The third imperative is to involve Kosovo, to the maximum extent possible, in the international affairs of Europe and of the world. The criteria for the recognition of statehood have been readily established. Kosovo has formally been recognized by many of the countries of Europe and the world. Now Kosovo must be as an active participant in the international conversation. Actual participation is more important than the accumulation of formal acknowledgements of recognition. In some instances participation will be difficult. Formal membership in the United Nations is not likely in the near future, because Russia is likely to veto any membership application. But, other institutions, such as the International Monetary Fund and the World Bank, are more accessible. The World Trade Organization may be another such global institution. Active participation in European institutions, beginning with the Council of Europe and the European Court of Human Rights, is especially important.

With broad recognition, Kosovo is now a new state. However, Kosovo now faces other obstacles and imperatives. With the determination that has guided it over recent history, Kosovo is poised to overcome and satisfy these new challenges.

⁴¹ Peace Conference on Yugoslavia Arbitration Commission Opinions, Jan. 11, 1992, 31 I.L.M. 1497 (1992).

B. *Regional Stability, Unworkable States, and the Obvious but Unattainable Solution*

Robert M. Hayden*

With all due respect for the ICJ and for the title of this conference, Fred Morrison has nailed the essence of the matter perfectly in his section of this report: “The Court managed to redefine the question into a form that was largely, but not totally, meaningless, and then answered that question ambiguously.”⁴² Mr. Morrison’s conclusion that, “The advisory opinion was a victory primarily for the Court”⁴³ indicates that the basis for decision was one *not* of legal principle. Rather, the Court found a way to prevent picking sides in Big Power politics by giving an ambiguous answer to a question it was not asked and avoiding answering the one that it *was* asked. Ultimately, the Court did not determine or say anything meaningful at all.

By avoiding more definitive language, the ICJ opinion has effectively determined that international law is not relevant in cases of secession. There are secessionist movements, from Catalonia to Quebec to Kashmir, that are quite pleased with this development. Also pleased are the Serbs on the one hand and the Croats in Bosnia and Herzegovina on the other. Perhaps the most pleased are the local politicians in those parts of Northern Kosovo where the Prishtina government does not rule and the population rejects coming under that government’s control. By avoiding setting legal precedent, the ICJ opinion ensured that the Kosovo secession counts as a real-life, political precedent. This status, unfortunately, avoids the logical legal resolution.

Unless they are negotiated and agreed to beforehand, partitions of territories are inherently tenuous; secession movements may fail. In the best-case scenario, those secessions that succeed may be legalized after the fact by recognition from the state in which they seceded—e.g. Bangladesh by Pakistan, Eritrea by Ethiopia, and East Timor by Indonesia. This legalization follows from the principle that a state may agree to a change of its borders. What gets messy is when a successful secession is *not* recognized by the state losing territory—e.g. the Turkish Republic of Northern Cyprus, Transdnistria, South Ossetia, and Abkhazia.

* Professor of Anthropology, Law, and Public and International Affairs, and Director of the Center for Russian and East European Studies at the University of Pittsburgh.

⁴² See *supra* Part I.A.4.

⁴³ See *supra* Part I.A.4.

Despite Serbia's lack of recognition of Kosovo's independence thus far, this conflict does not mean that a solution for the Kosovo situation could not be found. It has been clear since before the Kosovo war that Serbia has been willing to change its border and thus consider the secession of most of what has become Kosovo.⁴⁴ It was no secret in Belgrade in the late 1990's that most relevant political parties, with the exception of Vojislav Seselj's Serbian Radical Party and Vojislav Kostunica's Serbian Democratic Party, considered partition of Kosovo to be potentially favorable.⁴⁵ In Milosevic's government, this position was espoused by his coalition partner New Democracy. Serbian willingness to partition Kosovo was enunciated by Serbian Prime Minister Ivica Dacic in preparation for his recent meeting in Brussels with Kosovo Prime Minister Hashim Thaci Dacic.⁴⁶

The legal and political solution to the Kosovo secession is to partition the territory, with Serbia retaining the northern Kosovo municipalities of Leposavic, Zvecan and Zubin Potok and those parts of the city of Kosovska Mitrovica north of the Ibar River. These territories had majority Serbian populations before 1999, and are overwhelmingly Serbian now. Other problems could be resolved more easily—the protection of major Serbian religious sites, tourism to which would benefit Kosovo, and resolution of the property issues by ensuring that the Serbs who fled received real value for their properties. In return, Kosovo would gain clear title to most of the resources, and the infrastructural projects needed by both countries could be advanced.

There are both practical and normative reasons for electing this territorial partition. The practical one is that the population of the northern Kosovo region rejects inclusion in the Albanian state of Kosovo; note that I say “Albanian state” because Kosovo is an ethnocracy. This ethnic majority does not make Kosovo unique, or even an outlier, as every independence movement in the former Yugoslavia was based on political movements for ethno-national self-determination, and not that of a population of undifferentiated citizens. Every such movement that succeeded has produced systematic discrimination, at best, against the most prominent and numerous minorities.⁴⁷ The Serbs of northern Kosovo

⁴⁴ See ROBERT THOMAS, *THE POLITICS OF SERBIA IN THE 1990S* (1999).

⁴⁵ See generally *id.*

⁴⁶ *PM Reiterates: Kosovo Partition is only solution*, KOSOVOCOMPROMISE (Oct. 7, 2012), <http://www.kosovocompromise.com/cms/item/latestnews/en.html?view=story&id=3841>.

⁴⁷ See, e.g., Robert M. Hayden, “Democracy” without a Demos? *The Bosnian Constitutional Experiment and the Intentional Creation of Nonfunctioning States*, 19 E. EUR. POL. & SOCIETIES 226 (2005).

should expect a bleaker future should the territory in which they reside come under Prishtina's control.

There is another reason why partitioning Kosovo would be helpful. The refusal to recognize that the various independence movements have been aimed at creating ethnocracies has led to the creation of unworkable states. Bosnia does not actually exist as a state, since the central government has authority only in the parts ruled by Bosniaks, with the Serbs in Republika Srpska and the Croats in Western Herzegovina rejecting any effective Bosnian state.⁴⁸ In Macedonia, recent ethnic violence has raised concerns that radical paramilitary groups may seek a forceful secession of the western part of the country to create an ethnic Albanian state.⁴⁹ Restructuring the states to better match the ethno-national borders would provide better chances for these countries to develop governments that are empowered to control populations that actually do accept them, and thus become more closely bound by the rule of law.

There is another reason why agreeing to partition Kosovo would aid stability in the region. NATO presence would no longer be necessary. Approximately 10% of the NATO units in Kosovo are actually drawn from neighboring countries.⁵⁰ Effectively, Slovenian, Croatian, Hungarian, and Bulgarian troops are pitted against Serbs, with casualties occurring on both sides. In a region where historical memories run long, it is not good policy to create conditions in which military units of the neighboring countries are actually brought into conflict.

Agreeing to the reality of a new border will not solve all problems between Kosovo and Serbia, but it would set up the conditions under which most could be addressed more effectively. If the northern border of Kosovo with Serbia is not redrawn to reflect the clear will of the residents there, we will see either another round of ethnic conflict, or a continuation of the current stalemate. For the sake of the stability of the region, and of Kosovo and Serbia, the solution of territorial partition is far preferable to the current course of unilateral secession. An agreed

⁴⁸ See Robert M. Hayden, *The Partition of Bosnia and Herzegovina, 1990–93*, 2 RFE/RL REP. ON E. EUR., May 28, 1993, at 1–14; STEVEN L. BURG & PAUL S. SHOUP, *THE WAR IN BOSNIA-HERZEGOVINA: ETHNIC CONFLICT AND INTERNATIONAL INTERVENTION* (2000).

⁴⁹ *Radical Islam Poses Regional Threat*, TURKISH WEEKLY (May 11, 2012), <http://www.turkishweekly.net/news/135995/radical-islam-poses-regional-threat-.html>.

⁵⁰ NATO, Kosovo Force (KFOR), KEY FACTS & FIGURES (Nov. 30, 2012), available at http://www.nato.int/kfor/structur/nations/placemap/kfor_placemat.pdf.

partition would also set a much better practical precedent than the ICJ's artful dodging of the real issues in its opinion in the Kosovo case.

C. Declaring Independence Was the Easy Part

Henry H. Perritt Jr.*

1. Introduction

Kosovo declared independence on February 18, 2008. Five years later, questions remain about how much independence is worth to the people of Kosovo. Economic development is sluggish, the political system is trapped by preoccupation with the international community as its most important constituency, Kosovo's best and brightest are alienated from politics, and human rights values have penetrated few human hearts. Whether history will mark the Kosovo project as a success depends on overcoming these obstacles with a renewal of the spirit of 1997 and 1998.

2. The political constituency is the international community, not the local peoples

Kosovo's century-long struggle for independence convinced much of Kosovo's population that it lacked the capacity to determine its own political destiny but instead depended on the will of the great powers. That perception, combined with tight control over indigenous Kosovo institutions during the UNMIK period and EU supervision after independence, has caused Kosovo's political leadership to be more concerned about satisfying diplomats from other states than with satisfying aspirations of its own people.

The result is a politics for Kosovo that is strangely silent on the issues that dominate politics in most other democracies: jobs, economic development, trade, elimination of corruption, improvements in the justice system, and presentation of new faces as candidates for political leadership. The local press and media are filled with stories that hardly change from day to day or month to month, almost all of them about the latest statement from Belgrade, Brussels, or Washington on the future of the north. Rarely can one find any serious journalism about competing economic proposals, plans for education, or concrete initiatives to improve the court system.

3. Economic development is sluggish

A 2004 Economic Memorandum from the World Bank concluded that:

* Professor of Law and former Dean, Chicago-Kent College of Law. Author of *KOSOVO LIBERATION ARMY: THE INSIDE STORY OF AN INSURGENCY* (Univ. of Illinois Press 2010), and *THE ROAD TO INDEPENDENCE FOR KOSOVO: A CHRONICLE OF THE AHTISAARI PLAN* (Cambridge Univ. Press 2010).

The economy Kosovo inherited in 1999 had been damaged by poor economic policies, broken external trade and financial links, international sanctions, a lack of investments, and ethnic conflict. The macroeconomic data indicate that there has been a recovery of economic activity and positive growth since 2000. However, the recent growth performance has been driven by a post-conflict boom financed by official aid flows and is unlikely to be sustainable.⁵¹

The World Bank strategy document for Kosovo 2012-2015⁵² identified five sets of obstacles to doing business: severe infrastructure gaps, deficiencies in the rule of law, shortages of appropriately skilled labor, limited access to finance, and onerous regulatory procedures for business entry and operations.”⁵³

An unreliable electricity supply is perhaps the most serious obstacle to business expansion, followed by an inadequate transportation system.⁵⁴ Both have been recognized as problems since 1999, yet concrete ideas for expanding electricity generation and tying it to regional grids in Albania have received little political emphasis. Construction of a new highway to Albania is proceeding sluggishly, amid accusations of corruption. Albania’s portion was largely complete by 2010, when construction of Kosovo’s portion had barely begun.⁵⁵

The absence of a coherent program with respect to remittances provides a concrete example of failure in economic policy. Remittances from family members working outside Kosovo have been something of a safety value for the Kosovo economy. The share of remittances in GDP fell from 17.5% in 2004 to 13% in 2010, but the World Bank reports that it is still high by regional and global standards. The World Bank also notes that no public policy exists to maximize the contribution of remittances to Kosovo’s economic development. “No government

⁵¹ World Bank, *Kosovo Economic Memorandum*, at 6, Report No. 28023-KOS (May 18, 2004).

⁵² World Bank, *Country Partnership Strategy for the Republic of Kosovo for the Period FY12–FY15*, Report No. 66877-XK (May 1, 2012), available at <http://documents.worldbank.org/curated/en/2012/05/16258251/kosovo-country-partnership-strategy-period-fy12-fy15>.

⁵³ *Id.* at 8.

⁵⁴ *Id.* at 9.

⁵⁵ Compare Albania Motorway, BECHTEL, <http://www.bechtel.com/albanian-motorway.html> with Route 7, KOSOVO MOTORWAY, <http://www.kosovomotorway.com/Begp/index.php>.

document of any kind contains policies related to the economic aspects of migration.”⁵⁶

Agriculture regularly is identified as a sector in which Kosovo has economic opportunity; yet no coherent ideas have been expressed on how a badly fragmented pattern of minimally subsistent farms can be integrated into production units of viable size.

4. Rule of law barely exists

The court system is in shambles, with corruption rampant, professionalism largely absent, and bizarre decision-making only loosely tied to logical interpretations of written law. Opportunities in Kosovo for western levels of professional legal education do not exist. The quality of the Kosovar bar is abysmal, and yet no provision exists for foreign lawyers to appear formally in Kosovo courts—a practice that could provide role models for indigenous lawyers, as well as holding the judiciary to higher standards.

The Kosovo Police Service is professional and highly motivated, but it cannot do the job without partners in the judiciary and the bar, including the prosecution service.

5. The best and brightest are alienated from politics

Kosovo is blessed with many young people educated in Europe and the United States. They are ambitious and have strong work ethics. They are, however, too remote from politics.

Political alienation among Kosovo’s youth is pervasive and increasing as time passes without tangible progress in matters that affect daily lives. Movement to an open-list system for choosing candidates for the Assembly offered opportunities for ambitious young political candidates; yet few came forward. Vetëvendosje and FER (New Spirit) attracted advocates of change in the 2010 elections, but FER failed to meet the 5% threshold for seats in the Assembly and then was merged into Vetëvendosje. Vetëvendosje achieved a critical mass in the Assembly but has focused on strong nationalist rhetoric and on reviling the older parties and the international community rather than offering concrete alternatives in the domestic policy arena. The economic planks in its political program oppose privatization and advocate subsidies for domestic industry—essentially a return to discredited

⁵⁶ World Bank, *Migration and Economic Development in Kosovo*, at 1, Report No. 60590-XK (May 25, 2011).

socialism which ruined the economies of central and eastern Europe before the fall of the Soviet Union.

6. Human rights values have penetrated few human hearts

Article 3 of the Constitution of Kosovo declares that Kosovo is a multi-ethnic society, and that all individuals stand equal before the law in accordance with internationally recognized fundamental rights.⁵⁷ Chapter II guarantees “Fundamental Rights and Freedoms.” Article 24(2) prohibits discrimination on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability, or other personal status.⁵⁸

Kosovo’s political leadership has gone out of its way since 1999 to make public pronouncements assuring the equality of Serbs and Roma within Kosovo. Yet these values are not yet enshrined in many human hearts in Kosovo. Private conversations with Kosovar Albanians and Kosovo Serbs evoke preposterous myths about threats from the other and convictions that the two ethnic groups can never live together in respect and trust.

The Kosovo Constitution assures against discrimination based on sexual orientation. Two of this author’s students⁵⁹ visited Kosovo in the summer of 2012 to conduct research on the implementation of this provision, interviewing many gay and straight Kosovars and internationals. They discovered that the Assembly has done nothing to implement the provision against non-governmental sources of discrimination, meaning that no mechanisms for enforcement exist against private entities such as employers, places of public accommodation or private health care providers. Although each ministry and municipality has a human rights unit to take complaints of governmental discrimination, these units do not have independent budgets or confidentiality mechanisms. The Ombudsperson has not proactively invoked his power to send discriminatory laws to the Constitutional Court for review. Most young gay men and women live in abject fear of anyone discovering who they really are. That is not a free society.

There are, of course, some enlightened and inspiring voices, some friendships forged and maintained across ethnic and other divides. But there are not enough.

⁵⁷ Kushtetuta e Republikës së Kosovës [Constitution of the Republic of Kosovo] art. 3.

⁵⁸ *Id.* at art. 24(2).

⁵⁹ Anne and Sarah Marfisi.

These voices are still the exception rather than the rule. Bravery seems to be in shorter supply now than it was in 1998 and 1999.

7. Conclusion

Kosovo's war is not over yet: there is still too much of a gap between the dream and reality. Hopefully new faces will emerge, faces on bodies as brave as the KLA soldiers who fought against huge odds in 1998 and 1999. If that happens, like America, Kosovo can be free.

PART II—ACHIEVING EFFECTIVE STATEHOOD*D. Building Statehood Through Constitutionalism*

Iliriana Islami*

1. International Law and the Constitution

One of the requirements of international law for building statehood is internal constitutional sovereignty.⁶⁰ In most post-conflict societies, developing constitutional order is crucial to creating an effective, viable state. As such, the constitution emerges as an important limitation on the capacity of the majority to exercise political will. This role of a constitution implies that state sovereignty should be complemented by other guiding principles, notably the “global common interest” and/or “rule of law” and/or “human security.”⁶¹

This external element that shapes sovereignty necessarily conceives that international law cares about development of domestic constitutional standards. Based on contemporary international legal approaches, the constitutions of states, particularly of newly emerging states, come to the forefront in demonstrating these new internationalization tendencies.⁶² In this respect, constitutions forge the relationship between international and national law by creating a network of norms with the aim of establishing judicial globalization. Thus, constitutional texts, legislative texts, and judicial outcomes are influenced by international bodies tackling fundamental problems.⁶³

Kosovo’s constitutional framers accepted that the prevention (or resolution) of ethnic conflict is crucial for maintaining stability and peace. Minority rights are regarded as an instrument for attaining this stability and are considered as a core element of a viable constitutional framework. The drafters were strict in embracing international standards to provide rights for Kosovo’s minority Serbian population

* Professor of Law at the University of Prishtina Faculty of Law, and former judge, Constitutional Court of Kosovo.

⁶⁰ See Montevideo Convention on the Rights and Duties of States, art. 1(c), 165 L.N.T.S. 19, 49 Stat. 3097, T.S. 881, 3 Bevans 145 (1933).

⁶¹ Anne Peters, *Global Constitutionalism Revisited*, 11 INT’L LEGAL THEORY 39, 49 (2005).

⁶² See NEW TRENDS IN INTERNATIONAL LAWMAKING—INTERNATIONAL ‘LEGISLATION’ IN THE PUBLIC INTEREST (Jost Delbrück 1997).

⁶³ Michael Donelan, *A Community of Mankind*, in THE COMMUNITY OF STATES: A STUDY IN INTERNATIONAL POLITICAL THEORY 140, 142 (James Mayall ed., 1982).

that would extend beyond European standards.⁶⁴ This embrace of international norms and standards for minority protection is a process that can be characterized as the internationalization of constitutional law.

Beginning in 1991, European states defined criteria according to which they would recognize new states in the region.⁶⁵ These criteria emphasized the guarantee of “the right of ethnic and national groups and minorities.”⁶⁶ The Constitution of Kosovo, which came into effect on June 15, 2008, complies with this development and takes the additional novel step of using the term “communities” in place of “minorities.” This consciousness of minority rights is embodied in Article 3: “The Republic of Kosovo is a multi-ethnic society consisting of Albanian and other Communities, governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions.”⁶⁷

Kosovo is striving to build a modern multi-ethnic society safeguarded by its Constitution. Every constitutional system should comply with the functions and values of constitutionalism. Constitutionalism has to address the relationship between the state and the other emerging, “constitutionalized, levels of governance in order to establish legitimacy and coherence.”⁶⁸ A constitution is a “mirror reflecting the national soul”⁶⁹—the identification of the ideals and aspirations of a nation. The Constitutional Court comes to the forefront in revealing this soul through its interpretation. Therefore, the Constitutional Court must propound values and democratic principles to bond the people and discipline the government. I can say that the first year of the work in Kosovo was similar to other Constitutional Courts whereby jurisprudence has little to do with the rights of the particular named party, but much to do with a desire for national consideration.

⁶⁴ See Emma Lantschner, *Protection of Minority Communities in Kosovo: Legally Ahead of European Standards-Practically Still a Long Way to Go*, 33 REV. CENT. & E. EUR. L. 451 (2008).

⁶⁵ Guidelines on the Recognition of new States in Eastern Europe and in the Soviet Union, Dec. 16, 1991, 31 I.L.M. 1486.

⁶⁶ *Id.* See also Mathew Craven, *The European Community Arbitration Commission on Yugoslavia*, 1996 BRIT. Y.B. INT'L L. 333; Iliriana Islami, *The Quest for Statehood in the Internationalized Territory of Kosovo and the Challenges Ahead*, in A EUROPEAN PERSPECTIVE FOR THE WESTERN BALKANS 191 (Hubert Isakedt ed., 2007).

⁶⁷ Constitution of the Republic of Kosovo, *supra* note 57, at art. 3.

⁶⁸ Thomas Cottier & Maya Hertig, *The Prospects of 21st Century Constitutionalism*, 2003 MAX PLANCK Y.B. U.N. L. 261, 298.

⁶⁹ *State v. Acheson*, 1991 (2) SA 805 at 813 (Namib.), available at http://lrc.org.za/Docs/Constitution/Case_Law/Acheson.pdf.

2. International Law, Statehood, and Constitutional Interpretation

The Constitutional Court is responsible for supporting these values and democratic principles through its interpretation of the laws. An interpretation based on the spirit of the constitutional framers means priority should be given to international law. Article 22 of the Constitution provides that:

Human rights and fundamental freedoms guaranteed by . . . 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.⁷⁰

It has since fallen to the Constitutional Court to carry out this mandate to protect “community rights” as well as the “constitutional system” which relies on international norms.

The Constitutional Court appears to have established constitutional order in its first three years of jurisprudence. The Constitutional Court’s first referral addressing multi-ethnicity was filed by Ćemajl Kurtişi, Vice Chairperson of the Municipality of Prizren, on April 22, 2009.⁷¹ The referral claimed that Article 7 of the Statute of the Municipality of Prizren was in violation of Articles 3.1, 6.1, 58.1 and 59.1 of the Constitution because the emblem of the municipality of Prizren only recognized the cultural-historical significance of the Albanian community and did not transmit a message of multi-ethnicity in a multi-ethnic municipality.⁷² The Constitutional Court found a violation of the Constitution by recalling that:

“The Republic of Kosovo is a multi-ethnic society consisting of Albanian and other Communities” and equally guarantees the right of communities to use and display Community symbols in accordance with the law and international standards . . . it also emphasises [sic] the responsibility of the State to promote a

⁷⁰ Constitution of the Republic of Kosovo, *supra* note 57, at art. 22.

⁷¹ Gjykata Kushtetuese [Constitutional Court] KI 01/09, Judgment dated Mar. 18, 2010, ¶ 3 (Kos.), available at http://gjk-ks.org/repository/docs/ko_01_09_Ven_ang.pdf.

⁷² *Id.* ¶ 55.

spirit of tolerance and dialogue, and to support reconciliation among communities.⁷³

The Court further recognized that the Albanian Community has been put in a privileged position, because it has the dominant position in the Municipality.⁷⁴ Therefore, the Court ordered the Municipality of Prizren to change the emblem in accordance with Article 3 of the Constitution.

3. A Good Start

Decisions such as the one handed down to the Municipality of Prizren have started to establish the constitutional order envisioned by Kosovo's constitutional framers. The protection of "community rights" has created a foundation for lasting peace and stability. In this context, Kosovo is fulfilling constitutional function of legitimizing, limiting and guiding politics. By creating this inner constitutionalism, Kosovo is establishing its case for recognition and statehood. However, more work is left to be done, both judicially and politically, to ensure that communities are effectively integrated into the emerging constitutional order and also to ensure Kosovo becomes integrated fully by the international community.

⁷³ *Id.* ¶ 49 (internal citations omitted).

⁷⁴ *Id.* ¶ 51.

E. Foreign Policy After the Advisory Opinion

Zana Zeqiri Rudi*

Since the declaration of independence on February 17, 2008, Kosovo's aspiration has been to build a modern, democratic country that is recognized internationally. Today, Kosovo is a multi-ethnic democracy demonstrating economic growth and private sector potential.⁷⁵

1. The End of Supervised Independence

Kosovo completed the obligations set forth in the Ahtisaari Proposal, which brought the end of supervised independence on September 10, 2012.⁷⁶ Having built democratic, functional institutions in a process that was advised, mentored, and overseen by the international community, the International Steering Group's decision to end international supervision over Kosovo's independence is considered by Kosovars to be a major accomplishment. This end of supervised independence presents Kosovo with a momentous opportunity to take full responsibility over its Constitution.

The ICJ Advisory Opinion is considered by the Kosovo government as providing the foundation for exercising constitutional functions. The opinion is considered to have implicitly established that (i) States that have not yet recognized Kosovo's independence can do so because Kosovo's Declaration of Independence did not violate general international law; and (ii) there is no support for further status talks. On the first point, the Ministry of Foreign Affairs (MFA) has undertaken negotiations to obtain state-by-state recognition.

On the second point, it is important to recall that Kosovo and Serbia engaged in a dialogue to determine Kosovo's political status as determined in Security Council Resolution 1244 (1999).⁷⁷ As a result, Martti Ahtisaari recommended that Kosovo's status be independent, which led to the Declaration of Independence in

* Diplomatic Advisor at the Ministry of Foreign Affairs, Kosovo.

⁷⁵ See *supra* note 52.

⁷⁶ Kosovo's "supervised independence" ends, B92.NET (Sept. 10, 2012, 12:09 PM), http://www.b92.net/eng/news/politics.php?yyyy=2012&mm=09&dd=10&nav_id=82158.

⁷⁷ Status Process as of Aug. 1, 2007, UNOSEK, <http://www.unosek.org/unosek/>.

2008.⁷⁸ The UN General Assembly acknowledged the content of the Advisory Opinion of the ICJ in the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, and welcomed the readiness of the European Union to facilitate a process of technical dialogue between Kosovo and Serbia.⁷⁹ In its resolution 64/298, the UN General Assembly envisioned the dialogue contributing to peace, security, and stability in the region.⁸⁰ The UN General Assembly envisioned that the technical dialogue between Kosovo and Serbia would advance the path to European Union membership for both.⁸¹ In this way, the issue was moved from the General Assembly to the European Union (in the framework of good neighborly relations and regional cooperation).

One of Kosovo's main goals is integration into Euro-Atlantic institutions. To this end, Kosovo engaged in technical dialogue with Serbia in March 2011.⁸² The dialogue—under EU facilitation as stipulated by the UN General Assembly—produced seven bilateral agreements on issues like university diplomas, custom stamps, integration border management, and regional cooperation and representation.⁸³

After the Advisory Opinion and the General Assembly's resolution for the EU facilitated dialogue, the European Union integration process became a real endeavor. The possibility of EU Membership shapes Kosovo's political, economic, and cultural direction. Kosovo shares European values. Kosovo institutions have reinforced their EU integration objective by engaging in the technical dialogue with Serbia as stipulated by the General Assembly.

⁷⁸ U.N. Office of the Special Envoy for Kosovo (UNOSEK), Addendum to Letter dated Mar. 26, 2007 from the Secretary-General addressed to the President of the Security Council—Comprehensive Proposal for the Kosovo Status Settlement, U.N. Doc. S/2007/168/Add.1 (Mar. 26, 2007).

⁷⁹ G.A. Res. 64/298, ¶¶ 1–2, U.N. Doc. A/Res/64/298 (Sept. 9, 2010).

⁸⁰ See William Hague, U.K. Foreign Sec., Statement in Response to General Assembly Resolution 64/298 (Sept. 10, 2010), available at <https://www.gov.uk/government/news/foreign-secretary-on-un-general-assembly-resolution-on-icj-advisory-opinion-on-kosovo>.

⁸¹ See *id.*

⁸² "Three main topics" in *Belgrade-Pristina talks*, B92.NET (Mar. 7, 2011, 3:10 PM), http://www.b92.net/eng/news/politics-article.php?yyyy=2011&mm=03&dd=07&nav_id=73106.

⁸³ See, e.g., *Serbia and Kosovo sign deals*, ALJAZZERA (July 2, 2011, 10:31 PM), <http://www.aljazeera.com/news/europe/2011/07/201172202625940367.html>; *Serbia and Kosovo reach deal to end mutual trade embargo*, DEUTSCHE WELLE (Sept. 2, 2011), <http://www.dw.de/serbia-and-kosovo-reach-deal-to-end-mutual-trade-embargo/a-15362158-1?maca=en-rss-en-all-1573-rdf>.

Kosovo has received recognitions from 22 out of 27 EU Member States, as well as EU candidate states Croatia, Iceland, Macedonia, Montenegro, and Turkey.⁸⁴ Securing recognition from the other five members is essential. Kosovo's efforts to deepen cooperation with these members have started to bear fruit, with a recent decision by Slovakia to accept passports issued by Kosovo.⁸⁵

Kosovo has worked closely with the EU in completing a Feasibility Report. Through the process of a Feasibility Study, a path towards negotiations to sign a Stabilization and Association Agreement with the EU has been established. Late in the spring of 2012, Kosovo officially received the visa liberalization roadmap adopted by the European Commission.⁸⁶

Kosovo has experienced transitions, war, and the instability of international administration in its path to an independent state looking to join the EU. Kosovo's internationally-facilitated path to independence, the significant number of state recognitions, its membership in regional and international organizations, and the Advisory Opinion set the stage for the future of Kosovo.

⁸⁴ A list of official recognitions is maintained by Ministria E Punëve Të Jashtme [the Ministry of Foreign Affairs], available at <http://www.mfa-ks.net/?page=2,33>.

⁸⁵ *Slovakia recognizes Kosovo passports*, TOP CHANNEL (July 20, 2012, 6:30 PM), <http://www.top-channel.tv/english/artikull.php?id=6538>.

⁸⁶ Department of Home Affairs (EC), Press Release IP/12/605 (June 14, 2012), available at http://europa.eu/rapid/press-release_IP-12-605_en.htm.

F. Foreign Policy of the Republic of Kosovo: The Role of Parliamentary Diplomacy in State-Building

Vjosa R. Osmani*

Developing and executing foreign policy has been one of the biggest challenges for the Republic of Kosovo post-independence. As the youngest nation in Europe, and until recently the youngest country in the world, Kosovo's challenges in the state-building process are unique, especially in terms of recognition.

Historically speaking, foreign affairs have been at the heart Kosovo's politics. This focus was true during the nineties, when the Government-in-exile established informal representation offices in important decision-making countries. These representation offices, without diplomatic accreditation, managed to internationalize Kosovo's struggle for independence under the leadership of Kosovo's historic President, Dr. Ibrahim Rugova.

The Declaration of Independence of February 17, 2008, did not simplify Kosovo's foreign affairs. However, the establishment of core institutions to lead this process, such as the Ministry of Foreign Affairs, made the challenges easier to address. The Advisory Opinion, which ruled that Kosovo's declaration of independence is not in violation of any applicable rule of international law, strengthened Kosovo's international position and its quest for further recognitions. Kosovo's endeavor to achieve full recognition of its statehood and to secure membership in key international organizations remains a priority. The problems encountered in this path are as unique as the path Kosovo has taken towards its independence.

1. Foreign Policy of the Republic of Kosovo Before Independence

The abolition of Kosovo's autonomy by the Milosevic regime in 1989 was followed by the organization of a parallel system and the election of a shadow-like Government that provided the people of Kosovo with basic services like education and medical care.⁸⁷ While most key pillars of this Government were functioning with difficulties, President Rugova's resistance movement and his Government-in-

* Member of Parliament (LDK), Member on the Committee for European Integration, and Assistant Professor, University of Prishtina Faculty of Law.

⁸⁷ УСТАВ РЕПУБЛИКЕ СРБИЈЕ (1990) [USTAV REPUBLIKE SRBIJE] [CONSTITUTION] arts. 6, 109 (Srb.).

exile saw foreign policy as one of their key priorities.⁸⁸ During this time, there was no active role of the Parliament in foreign policy development. Members of Kosovo's Parliament had been chased out of the Parliament building forcefully, which was surrounded by tanks.⁸⁹ Parliament organized the Constitutional Declaration of 2 July 1990 and adopted the Constitution on 7 September 1990, which finally led to the organization of the Referendum for Kosovo's independence in 1991.⁹⁰

Despite these historical activities, most Members of the resulting Kosovo Parliament either lived in exile or were arrested by Serbian forces. Thus, there was no direct involvement of the Parliament in diplomacy. Kosovo's case eventually did become international in 1999, and United Nations Security Council Resolution 1244 allowed an international civilian and military presence in Kosovo.⁹¹ Accordingly, NATO intervened, with the resulting removal of Serbian military, police and paramilitary forces from Kosovo.⁹² While a number of functions were transferred from UNMIK to Kosovo authorities over the course of nine years of UNMIK administration, foreign policy remained an area where the local institutions had very little power.⁹³ The Constitutional Framework⁹⁴ provided that:

[e]xternal relations, including with states and international organisations, as may be necessary for the implementation of his mandate. In exercising his responsibilities for external relations, the SRSB will consult and co-operate with

⁸⁸ See Ibrahim Rugova: *Pacifist at the crossroads*, BBC (May 5, 1999), http://news.bbc.co.uk/2/hi/special_report/1998/kosovo2/110821.stm.

⁸⁹ See generally MARC WELLER, *THE CRISIS IN KOSOVO 1989–1999*, at 60–62 (1999).

⁹⁰ *Id.* at 64–65.

⁹¹ S.C. Res 1244, ¶ 5, U.N. Doc. A/RES/1244 (June 10, 1999).

⁹² *History of KFOR Deploys*, NATO—KOSOVO FORCE (KFOR), <http://www.aco.nato.int/kfor/about-us/history.aspx>.

⁹³ Prindon Sadriu & Vjosa Osmani, *Foreign Policy of the Republic of Kosovo*, in *BALKANS—FOREIGN AFFAIRS, POLITICS AND SOCIO-CULTURES* 62 (Cüneyt Yenigün & Ferdinand Gjani eds., 2011).

⁹⁴ The Constitutional Framework for Provisional Institutions of Self Government, adopted in 2001, created the legal basis for the powers of Kosovo local institutions during the UNMIK administration. Moreover, it outlined the so-called “reserved powers” which belonged to the Special Representative of the Secretary General of the United Nations.

the Provisional Institutions of Self-Government with respect to matters of concern to the institutions.⁹⁵

A number of international agreements were signed by UNMIK on Kosovo's behalf during this period, and in particular, Free Trade Agreements (FTA's) were concluded with some countries in the region.⁹⁶ UNMIK was also participating in all regional and international meetings on behalf of Kosovo. In some instances, even when the representatives of the local Kosovo institutions would be invited, an UNMIK official had to be present in the delegation. During the 1999–2008 period, UNMIK was mainly concerned in dealing with foreign policy issues connected to regional relations and practical issues such as trade.⁹⁷ Even during this period, however, the President of Kosovo, the Prime Minister, and a number of Ministers were receiving several foreign dignitaries and also travelling abroad on the invitation of their counterparts.⁹⁸

The role of Kosovo institutions in foreign affairs became quite significant once the Vienna talks for the final status of Kosovo began in 2006. Kosovo was only represented by the local institutions; UNMIK was not part of the Kosovo delegations in this process.⁹⁹ Except for preparations for the negotiations with Serbia, which were mediated by the UN Special Representative Marti Ahtisaari, Kosovo institutions independently controlled their foreign policy agenda. This agenda focused on bilateral meetings with individual nations.¹⁰⁰ In each of these bilateral relations, Kosovo had two primary objectives: first, to gain the support of individual countries for Kosovo's position in the negotiations, and second, to gain their support for recognition of independence, once it would happen. Furthermore,

⁹⁵ Constitutional Framework for Provisional Self-Government, UNMIK Reg. 2001/9, art. 8.1(o), U.N. Doc. UNMIK/REG/2001/9 (May 15, 2001).

⁹⁶ Sadriu & Osmani, *supra* note 93, at 63.

⁹⁷ KOSOVAR INST. FOR RESEARCH & DEV., KOSOVO'S FOREIGN POLICY: STRATEGIC FACTORS, OBJECTIVES AND CHALLENGES 6 (2007), available at http://www.kipred.org/advCms/documents/67832_foreign_policy.pdf.

⁹⁸ See, e.g., *Kosova Daily Report #1669, 99-01-20*, HELLENIC RESOURCES NETWORK, <http://www.hri.org/news/balkans/kosova/1999/99-01-20.ksv.html#01>.

⁹⁹ See *supra* note 77.

¹⁰⁰ See, e.g., *Macedonia and Kosovo prime ministers discuss the border-issue*, PRAVDA (May 5, 2006), <http://english.pravda.ru/news/world/05-05-2006/79964-kosovo-0/>.

Kosovo was actively engaged in establishing positive relations with neighboring countries.¹⁰¹

During the UNMIK governance, all Kosovo local institutions were considered Provisional Institutions of Self-Government (PISG), as established by the Constitutional Framework.¹⁰² These PISG included the Assembly, Kosovo's legislative arm.¹⁰³ The powers of the legislature, however, were limited and allowed it only to adopt laws that were subject to final promulgating by the UNMIK representative.¹⁰⁴ Since Kosovo did not have a Ministry of Foreign Affairs, the Assembly could not adopt laws that related to the functioning of foreign policy. It did, however, have a very significant role in giving legitimacy to the entire negotiation process for the final status.¹⁰⁵ The Assembly voted to endorse negotiations and to appoint the Unity Team, which aimed at informing the Assembly on the flow of negotiations and the bilateral relations with other states.¹⁰⁶ The Assembly received frequent reports from the President, who was the head of the Unity Team.

As expected, once the Comprehensive Proposal for the Kosovo Status Settlement (also known as the Ahtisaari Plan)¹⁰⁷ was presented, it received overwhelming support from the Assembly of Kosovo.¹⁰⁸ In preparation for the Declaration of Independence, Parliament's role in foreign affairs was enhanced

¹⁰¹ *See id.*

¹⁰² UNMIK Reg. 2001/9, *supra* note 95, at art. 1.5.

¹⁰³ *Id.* at art. 1.5(a), 9.1.1.

¹⁰⁴ *Id.* at art. 9.1.45. *Cf.* Press Release, Security Council, *Security Council Deplores Kosovo Assembly's Resolution Concerning Province's 'Territorial Integrity,' In Presidential Statement*, U.N. Press Release SC/7413 (May 24, 2002).

¹⁰⁵ U.N. Secretary-General, *Report of the Secretary General on the United Nations Interim Administration Mission in Kosovo*, ¶ 4, U.N. Doc. S/2006/45 (Jan. 25, 2006).

¹⁰⁶ *Id.*

¹⁰⁷ U.N. Secretary-General, Letter dated Mar. 26 2007 from the Secretary-General addressed to the President of the Security Council, Addendum, U.N. Doc. S/2007/168/Add.1 (Mar. 26, 2007).

¹⁰⁸ *See generally*, KOSOVO DECLARATION OF INDEPENDENCE, ¶ 1 (Kos. 2008) ("This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement.").

through two new Parliamentary Committees: the Committee for Foreign Affairs and the Committee for European Integration.¹⁰⁹

2. Foreign Policy of the Republic of Kosovo after Independence

When independence was declared, Kosovo had several institutions and ministries that had been established during the UNMIK administration, but no Ministry for Foreign Affairs. The establishment of this institution after the Declaration of Independence was wrought with challenges. Among these challenges was a lack of professional diplomatic expertise.¹¹⁰ Kosovars were not able to participate in the former Yugoslav diplomatic service, unlike citizens from the other former Yugoslav regions.¹¹¹ Consequently, Kosovo did not have a pool of career diplomats to help the country during its early establishment phase. Everything had to be built from scratch. Despite this lack of expertise, the process was smoother than expected. During the first year of independence, Kosovo established 20 Embassies around the world and a Consulate General in New York to cover diplomatic activities at the United Nations.

The process to further develop the diplomatic service is closely linked to the recognition process. Kosovo cannot establish a diplomatic mission in a country until that country recognizes Kosovo's independence.¹¹² On the date of Kosovo's Declaration of Independence, the President and Prime Minister of Kosovo sent a request for recognition to all United Nations Member States, and several international organizations, proposing the establishment of diplomatic relations. Seventeen countries recognized Kosovo in the first week.¹¹³ This number was up to 69 when the ICJ opinion was published on July 22, 2010.¹¹⁴ In June 2009, Kosovo became a member of the International Monetary Fund (IMF) and the World Bank

¹⁰⁹ KOSOVAR INST. FOR RESEARCH & DEV., MAPPING OUT THE CURRENT PARLIAMENTARY OVERSIGHT OF THE SECURITY SECTOR IN KOSOVO 14 (2008), available at http://www.kipred.org/advCms/documents/21596_PARLIAMENTARY_OVERSIGHT_OF_THE_SECURITY_SECTOR.pdf.

¹¹⁰ KOSOVAR INST. FOR RESEARCH & DEV., *supra* note 97, at 34.

¹¹¹ See generally, G.A. Res. 48/153, ¶ 18(b), U.N. Doc. A/RES/48/153 (Feb. 7, 1994) (alluding to the mass dismissal of Ethnic Albanian civil servants by the Federal Republic of Yugoslavia).

¹¹² See Vienna Convention on Diplomatic Relations, art. 2, Apr. 18, 1961, 500 U.N.T.S. 95.

¹¹³ See note 10 in section E *supra*.

¹¹⁴ *Id.*

(WB).¹¹⁵ These memberships marked a significant diplomatic success for Kosovo, as both the IMF and the WB are UN specialized agencies.¹¹⁶ Furthermore, support for membership into the IMF came from some nations which have not yet recognized Kosovo.¹¹⁷

a. Foreign Policy of the Republic of Kosovo after the ICJ Opinion

The ICJ Advisory Opinion strengthened Kosovo's case in the international arena. The Opinion meant that countries had no legal reason to postpone recognition. The concern that Kosovo's independence could be used as a precedent for other breakaway provinces seeking independence should not have been an issue because Kosovo's independence was factually unique.¹¹⁸ No country in the world has declared independence based on Kosovo's example. The only independent country emerging after Kosovo was South Sudan, which achieved its independence under completely different circumstances.

Kosovo is now recognized by nearly half of the United Nations Member States.¹¹⁹ Its own membership in the United Nations is blocked by Russia, who has threatened to use its veto at the UN Security Council if Kosovo applies for membership.¹²⁰ The UN Security Council must make a recommendation for Kosovo's membership before it is voted on at the General Assembly.¹²¹ This obstacle will not stop Kosovo from securing membership in other international organizations, however. Efforts are underway to secure membership in the Council

¹¹⁵ Press Release, Dept. St., Kosovo Joins the IMF and World Bank (June 29, 2009), available at <http://www.state.gov/r/pa/prs/ps/2009/06a/125489.htm>.

¹¹⁶ Structure and Organization, U.N., <http://www.un.org/en/aboutun/structure/index.shtml>.

¹¹⁷ See Neil MacDonald, *Kosovo says it is able to join IMF*, THE FINANCIAL TIMES (May 6, 2009), <http://www.ft.com/intl/cms/s/0/8651fd90-39d5-11de-b82d-00144feabdc0.html#axzz2qQ8obveS> ("Some countries that refuse to accept Kosovo as a state backed its IMF membership, including Greece, one of five European Union member states refusing to dismiss Serbian sovereignty claims.").

¹¹⁸ See *Spain exposes EU split as US leads recognition*, THE GUARDIAN (Feb. 18, 2008), <http://www.theguardian.com/world/2008/feb/19/kosovo.serbia> ("The EU statement said the Kosovo breakaway was unique, due to the wars in the 1990s that tore Yugoslavia into seven different countries.").

¹¹⁹ See *supra* note 84.

¹²⁰ *UN membership door closed for Kosovo—Russia*, TV-NOVOSTI, <http://rt.com/politics/churkin-kosovo-un-resolution/>.

¹²¹ U.N. Charter art. 4, para. 2.

of Europe, the European Bank for Reconstruction and Development, the World Customs Organization, the International Organization for Migration, and others. Coordinated efforts from all of Kosovo's institutions, including Parliament, can make this process a success.

b. The Development of Parliamentary Diplomacy

Parliamentary diplomacy is a new concept that is rapidly expanding throughout parliamentary assemblies of western democracies.¹²² Parliaments have played this role in the past in a different context and format. The separation-of-powers paradigm in many democratic countries has made the role of the parliament in the formulation of foreign policy a difficult one to define, as the executive branch is most often charged with taking the lead role in foreign policy.

In Kosovo, Parliament has expanded its engagement in the area of foreign affairs over the last few years. In the first years after independence, Parliament struggled to define its role because the Constitution provides that the President of the Republic is the head of state and the organ of foreign policy.¹²³ However, the Constitution also provides that the Government, through the Ministry of Foreign Affairs, deals with foreign policy.¹²⁴ This conflict in scope of power became a source of disagreement between the President and the Government, especially because these two institutions were run by different political parties after the declaration. While these two institutions learned to coordinate their efforts, Parliament became heavily involved in many foreign policy initiatives. Frequently, Parliament discusses issues of foreign policy in its Committees and during plenary sessions, particularly for topics that related to the dialogue with Serbia.

Parliament has played a significant role in foreign policy by exercising its power to ratify international agreements. The Constitution requires international treaties and membership in international organizations to be ratified by a 2/3 majority in the Parliament.¹²⁵ Parliamentary oversight of foreign affairs is also increasing through its development of bilateral relations with other parliaments. There are a number of countries that hesitate to host high level officials from

¹²² George Noulas, *The Role of Parliamentary Diplomacy in Foreign Policy*, FOREIGN POL. J. (Oct. 22, 2011), <http://www.foreignpolicyjournal.com/2011/10/22/the-role-of-parliamentary-diplomacy-in-foreign-policy/>.

¹²³ Article 84 of the Constitution of the Republic of Kosovo.

¹²⁴ *Id.* at art. 93(1).

¹²⁵ Article 18 of the Constitution of the Republic of Kosovo.

Kosovo, but that may invite parliamentary delegations. The parliaments of many non-recognizing countries have hosted parliamentary delegations from Kosovo, and have even made statements in favor of Kosovo's independence, despite the fact that their executive branches have not recognized Kosovo's independence.¹²⁶ This willingness to treat with parliamentary delegations has also been the case with parliamentary assemblies of international organizations and institutions. Parliamentary delegations from Kosovo have been invited to, and have participated in the work of, parliamentary assemblies at the EU Parliament, the Council of Europe, and NATO. Given the fact that Kosovo has yet to join these prominent international organizations, its presence at many of these forums has been rooted in the goodwill of the hosting or organizing party. So far, Kosovo has not been able to use the potential influence of its Parliament in the legislative output of these forums in support of its legitimate interests.

Foreign policy, by terms of the Constitution, is exercised by the Executive branch. However, there is a growing need for Kosovo's Parliament to increase the role of both bilateral and multilateral parliamentary diplomacy through active engagement with parliamentary members of regional countries and beyond. The positive and modest role played by the Parliament of Kosovo on foreign policy is because political forces present in the Parliament have agreed on most foreign policy issues. Kosovo's Parliament has also shown its interest in diplomacy through parliamentary control, frequent meetings of committees, and by enhancing the involvement of parliamentarians in foreign affairs.

3. The Future of Parliamentary Diplomacy

September 7, 2012 marked the end of supervised independence and the start of a new era in Kosovo. The temporary supervision of independence was a process foreseen in the Ahtisaari plan, which was to end after Kosovo implemented all the obligations foreseen in that settlement proposal. A process of constitutional and legislative amendments was necessary for the end of supervised independence, and the institution that led and concluded this process was Parliament. With enormous challenges ahead in the long path towards Euro-Atlantic integration, it is crucial that parliamentary diplomacy develops further, with a particular focus on parliamentary oversight of foreign affairs.

¹²⁶ One such example occurred shortly after the conference. See *Zeidan meets parliamentary delegation from Kosovo*, LIBYA HERALD (Dec. 18, 2012), <http://www.libyaherald.com/2012/12/18/zeidan-meets-parliamentary-delegation-from-kosovo/#axzz2qQMPWR1u>.

PART III—THE ECONOMY, LEGAL INSTITUTIONS, AND EDUCATION

G. *Trade and Investment in Kosovo: Opportunities and Challenges*

Katerina Ossenova*

There has been endless political discourse about the legality of Kosovo's 2008 declaration of independence, the recognition of Kosovo by nations around the world, the fragility and continuing tension in northern Kosovo, and the stalled progress with Serbia. While many political and territorial questions remain unanswered four years after independence, Kosovo needs to shift its focus to economic growth and development. Kosovo's future depends on its ability to continue on a path toward economic growth and sustainability, including regional and European economic integration.

1. Opportunities for Trade and Investment in Kosovo

a. Recent Economic Developments

Despite a global recession, Kosovo's Gross Domestic Product (GDP) has steadily increased since 2007, experiencing a 5.3% growth in 2011.¹²⁷ Despite a decrease in 2009, Foreign Direct Investment (FDI) also experienced steady growth, with an 8% increase in 2011.¹²⁸ Foreign investment has largely been devoted to Kosovo's construction, production, financial services, and real estate sectors.¹²⁹ Kosovo's trade with the United States has been modest: in 2011, U.S. exports to Kosovo totaled just over \$15 million; imports from Kosovo amounted to less than \$1 million.¹³⁰ In 2011, U.S. FDI into Kosovo was almost \$19 million.

The Government of Kosovo, led by the Ministry of Trade and Industry, has developed a comprehensive strategy to increase FDI and create sustainable

* Attorney Advisor International, Commercial Law Development Program, U.S. Department of Commerce.

¹²⁷ *Europe: Kosovo*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html> (last visited Nov. 16, 2012); *Investing in Kosovo*, INV. PROMOTION AGENCY OF KOSOVO, 19 (May 2011), <http://www.invest-ks.org/documents/brochure/Investors%20Guide%202011.pdf>.

¹²⁸ *Investing in Kosovo*, *supra* note 127, at 17.

¹²⁹ *Id.* at 18.

¹³⁰ *Trade in Goods with Kosovo*, UNITED STATES CENSUS BUREAU, <http://www.census.gov/foreign-trade/balance/c4803.html> (last visited Nov. 16, 2012).

economic development. Kosovo has defined the sectors that present the best investment opportunities: business process outsourcing, mining and energy, wood and metal processing, agribusiness, textiles, decorative stone, tourism, construction, automotive components, and electronic components.¹³¹

b. Making the Case for Investing in Kosovo

There are many reasons why foreign companies should consider investing in Kosovo. Its liberal trade regime includes membership in the Central European Free Trade Agreement (CEFTA), and its autonomous trade preferences with the European Union provide duty free access to the EU market.¹³² Kosovo is eligible for both the US and EU Generalized System of Preferences (GSP) Programs, giving it preferential duty-free entry for up to 5,000 products. Kosovo's strategic location—bordering Albania, Macedonia, Montenegro, and Serbia—gives it an opportunity to become a regional hub with easy access to the rest of Europe. Kosovo has streamlined and simplified its corporate and income tax system in an effort to attract investment. There is a flat corporate tax rate of 10%, a progressive income tax rate ranging from 0-10%, and VAT is capped at 16%.

With a population of 1.8 million, Kosovo boasts Europe's youngest population, with an average age of 27.¹³³ There are a number of public and private universities, with 15,000 new graduates every year.¹³⁴ English and German are widely spoken and many graduates spend a semester or year studying in Europe or the United States. The average monthly wage, at approximately 300 euros a month, is significantly less than its European neighbors.

Kosovo's business friendly reforms include the Law on Foreign Investments, which requires equal treatment for foreign and domestic investors. The Bilateral Agreements on Investment Protection and Promotion provide for free transfer of funds, repatriation of profits and dividends, protection against retroactive application of laws, and protection against expropriation. Kosovo became a member of the World Bank and the International Monetary Fund in 2009, and most recently, the European Bank for Reconstruction and Development in November

¹³¹ *Investing in Kosovo*, *supra* note 127, at 7.

¹³² *Kosovo Country Report*, BTI-PROJECT, 18 (2012), <http://www.bti-project.de/fileadmin/Inhalte/reports/2012/pdf/BTI%202012%20Kosovo.pdf> [hereinafter *Kosovo Country Report*].

¹³³ *Europe: Kosovo*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html> (last visited Nov. 16, 2012).

¹³⁴ *Investing in Kosovo*, *supra* note 127, at 26.

2012—all significant steps in the integration of Kosovo into international organizations.¹³⁵ In September 2012, Kosovo started negotiations with Turkey for its first Free Trade Agreement (FTA) and made plans to start FTA negotiations with the EU and other nations in 2013.¹³⁶

Kosovo was recently ranked 98th in the 2013 World Bank Doing Business Report (up from 126th in 2012).¹³⁷ The two biggest improvements in the report were “starting a business” and “protecting investors,”—areas where Kosovo has undertaken reforms in recent years. The business registration process has been significantly streamlined, administrative procedures for exports and imports have been reduced, and many required licenses were reduced or eliminated.¹³⁸

2. Trade and Investment Challenges in Kosovo

The institutional and structural challenges that remain in Kosovo will impede meaningful and sustained economic development until they are overcome or addressed.

a. Public Perception

The challenge of public perception is a difficult one to define, explain, or quantify. Extensive media coverage of Kosovo’s fight for independence, its uncertain status throughout Yugoslavia’s history, the conflict with Serbia in the 1990’s, and its administration by the United Nations Mission in Kosovo (UNMIK) from 1999 until 2008 has educated the world about the plight of Kosovo and what it has endured on its path to independence. These events have also created a public perception that Kosovo is a risky, underdeveloped, post-conflict nation too unstable for trade and investment. There is an overwhelming perception that Kosovo’s public administration is inefficient, that business regulations are complex, that

¹³⁵ World Bank, *Kosovo Joins World Bank Grp. Insts.* (June 29, 2009), <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/0,,contentMDK:22230081~menuPK:258604~pagePK:2865106~piPK:2865128~theSitePK:258599,00.html>; *Kosovo Becomes the International Monetary Fund’s 186th Member*, INT’L MONETARY FUND (June 29, 2009), <http://www.imf.org/external/np/sec/pr/2009/pr09240.htm>; *Kosovo To Become Member of the EBDR*, THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT (Nov. 16 2012), <http://www.ebrd.com/pages/news/press/2012/121116a.shtml>.

¹³⁶ *Kosova: Discussions on Free Trade Agreement With Turkey*, UNREPRESENTED NATIONS AND PEOPLES ORG. (Sept. 26, 2012), <http://www.unpo.org/article/14911>.

¹³⁷ *Ease of Doing Bus. in Kosovo*, THE WORLD BANK, <http://www.doingbusiness.org/data/exploreeconomies/kosovo> (last visited Nov. 16, 2012).

¹³⁸ *Investing in Kosovo*, *supra* note 127, at 7.

corruption is tolerated and prevalent, and that companies are unable to resolve contract disputes in court in a fair and efficient manner.

Kosovo must create public awareness about itself as a nation and formulate a comprehensive and aggressive trade and investment strategy. It must actively engage with the international business community, participate in global and national conferences, trade fairs, and symposia, and engage in a wide-reaching public relations campaign focused on the cultural, economic, and people-oriented facets of Kosovo.

b. International Recognition

Kosovo's relationship with foreign countries will inevitably affect business and investment prospects. Eliminating trade and investment possibilities with countries that have not recognized Kosovo, or with countries that support Serbia's unwillingness to recognize Kosovo, drastically narrows the field for possible investment opportunities.

Continuing conflicts over independence and territorial sovereignty have a negative impact on trade and transportation, especially with Serbia's strategic location as a gateway to the rest of Europe. While Serbia's recognition of Kosovo may not be realistic, negotiating for the free flow of goods and services between the two countries should be a priority.

c. Rule of Law

One of the most fundamental and essential challenges in Kosovo remains the rule of law. Economic stability and development is closely linked to the rule of law and a transparent, fair, and efficient government. Kosovo continues to struggle with creating such government institutions and justice systems. High level corruption is common, with only a few implicated officials properly prosecuted.¹³⁹ A Transparency International report revealed that between 13% and 22% of those surveyed admitted to bribing a public official in 2009; 38% of those surveyed believe that the judiciary is the most corrupt institution in Kosovo.¹⁴⁰ Kosovo does

¹³⁹ *Kosovo Country Report*, *supra* note 132, at 18.

¹⁴⁰ David L. Phillips, *The Balkans' Underbelly*, WORLD POLICY INST., 93 (2012), <http://hrcolumbia.org/peacebuilding/balkans-underbelly.pdf>.

not have truly independent police, prosecutors, and judges who are immune to political pressure.¹⁴¹

Kosovo needs high level political will to ensure that the rule of law becomes fundamental; such support is critical in order for Kosovo's citizens to embrace the notion.¹⁴² By emphasizing the importance of the rule of law, Kosovo will be able to create public awareness and confidence, increasing the demand and respect for justice. The rule of law can only permeate in society through an informed, involved, and empowered public.

d. Dependence on the International Community and Diaspora

Kosovo's continued dependence on international aid and its large and supportive diaspora cannot be a foundation for a sustainable economy. Remittances from the diaspora account for about 11%–16% of Kosovo's GDP. Donor-financed activities and aid account for another 15% of GDP.¹⁴³ Approximately 25% of households receive remittances, which are used for necessities. Remittances are now the third largest source of income for Kosovo households, behind work earnings and government transfers.¹⁴⁴

Kosovo remains the poorest country in the region, with 45% of the population living below the poverty line and 15% in extreme poverty.¹⁴⁵ While donor aid will inevitably decline over time, dependence on remittances is something Kosovo can begin to address. For example, the government can create incentives to direct remittances to productive entrepreneurial activities, thereby encouraging their use for investment rather than consumption.

¹⁴¹ *Snapshot of the Kosovo Country Profile*, BUSINESS ANTI-CORRUPTION PORTAL (Feb. 2012), <http://www.business-anti-corruption.com/country-profiles/europe-central-asia/kosovo/snapshot/>.

¹⁴² *Kosovo is Lagging Behind in the Fight Against Corruption*, TRANSPARENCY INT'L (Oct. 13, 2012), http://www.transparency.org/news/pressrelease/20121018_kosovo_is_lagging_behind_in_the_fight_against_corruption.

¹⁴³ *Kosovo Remittance Study 2012*, UNITED NATIONS DEV. PROGRAM, 20 (July 2012), http://www.kosovo.undp.org/repository/docs/KRS2012_English_858929.pdf [hereinafter *Kosovo Remittance Study 2012*]; *Kosovo Country Fiduciary Assessment*, THE WORLD BANK, 7 (Mar. 2012), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/08/22/000425962_20120822115846/Rendered/PDF/707020ESW0P1230ovo0CFA0FINAL0public.pdf.

¹⁴⁴ *Kosovo Remittance Study 2012*, *supra* note 143, at 21.

¹⁴⁵ *Kosovo Country Report*, *supra* note 132, at 18.

e. Regional Competition

There is a plethora of regional competition that detracts from potential trade and investments opportunities for Kosovo. Much of what makes Kosovo attractive for investment can be found to a larger degree in other Southeast European nations. Kosovo must develop strategies for surpassing its neighbors and developing an economy and infrastructure that will withstand strong regional competition.

f. Infrastructural Challenges

Kosovo's underdeveloped infrastructure will increase the cost of doing business, limit and discourage businesses from operating in Kosovo, and hinder larger economic growth efforts. There are frequent power outages and electricity is limited and unreliable.¹⁴⁶ Roads, railways, and airports are damaged from the war and are implicated in complex territorial challenges. Countries that do not recognize Kosovo do not recognize Kosovo's customs stamps and/or bar Kosovo registered trucks. These impediments present daunting challenges in developing new enterprises and attracting foreign investment.

g. Expanding Beyond Services

Kosovo's current economy is too dependent on services. It needs to develop its unexploited natural resources and new value-added exports. Services account for over 60% of GDP and can be attributed to the large remittance inflows and international presence in Kosovo. In 2010, Kosovo imported \$3 billion in goods and services and exported only \$400 million.¹⁴⁷ The economy is largely driven by government and small-scale retail businesses. There is a lack of viable and productive domestic industries or manufacturing capabilities.

Kosovo has one of the lowest export/import rates in the region. There is minimal productive investment in the tradable goods sector and exports are mostly raw materials and unprocessed goods, with very little value added. The largest export is scrap metals, comprising 64.5% of total exports.¹⁴⁸

¹⁴⁶ *Kosovo Unlocking Growth Potential: Strategies, Policies*, THE WORLD BANK, 30–31 (Apr. 2010), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/05/27/000333038_20100527043201/Rendered/PDF/531850ESW0P112101Official0Use0Only1.pdf [hereinafter *Kosovo Unlocking Growth Potential*].

¹⁴⁷ *Kosovo (01/11/12)*, UNITED STATES DEP'T OF STATE, <http://www.state.gov/outofdate/bgn/kosovo/195656.htm> (last visited Nov. 16, 2012).

¹⁴⁸ *Kosovo Country Report*, *supra* note 132, at 18.

Kosovo also needs investment to exploit its natural resources. Kosovo's natural resources, which include lignite, lead, zinc, ferronickel, magnesium, and ore, present an opportunity to generate revenue, create jobs, and help mitigate energy shortages. While equipment, technologies, and processes for exploiting these resources are in need of FDI, they represent an opportunity for Kosovo's economic development strategy.

h. Increased and Streamlined Trade Facilitation

While Kosovo has undertaken reforms to promote trade facilitation, additional reforms are needed to streamline business registration, licensing procedures, and ensure a better business enabling environment. Complicated and costly procedures hinder entrepreneurs and encourage an informal culture where professional business practices are undermined. Kosovo needs to continue to implement reforms that focus on protection and enforcement of intellectual property rights, enforcements of contracts, anti-corruption, and protection of property.

i. Improved Public Procurement and Privatization Systems

Public procurement and privatization in Kosovo are under intense public scrutiny. While the Public Procurement Law (PPL) is largely aligned with EU Procurement Directives and in compliance with international norms and standards, additional improvements are needed to ensure a transparent and efficient public procurement system that abides by the PPL.¹⁴⁹ Kosovo's procurement system at times disregards enforcement of the PPL, requires additional procurement and contract management training, needs a stringent performance evaluation system for procurement officers, and needs to establish a clear and transparent appeals process.¹⁵⁰ With several high profile public procurement corruption cases, the public inside and outside of Kosovo doubts the integrity and transparency of the public procurement system. In order for companies to feel as though they are being treated equally and fairly, Kosovo's public procurement system needs to be open and transparent, and accusations of a corrupt system need to be addressed and resolved.

Privatization in Kosovo suffers from a similar negative public perception and allegations of corruption and bribery. It has been blamed for stalled economic development in Kosovo and for undermining a large number of successful state-

¹⁴⁹ *Kosovo Unlocking Growth Potential*, supra note 146, at 7, 19.

¹⁵⁰ *Id.*

owned enterprises. Privatization in Kosovo needs to be carried out in a fair, transparent, and efficient manner.

j. Judicial Capacity in International Commercial Disputes

A lack of confidence in the judiciary is a concern for any foreign business evaluating whether to invest in Kosovo. Kosovo's judiciary faces structural weaknesses and lacks essential capacities to adjudicate international commercial disputes. There is an insufficient number of judges and a large backlog of cases.¹⁵¹ The new Law on Courts revised the court system and called for the appointment of new judges, but many of them lack the capacity and experience to adjudicate complex commercial disputes. The judiciary is also perceived to be under political influence and is mistrusted and viewed with cynicism by the public. Additional capacity building and training is needed in order to create a cadre of judges who can provide fair, efficient, and consistent adjudication of international commercial disputes.

3. Observations

While there have been positive economic developments and reforms in Kosovo, much must be done to ensure economic sustainability and regional and European economic integration. The government and private sector need to focus on developing and implementing a comprehensive economic growth strategy that tackles the abovementioned challenges. The importance of developing a sustainable and competitive economy cannot be compromised or undermined.

¹⁵¹ *Kosovo Country Report*, *supra* note 152, at 18.

H. Privatization and Sustainable Long Term Economic Development

Arben Limani, Naim Avdiu, and Mrika Tahiri*

1. UNMIK and Socially Owned Enterprises

One of the most important agencies in the economic development of Kosovo is the Privatization Agency of Kosovo (PAK or the Agency). The Agency holds responsibility for the privatization of the economy in a manner that promotes sustainable long-term economic development.

Public perception has been that the Agency should be more active in the strategic planning of economic development. However, as an administrative public body with no political role and with limited resources, the Agency depends largely on other stakeholders who are obliged under Kosovo law to establish the path for long-term, sustainable economic development.

Socially-owned enterprises (SOEs) were widely used in the former Yugoslav economy. Social property was meant to be its own legal category separate from private and state property. The primary feature of social property was that society was the title-holder; no individual was entitled to acquire an ownership interest. Former SOEs were characterized by the need to fulfill a social need, which resulted in over-employment, decreased productivity, increased costs, run-down development, illiquidity, and decreased investment. SOEs in Kosovo experienced mass employee lay-offs and lost marketability after the fall of Yugoslavia in the 90's.

Privatization began with UNMIK in 1999. The Special Representative of the Secretary General (SRSG) determined, through UNMIK's first legislative act on July 25, 1999, that it would administer the state property of the Federal Republic of Yugoslavia, or the Republic of Serbia, in Kosovo. SOEs were added to state property in a later amendment to this Regulation.

The Constitutional Framework for Provisional Self-Government in Kosovo provided that certain powers would not be granted to the Provisional Institutions of Kosovo, but would remain exclusively with the SRSG. Among these powers were the authority to administer public, state, and socially owned property; the regulation of public and socially owned enterprises; and the definition of the

* Arben Limani is the Director of Privatization Agency of Kosovo; Naim Avdiu is a Deputy Managing Director of Privatization Agency, Kosovo; and Mrika Tahiri, is a Deputy Managing Director of Privatization Agency, Kosovo.

jurisdiction and competence for the resolution of commercial property disputes. UNMIK functioned through four “pillars.” Pillar IV was managed by the European Union and was tasked with economic reconstruction and development.

The legal framework in force during the UNMIK administration was not in line with the new Constitution. The need for legal change in the privatization process was immediate. Upon the Declaration of Independence, laws were promulgated to replace relevant UNMIK Regulations. Existing laws were amended to reflect the new political structure in Kosovo.

2. The Replacement of UNMIK Regulation 2002/12 by the Law on the Privatization Agency of Kosovo

The Law on the Privatization Agency of Kosovo, No. 03/L-067 replaced UNMIK Regulation 2002/12. As a result, the Privatization Agency of Kosovo was established to replace the Kosovo Trust Agency (KTA), which had managed and privatized Kosovo’s SOEs. This change included a new law, which limited the scope of the Agency to SOEs. Administration of POEs was regulated by the new Law on POEs No. 03/L-087, and subsequently was amended with the Law No. 04/L-111. After the ICJ Opinion on Kosovo’s independence, it was subsequently replaced with the Law on the Privatization Agency of Kosovo No. 04/L034, which gave a new shape to the process of liquidation. The main goal was to accelerate the liquidation process of SOEs through organizational restructuring, and the removal of redundant steps and excessive backlogs.

Another positive change was the adoption of the new policies that enabled the interim distribution of 20% of the proceeds to eligible employees. The PAK adopted this change with the view of distributing proceeds in a more rational timeframe. The efficient distribution of these proceeds has had a direct effect on the individual economies of the ex-employees, as well as in easing social dissatisfaction.

The new law also changed the composition of the Board of Directors of PAK. It stipulates that three members must be international and appointed by the International Civilian Representative in Kosovo. The other five directors are non-political, nationals of Kosovo appointed by the Assembly of Kosovo. The Assembly also designates a national of Kosovo to serve as Chairman of the Board. These changes enable privatization to be in the hands of locals, while maintaining some form of international supervision.

3. Replacement of UNMIK Regulation 2002/13 as amended by 2008/4 on the Special Chamber of the Supreme Court

UNMIK Regulation 2002/13 was amended on January 1, 2012 to establish the Special Chamber of the Supreme Court of Kosovo (SCSC), with a mandate to address all matters related to the Kosovo Trust Agency. According to the Special Chamber, the KTA is the only entity authorized to present cases related to SOE privatization in front of this court. This stance disregarded potential adverse legal and economic consequences for Kosovo. It was justified by a legal opinion issued by UNMIK in 2009, which determined the applicable law regarding privatization.

UNMIK explained that Regulation 2002/12 on KTA is the only applicable law; not the law that regulates SOE privatization. This opinion was justified by the Kosovo Assembly, which issued a statement that its laws cannot supersede an UNMIK Regulation. As a result, the Special Chamber considered the law on the Privatization Agency as an internal regulation of the Agency. Thus, PAK was recognized as an “interested party” in the procedure in the front of SCSC. This resulted in an odd situation when cases were tried in this court. A UNMIK legal representative would appear in court, with almost no knowledge about the particular case. On the other side was a PAK legal representative, with full access to the history and documents of the case, but with limited procedural capacity. This situation has caused delays in the privatization process, as well as a rollover effect in most segments of privatization, with an emphasis on the distribution of 20% for employees and timely defining of the rights and obligations of the parties asserting rights before this court.

It is not clear why UNMIK Regulation 2002/13 was not replaced by the Kosovo legislation. When it became clear that this situation is harmful to the privatization process, Law on the Special Chamber of the Supreme Court on Matters Related to PAK, Nr. 04/L-033 was promulgated and entered into force on the January 1, 2012. Nonetheless, the Special Chamber has been an obstacle to finalizing the 20% distribution. Since 2008, the court has only approved one final list of eligible employees out of hundreds pending before the court.

4. Commercialization and Special Spin Offs as a projection of long term sustainable economic development

In 2000, UNMIK published its “Enterprise Development Strategy” as a White Paper. This document was not formally adopted, but was considered the basis for putting SOE assets into economic use. The first such activity undertaken by UNMIK and the Department for Trade and Industry was commercialization of SOEs. Commercialization consists of a long-term lease of an SOE to an investor under specific conditions. The lessee is responsible for lease payments, as well as

making certain investments and maintaining a designated number of the SOE employees. The lessee usually obtains the right of first refusal if the Agency decides to privatize the SOE.

In certain cases, SOE investors were also entitled to count the depreciated value of their investment toward the purchase price. From a long-term sustainable economic development standpoint, commercialization is viewed as successful in some cases, but also devastating to some SOEs. Some commercialized SOEs have become very successful businesses, even after full privatization. Other SOEs have become virtually nonexistent. Failure has usually been a result of investor non-compliance with the commercialization contract. This non-compliance has occurred, in part, because the only sanction foreseen was the termination of the contract, which has never been utilized, largely because of a lack of monitoring of these arrangements. Monitoring and sanctions have only occurred after the Agency was turned over to Kosovo authorities.

Special spin-off privatization was slightly different for the commercialization process. This process was more of an ownership transfer that took place under certain investment and employment conditions, with the possibility of purchasing back shares of the enterprise in cases of egregious breach. The commitment agreements have usually provided an obligation for the buyer to invest a certain amount of money and retain a certain number of employees for a period of two years. This model is intended to be used for larger, more important SOEs, in order to preserve certain industries. There were 25 SOEs privatized through the special spin-off method, and most of them have been successful in reaching the investment and employment goals required by the contract. Special spin-offs have played a role in preserving important industries in Kosovo.

5. Legal Reforms and Privatization

Legal reforms have had diverse effects on the privatization process in Kosovo. While these reforms have removed redundant steps and shortened otherwise burdensome timelines, the reforms have had little or no effect on some aspects of the privatization process. Greater efficiencies have been gained in monitoring of the conditional sales resulting from Special Spin Off and conditional privatizations. The process of privatization and liquidation sales has also been accelerated, enabling the distribution of 20% for the eligible SOE employees and the creation of the basis for initiation and timely execution of the liquidation of the SOEs. Little or no effect was felt in the efficiency of the Special Chamber of the Supreme Court of Kosovo which is a crucial stakeholder in this process. Unfortunately, legal reforms have not increased cooperation and coordination among ministries, municipalities, and cadastral authorities.

I. Reform in the Judicial Branch in Kosovo

The Honorable John Tunheim*

To fully assess the workings of a judicial system, one needs an extensive checklist with many indicators of an effective judiciary. I will focus on a number of critical areas that serve as indicators for determining the effectiveness of the Judicial Branch in Kosovo.

1. Organization and Jurisdiction of the Courts

When the United Nations took over administrative control of Kosovo, it reinstated the old familiar Yugoslav legal system. This system is confusing, highly duplicative, and inefficient. It has thus facilitated a serious case backlog and has hurt the credibility of the judiciary.

In July 2010, the Kosovo Assembly adopted a new Law on Courts, which is modern and well-structured. It reforms the court system into a first instance (trial level) Basic Court in many of Kosovo's municipalities; it creates a national Court of Appeals in Pristina, with a guaranteed right of appeal in all cases; and it reforms the Supreme Court. This law will become fully effective in January 2012 and, in my view, is the most important improvement in the history of judicial systems in Kosovo.

2. Judicial Independence through Governance

An independent Kosovo Judicial Council (KJC), with responsibility for overseeing the judiciary, was enshrined in the Constitution. The KJC is critiqued in Europe for not including enough judges elected by their peers, but there are a majority of judges on the Council who are overseeing the transition to the new organization of the courts.

3. Appointment and Tenure of Judges

The UN appointed judges for a fixed term due to its own transitional status. This was problematic because a lengthy term of office is critical to exercising sufficient independence in a modern judiciary. In 2010, the KJC went through a vetting process (with significant international participation) to decide which of the sitting UN judges would be re-appointed. Many judges failed the test, while others were given life terms until mandatory retirement. Removal is very limited and must

* Federal District Judge for the United States District Court for the District of Minnesota.

be administered by the KJC. This process has established the judicial tenure that is a necessary ingredient for judicial independence.

One concern is that new judges will receive a three-year probationary term before receiving life tenure. This was a concession to secure lifetime tenure. The method for evaluating new judges has yet to be determined.

4. Judicial Salaries

Until January 2011, judges in Kosovo were not being paid a salary that ensured independence of judgment and competence of decision-making. Most judges received a salary of a little over 500 euros a month. This made them susceptible to a host of improper influences, and encouraged some to take second jobs. In January 2011, salaries were improved. These improvements are not substantial—a Supreme Court judge makes 1271 euros a month—but they are now in line with salaries in the executive branch.

5. Court Security

A critical aspect to judicial independence is security. In Kosovo, it is said that there have been many threats made to judges that have influenced decision-making. It is difficult to document these troubling events, but given the country's historical and societal makeup, security is a real issue. The new Law on the Courts has established a right to judicial security. At this point, administration of this right is not clear, but it must be. Security is essential and must be placed on the front-burner.

6. International Judges

When the UN assumed control of Kosovo, there was a significant proposal to create a War and Ethnic Crimes Court to handle the most significant and serious cases in Kosovo, including war crimes. The United States opposed the creation, and the alternative that was implemented was to bring in international judges to handle tough cases. In 2001, this was a necessary measure. Kosovo judges were not ready to handle these cases and undue influence was rampant.

When the UN left in 2008, the UNMIK judges were replaced by judges appointed by the European Union Rule of Law Mission in Kosovo (EULEX). EULEX judges are on one-year contracts. They have a right to handle serious cases, particularly politically sensitive cases.

The appointment of EULEX judges was meant to be a transitional measure. However, I have seen little evidence of transition. In my opinion, the international judge program needs to stop soon. The EULEX program has the effect of keeping the Kosovo judiciary in a permanent second-class status and sends a message to everyone that Kosovo judges are not competent to handle difficult cases. While

Kosovo's judges may not be able to handle these cases at first, they will be able to with security enhancements, independence, and adequate training.

7. Effective Training and Continuation of Old Habits

Effective training of judges is essential for an effective judiciary based on the rule of law. This is especially true in a new democracy that is constantly updating and changing its laws. The Judicial Training Centre in Kosovo has been in place since 2000. While it is a well-organized center, I am not sure its work has resulted in well-trained modern judges. Many of Kosovo's judges were working in the 1980's under the old system. Over the last decade, they have operated under the UN system, which re-constituted the Yugoslav system. Applicable law was unclear and confusing at first, and facilities are substandard.

Kosovo's courts today are rightly criticized for adherence to old, poor habits. These criticisms include holding trials in their offices, poor coordination with prosecutors and advocates, and a lack of transparency. Often times, a proper record of proceedings is not created. These failures are a matter of proper judicial training and require significant attention in Kosovo.

8. Court Administration

In early 2011, the backlog in Kosovo's courts exceeded 120,000 cases. In earlier years, computers were not being used and clerks were entering cases and matters into large books. USAID, in particular, has devoted considerable resources to effective court administration. In 2004, we helped develop a case weighting system to better measure judges' workloads. These things have improved today, but this improvement needs to remain consistent.

9. Human Rights Issues

The courts must be the ultimate protector of human rights. With Kosovo's history, the protection of human rights has been a primary goal throughout the past thirteen years. To address this issue, the Kosovo Constitutional Court was given the authority to hear any case involving human rights claims after having exhausted the regular court system. Although there have been few cases thus far, I am hopeful that the Court, along with the other protections built in for minorities in the Constitution, will ensure that all people are treated well by the legal system.

10. Courts in the North

The courts in Mitrovica and in the north of Kosovo are not fully operational. In fact, it can be said that they are barely functioning. This dysfunction is no fault of the judiciary, but rather it is part of a much more serious problem. However, this dysfunction reflects poorly on the judiciary as a whole when Kosovo's laws cannot operate in a part of its territory. I am hopeful that negotiations can improve this intolerable situation.

11. Kosovo Constitutional Court

I have worked closely with the Constitutional Court in developing its procedures and jurisprudence. The Court has, for the most part, been very professional and independent and represents a very bright spot in Kosovo's legal system. It has demonstrated what a professional court can do for a country—curb the excesses of the majority and instill the rule of law.

12. Public Perception

It is not easy to measure public opinion concerning the courts, but I think I can say with some degree of certainty that the public perception of Kosovo's judiciary is not strong. The lengthy backlog undoubtedly contributes to this perception, as does an often wildly inaccurate news media. The new organization of the courts will help, as will a renewed emphasis on public service and customer satisfaction. A solid public relations campaign, which includes advertising and brochures that explain court procedures, will also help. Ultimately, what is necessary is an improvement in the performance of all aspects of the judiciary, with achievable goals in timing and resolving cases, and more transparency.

13. Final Thoughts

Overall, I give Kosovo's judiciary a passing grade, but just barely; more work needs to be done. The international community must remember that the development of the rule of law is often the result of millions of baby steps as opposed to one giant leap. It is a marathon, not a sprint.

J. Criminal Code Changes in the Consolidation of Kosovo's Statehood

Bajram Ukaj*

1. The Impetus for Change to the Criminal Code of Kosovo

Any functioning democratic state must be built on the rule of law, and the rule of law in today's world must include an effective system of criminal law. In this regard, Kosovo has taken steps to provide for the necessary foundation in its Criminal Code.

The previous Criminal Code of the Republic of Kosovo was approved by the UN Mission in Kosovo (UNMIK) on July 6, 2003 and entered into force on April 6, 2004.¹⁵² However, this version of the Criminal Code was plagued by gaps, inadequate criminal policies, and difficulty in its implementation. These problems led courts, prosecutors, and other attorneys to submit proposals for changes and revisions.

These practical concerns were not the only shortcomings of the previous Criminal Code. Because the previous Criminal Code was drafted prior to the Constitution of Kosovo, the previous Code failed to fully integrate the Constitution's goals of promoting human rights and international law principles. Those inadequacies of the previous Code also acted as an impediment to fuller integration within the European Community, and hopefully eventually the EU. Therefore, it was evident that drafting a new Criminal Code was necessary to strengthen the rule of law in Kosovo, to promote harmony with the Constitution of Kosovo, and to insure compliance with the standards of the EU.

The Ministry of Justice for the Republic of Kosovo established a commission to assist in the drafting of a new Criminal Code. This commission was composed of members of the government (including judges, prosecutors, lawyers, and professors of criminal law), and of the private sector, in addition to representatives from the United States Embassy, USAID, and European Union Rule of Law Mission in Kosovo (EULEX). In drafting, the commission made every effort for the new Criminal Code to be in compliance with EU legislation and UN principles. To aid

* The author is Professor of Criminal Law and Dean of the Faculty of Law of the University of Pristina, Republic of Kosovo.

¹⁵² Provisional Criminal Code of Kosovo, UNMIK Reg. 2003/25, U.N. Doc. UNMIK/REG/2003/25 (July 6, 2003).

in this goal, the commission considered contemporary criminal codes of democratic countries such as Germany, France, the United States, Italy, Sweden, Netherlands, Croatia, Slovenia, and Albania, as well as international instruments.

The commission forwarded its draft to the Ministry of Justice, and then to the Government. The Government, through its Decision No. 01/41 of October 10, 2011, adopted the Draft Criminal Code of the Republic of Kosovo.¹⁵³ The Government certified that the Draft Code complied with EU legislation.¹⁵⁴ The Draft Code was processed for review and approval by the Assembly of the Republic of Kosovo. The Assembly adopted the Draft Code as the new Criminal Code on June 22, 2012.¹⁵⁵ The Criminal Code was published in the *Official Gazette of the Republic of Kosovo* and will enter into force on January 1, 2013.¹⁵⁶

The new Criminal Code consists of two parts: the General Part and the Special Part. The General Part consists of 13 chapters and 118 articles. In these chapters, the Code lays out both the provisions for determining criminal liability and the principles for determining criminal sanctions. Those chapters addressing criminal sanctions also incorporate goals of both deterrence and education. The Special Part consists of 22 chapters and 326 articles, where it defines specific criminal offenses.

These chapters contain many changes and additions, all of which help to strengthen the rule of law in Kosovo. But, in the context of the path ahead for Kosovo following the ICJ Opinion, it is essential to highlight those changes which help to move Kosovo toward compliance and integration with the European Community and EU.

2. Major Changes to the General Part

The majority of changes to the general part adjusted the permitted level of criminal sanctions (both imprisonment and fines).¹⁵⁷ Additionally, the General Part

¹⁵³ Government Decision on the Draft Criminal Code, Oct. 10, 2011, Decision No. 01/41 (Kos.).

¹⁵⁴ Republic of Kosovo, Ministry of European Integration, *Statement of Compliance with the European Union Legislation* (Oct. 19, 2011).

¹⁵⁵ *Meeting of Government of Republic of Kosovo held*, THE REPUBLIC OF KOSOVO (June 22, 2012), <http://www.kryeministri-ks.net/?page=2,9,2954>.

¹⁵⁶ Official Gazette of the Republic of Kosovo, No. 19 (July 13, 2012), available at [http://gazetazyrtare.rks-gov.net/Documents/GZK-Nr.%2019-2012%20\(anglisht\).pdf](http://gazetazyrtare.rks-gov.net/Documents/GZK-Nr.%2019-2012%20(anglisht).pdf).

¹⁵⁷ See, e.g., Criminal Code of the Republic of Kosovo, ch. III, arts. 45–46 and ch. VI, art. 94.

of the new Criminal Code incorporated some definitions essential for the understanding of the Code as a whole.¹⁵⁸ However, other changes reflect a shift toward standardizing criminal law with the rest of Europe. Among the major changes to the General Part of the new Criminal Code include:

- Chapter I enumerates that criminal sanctions must be determined by balancing the rights of Kosovo for justice and self-preservation with the individual's rights and freedoms guaranteed by the Constitution.¹⁵⁹
- Chapter I now requires a strict adherence to the legal principle: *nullum crimen sine lege; nulla poeana sine lege*.¹⁶⁰
- Self-defense as an absolute defense to criminal behavior is now recognized in certain limited circumstances.¹⁶¹
- Chapter II recognizes the criminal culpability of individuals who promote crime by participating as an accessory-before-the-fact or who conspire to act criminally,¹⁶² but limits liability to relative culpability.¹⁶³
- In the new Criminal Code, the purpose of punishment has been articulated in a more precise and detailed terms. Among the purposes enumerated are the deterrence of criminal behavior, rehabilitation, and to strengthen the rule of law.¹⁶⁴
- One major change which is at odds with the norms within the EU is the possibility of imposing life imprisonment “for the most serious criminal offenses committed under especially aggravating circumstances or criminal offenses that have caused severe consequences.”¹⁶⁵

¹⁵⁸ *Id.* at ch. VIII, art. 120.

¹⁵⁹ *Id.* at ch. I, art. 1.

¹⁶⁰ *Id.* at ch. I, art. 2.

¹⁶¹ *Id.* at ch. II, art. 14(1) (“A criminal offence committed under the influence of unbearable violence or unbearable threat is not a criminal offence.”).

¹⁶² *Id.* at ch. II, arts. 27(2), 35(2).

¹⁶³ *Id.* at ch. II, art. 40(3).

¹⁶⁴ *Id.* at ch. III, art. 41(3).

¹⁶⁵ *Id.* at ch. III, art. 44(1).

- The new Criminal Code provides detailed rules which condition the aggravation or mitigation of criminal sanctions.¹⁶⁶
- Chapter IV provides the rules for merger of offenses in determining criminal sanctions.¹⁶⁷
- Chapter V provides new regulations on the imposition of mandatory psychiatric or substance abuse treatment.¹⁶⁸

3. Major Changes to the Special Part

Unlike the General Part of the Criminal Code, which lays out the general principles of criminality and punishment, the Special Part is solely comprised of specifically enumerated offenses. The Special Part has seen far more revisions and additions than the General Part. Some of these changes are merely cosmetic,¹⁶⁹ others address gaps in the UNMIK Criminal Code.¹⁷⁰ However, many crimes, and even whole new chapters of crimes, have been created in order to build toward integration with the EU. Often the behavior now proscribed relates to systematic issues throughout Europe. Some of the additions made to the Criminal Code with an eye toward integration include:

- The Code has added chapters which criminalize acts against the state, including support of terrorism,¹⁷¹ as well as narcotics related offenses.¹⁷²
- The Code now prohibits activities which curtail rights guaranteed by the Constitution of Kosovo, such as violation of voting rights¹⁷³ and labor rights.¹⁷⁴

¹⁶⁶ *Id.* at ch. III, art. 74.

¹⁶⁷ *Id.* at ch. IV, art. 81.

¹⁶⁸ *Id.* at ch. V, arts. 87–91.

¹⁶⁹ For example, Chapter XIV of the UNMIK Criminal Code were titled “Criminal Offences against International Law.” Those same crimes are now contained in a chapter titled “Criminal Offences against Humanity and Values Protected by International Law.” Criminal Code of the Republic of Kosovo, Chapter XV.

¹⁷⁰ *See, e.g.*, Criminal Code of the Republic of Kosovo, ch. XXVI, art. 320 (Theft of Utility Services).

¹⁷¹ *Id.* at ch. XIV.

¹⁷² *Id.* at ch. XXIII.

¹⁷³ *Id.* at ch. XVIII, arts. 210–15.

¹⁷⁴ *Id.* at ch. XIX, arts. 221–25.

- Several additions to the Code address criminal activity which have been problematic across Europe, such as: human trafficking for prostitution¹⁷⁵ and ecological crimes.¹⁷⁶
- Some of the additions are related to showing with compliance with international agreements regarding war crimes¹⁷⁷ or in response to crimes tried by EULEX prosecutors.¹⁷⁸
- The Code may be seeking to allay any international concerns about the Kosovo economic system by criminalizing a much wider range of “offences against the economy.”¹⁷⁹

4. Conclusion

Overall, the adoption of the new Criminal Code by the Assembly of the Republic of Kosovo has been important not only in terms of building, strengthening, and implementing the rule of law and it’s an important factor in the protection of human rights and freedoms in Kosovo, but it also represents a standard for Kosovo’s possible integration into the European Union. Hence, the Criminal Code in its legal aspect enables implanting state-building and protecting the sovereignty of Kosovo.

¹⁷⁵ *Id.* at ch. XX, art. 231 (criminalizing sexual acts with a trafficking victim); *id.*, at ch. XXI, art. 254 (criminalizing failure to report child abuse).

¹⁷⁶ *Id.* at ch. XXVI, art. 361 (criminalizing sale or removal of protected plants or animals out of Kosovo).

¹⁷⁷ *Id.* at ch. XXVI, art. 387 (criminalizing failure to inform on a person indicted by a international criminal tribunal).

¹⁷⁸ *Id.* at ch. XXI, art. 265 (punishing unlawful organ harvesting or transplation); *see also* Kosovo medics accused of trafficking kidneys, BBC (Nov. 12, 2010, 7:21 AM), <http://www.bbc.co.uk/news/world-europe-11741964>.

¹⁷⁹ Criminal Code of the Republic of Kosovo, Chapter XXV. *See also, id.* at ch. XXVII, art. 337 (criminalizing fraud related to receiving funds from European Community); *id.* at ch. XXXIV, art. 430 (prohibiting giving bribes to foreign public officials).

K. Cooperation in Legal Education and Legal Reform

Ronald A. Brand*

1. A New Situation and Recurring Issues

Discussing “Kosovo after the ICJ Opinion,” allows us to consider a situation that has no historical precedent: the process of fulfilling the aspirations of a declaration of independence that has been considered by the International Court of Justice. This discussion also allows us to consider issues that have been considered by many transition states over the past two and a half decades, as well as common elements faced in the process of state-building. This section focuses on one such common element: legal education and its role in the legal reform process. In particular, this section addresses the benefits of cooperation in legal education between the University of Pittsburgh School of Law (Pitt) and the transition State of Kosovo.

The comments here draw on my writings about the export of legal education and the importance to U.S. law schools considering the external, international influences of implementing changes in the traditional structure of U.S. legal education¹⁸⁰ and about how teaching methods distinguish differing legal systems and require cross-system consideration of pedagogical style and methodology. More importantly, these comments leverage my experience in the administration of the LL.M. Program at the University of Pittsburgh School of Law as a fulcrum for educating future lawyers, government officials, and law professors from both the United States and Kosovo in a cooperative process that has had a very real effect. There are lessons in that cooperation for both legal educators in the United States and for legal educators and government officials in Kosovo.

2. Foundations of Cooperation—U.S. Department of State Funding

In 2002, the University of Pittsburgh—in an internal partnership between the School of Law’s Center for International Legal Education (CILE) and the Center for Russian and East European Studies (REES)—and the University of Pristina Faculty of Law received funding from the Bureau of Educational and Cultural

* Professor and Director, Center for International Legal Education, University of Pittsburgh School of Law.

¹⁸⁰ THE EXPORT OF LEGAL EDUCATION: ITS PROMISE AND IMPACT IN TRANSITION COUNTRIES (Ronald A. Brand & D. Wes Rist eds., 2009) [hereinafter EXPORT].

Affairs of the U.S. Department of State. This partnership was part of a network of projects undertaken by CILE and REES in Ukraine, Serbia, and Kosovo.¹⁸¹ Each project focused on assisting a law faculty in a transition country with the issues it faced during the transition process.

In Prishtina, over four years of grant-funded activities, the partnership opened a jointly-administered International Law Resource Center; graduated three outstanding Kosovar academics from the LL.M. program (with generous grants of tuition from Pitt's University Center for International Studies (UCIS) and from the Muskie Fellowship Program); executed three summer academic programs in Prishtina; prepared and accompanied four teams of students and faculty coaches from Prishtina to Vienna for the Willem C. Vis International Arbitration Moot Competition (Vis Moot); and provided extensive library materials, curricular advice, and faculty training in Prishtina. We were able to leverage the State Department funds by providing support from other sources in a manner that created a sustainable and lasting process.

3. Sustained Cooperation—Kosovo LL.M. Students at Pitt Law

This process of cooperation continued after the termination of State Department funding in 2006. CILE has continued to work with REES, and with other parts of UCIS, to provide funding to support critical elements of cooperation—especially tuition and other support for Kosovar students attending the University of Pittsburgh School of Law's LL.M. program. In Kosovo, the process of cooperation has been an organic one. Kosovars who studied in Pitt's LL.M. program have returned to Kosovo and maintained the contacts and relationships established during their time in Pittsburgh. The result is a very strong network of relationships upon which additional cooperation has continued to be built. Additional young Kosovar lawyers have come for LL.M. degrees at the University of Pittsburgh. Scholars returning to Kosovo have continued sending a Vis Moot team to Vienna each year from the University of Prishtina, and, in 2013, they helped initiate the first Vis Moot team from the American University in Kosovo.

Nine Kosovo lawyers have received, or are receiving, a LL.M. education from the University of Pittsburgh School of Law in the past nine years. This

¹⁸¹ CILE and REES also received similar Department of State grants for cooperation with Kyiv National Taras Shevchenko University (Ukraine), the University of Belgrade (Serbia & Montenegro), and Donetsk national University (Ukraine).

demonstrates both the sustainability of the original program of cooperation and the commitment of Pitt Law and CILE to not only continue, but to strengthen the Pittsburgh-Prishtina relationship. These lawyers have had, and will continue to have, significant influence on legal practice and legal reform in Kosovo.

4. Sustained Cooperation—Pitt Law Internships in Kosovo

The Pittsburgh-Prishtina relationship is not a one-way street. Not long after the partnership was formed in 2002, Pitt J.D. students began traveling to Kosovo to do internships in various offices and organizations. These internships have included placements in Pristina at: the Center for Human Rights, the ABA-CEELI (Rule of Law Initiative), the Criminal Defense Resource Center, the United Nations Mission in Kosovo Department of Justice, Legal Office, the Assembly of Kosovo, the Office of the Legal Advisor to the President of Kosovo, the Foreign Affairs Office of Kosovo, the Kosovo Ministry of European Integration, the Kosovo Ministry of Justice, and the International Foundation for Electoral Systems in Northern Mitrovice.

5. Sustained Cooperation—The Pitt Law Consortium at the Vis Moot

Another aspect of the sustained cooperation has been the Pitt Law Consortium at the annual Vis Moot in Vienna each spring. Under the original State Department grants, CILE helped expand the international commercial law and arbitration curriculum at Donetsk National University and Kyiv Taras Shevchenko University in Ukraine, at the University of Belgrade in Serbia, and at the University of Prishtina in Kosovo. Each of those schools continues to send a team to the Vis Moot competition in each year, without CILE support. These teams cooperate with one another by arriving early and engaging in practice arguments before the formal competition begins. In 2012, a second Kosovar Vis Moot team was added to the consortium when Pitt Law graduate Vjosa Osmani, helped arrange funding and served as faculty adviser for the American University in Prishtina. The consortium has been further enhanced by CILE's recent contracts with the U.S. Department of Commerce Commercial Law Development Program (CLDP) to do similar curricular development in the Middle East, with Vis Moot teams from Bahrain, Iraq, Jordan, Oman, Qatar, and the UAE joining the Consortium at the beginning of the Moot in Vienna. In each instance, initial efforts by CILE and financial assistance through CLDP have turned to self-sustaining participation by each Middle East law school. Thus, the consortium continues to build on the model that exists in Kosovo.

6. Specific Results—Continued Pittsburgh-Prishtina Cooperation in Legal Education

The lives of the nine Kosovar lawyers who have received LL.M. degrees from the University of Pittsburgh School of Law, and of the more than twenty Pitt Law students who have engaged in legal internships in Kosovo, are a testimony to the impact of legal education in a multi-system environment. While a sophisticated empirical study of that impact is beyond the scope of this section, the accomplishments of those LL.M. graduates from Kosovo are a clear indication of this impact on the legal system and legal education system of Kosovo. These graduates have affected the Office of the President and the Assembly of the Republic of Kosovo. Moreover, they have established new law firms, taught in several universities (both inside and outside of Kosovo), worked for human rights organizations and development projects, drafted proposed legislation, and studied legal system needs.

The stories of the Pitt J.D. graduates who have interned in Kosovo reveal a similar impact. These individuals have become employed by the United Nations, the U.S. Department of State, the U.S. Department of Commerce, and major law firms and corporations. They have also performed human rights and development work in many countries. All of these students have been influenced by their Kosovo experiences.

7. General Impact—The Export of Legal Education¹⁸²

A 2007 Working Paper of the International Monetary Fund concluded that, when students study outside their home countries, there is “a very strong correlation between the lagged average indices of democracy in host countries and the current level of democracy in the origin country.”¹⁸³ The same study noted that in 2007, 46 heads of government were products of higher education in the United States, and that in 1990:

Out of 115 world leaders, 66 studied abroad at a certain point; the percentage of foreign-education leaders’ increases to more than two-thirds if one is considering only developing nations. These numbers show clearly that foreign-

¹⁸² This portion of the paper is taken from the author’s work in EXPORT, *supra* note 180.

¹⁸³ Thomas Carothers, *The Rule of Law Revival*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 20 (Thomas Carothers ed., 2006).

educated individuals do play an overwhelming role in their own home countries.¹⁸⁴

In a 2005 article in *The American Lawyer* titled, "They Rule the World," Michael D. Goldhaber considered the importance of an LL.M. degree from a U.S. law school to government and business relations throughout the world. Mikhail Saakashvili is an example of that influence.¹⁸⁵ Saakashvili returned to the former Soviet Republic of Georgia after obtaining his LL.M. degree at Columbia Law School to lead a democratic revolt and be elected President of a new state. Once in office, he appointed other U.S. LL.M. graduates to be his Foreign Minister and his Deputy Justice Minister. Says Goldhaber in his article:

Lawyers like these are unstoppable when armed with another degree. Former LL.M.'s Giuliano Amato of Italy and Mary Robinson of Ireland rose to become heads of state. A third of the judges on the International Court of Justice hold graduate degrees from U.S. law schools. And in Taiwan, which rivals Georgia for LL.M. power, U.S. alumni include the vice president, the mayor of Taipei, and at least two grand justices.¹⁸⁶

According to Gocha Lordkipanidze, a foreign policy adviser to the Georgian Prime Minister and Harvard LL.M. graduate:

It definitely has an impact on our careers and our lives. It's ingrained in every piece of paper I'm writing or action I'm taking for the government of Georgia. After Harvard, I'm neither European nor American, but at peace with both ways of thinking.¹⁸⁷

This anecdotal approach indicates the importance of a U.S. legal education not only to its recipient, but also on the home country of the returning scholar. This importance is part of what should be a much larger discussion of the export of U.S. legal education. Few, if any, other exports can have similar impact. For those of us

¹⁸⁴ *Id.* at 21.

¹⁸⁵ Michael D. Goldhaber, "They Rule the World," *THE AM. LAW.*, Sept. 14, 2005.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

involved in legal education, and in particular for those of us who have followed students involved in the Pittsburgh-Prishtina partnership, it is difficult not to believe in the value of the export of legal education.

A 2004 Organisation for Economic Co-operation and Development Policy Brief noted four “different, but not mutually exclusive, approaches to cross-border higher education.”¹⁸⁸ They are:

- 1) the mutual understanding approach, focused on encouraging the mobility of both domestic and foreign students;
- 2) the skilled migration approach, emphasizing the recruitment of skilled foreign students to remain in the host country after completing their education;
- 3) the revenue-generating approach, focused on the presence of foreign students to add to the income of the educational institution; and
- 4) the capacity-building approach, encouraging cross-border education as a tool in assisting the student’s home country upon return after the completion of the educational stay.

The U.S. LL.M. process for foreign lawyers exemplifies the fourth of these approaches to cross-border education. Kosovar LL.M. graduates from the University of Pittsburgh School of Law have improved law school curricula at home, become better teachers, encouraged the rule of law and ethical conduct of lawyers, designed and implemented new legislation, assisted in the administration of international development programs, and participated in the preparation of the case for the Kosovo declaration of independence at the International Court of Justice.

This capacity-building for Kosovo also promotes the rule of law. The 2007 IMF Working Paper on *Democracy and Foreign Education* offered hypotheses for how foreign-educated individuals bring about changes in levels of democracy in their home countries.¹⁸⁹ The hypotheses considered in the IMF Working Paper included the following:

¹⁸⁸ OECD Policy Brief, *Internationalisation of Higher Education* 4 (2004).

¹⁸⁹ Antonio Spilimbergo, *Democracy and Foreign Education*, IMF Working Paper AP/07/51, at 22 (Mar. 2007).

- 1) “foreign-educated technocrats are such a scarce resource in many countries that they can impose their own preferences in favor of democratic regimes;”¹⁹⁰
- 2) “foreign-educated leaders seem to be extremely motivated to introduce democracy and to keep up with the more developed countries where they studied;”¹⁹¹
- 3) “foreign-educated individuals make it more difficult for the dictatorial regimes to maintain repression by spreading new ideas at home;”¹⁹²
- 4) “foreign-educated individuals can make repressive activities more costly for a dictatorial regime since they have easier access to external media;”¹⁹³ and
- 5) “education abroad may inculcate a sense of common identity with the international democratic community.”¹⁹⁴

Each of these hypotheses can be applied as well to explain how U.S. educated law professors and lawyers in Kosovo can serve to advance the rule of law. These lawyers return to Kosovo as scarce resources to be relied upon for advice and expertise in the development and application of the law, as well as in leading the reform of legal education.

8. Concluding Thoughts

Wade Channell, Senior International Trade Advisor at the U.S. Agency for International Development (USAID) has called U.S.-trained LL.M. graduates who return to their home countries “agents of understanding, agents of change, and agents of hope.”¹⁹⁵ These graduates provide a bridge that facilitates positive legal reform that both understands other legal systems and filters the process of change in their home countries through a native sensitivity to local cultural needs. While many at the University of Pittsburgh School of Law have benefited from the presence of Kosovar lawyers in the LL.M. program, the greatest benefit from their

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Wade Channell, *Making a Difference, the Role of the LL.M. in Policy Formulation and Reform, in EXPORT*, *supra* note 180, at 13–22.

time in Pittsburgh will be felt in Kosovo. Those lawyers have much to contribute and will affect legal reform in Kosovo in a positive way for years to come.

L. Cooperation and Reform Through Legal Education: How Academic and Nongovernmental Organizations Can Effect Sustainable Change

D. Wes Rist*

In recent years, there seems to be a greater recognition of international legal education programming as a desirable element in legal reform. As Professor Brand noted, the IMF has recognized a positive correlation between utilizing such programming and the development of the rule of law.¹⁹⁶ However, like the field of rule of law development itself,¹⁹⁷ international legal education programs are not coordinated across departmental lines and/or national and regional boundaries. The result is different educational programs promoting legal development and reform in different ways. Unfortunately, there is little data which provides guidance as to which approaches are most productive.

The lack of data on the long-term effect of international legal education on rule of law and legal reform is an acknowledged weakness.¹⁹⁸ A study of this effect would be complex and intrinsically debatable as there are a large variety of methodologies to evaluating legal education reform and its influence on a country.¹⁹⁹ Attempting to evaluate the bearing of one country's legal education system on multiple jurisdictions would be even more difficult.

Despite an undeniable need for this kind of research, the international legal community should not fixate on how much international legal education has affected legal reform—international legal education ought to be included in any discussion of rule of law development. Rather, the most important question is: how can the international legal community best use international legal education and legal education reform to accomplish the goals of greater legal reform? Several key

* Director of Education and Research, American Society of International Law.

¹⁹⁶ See *supra* note 189.

¹⁹⁷ See Ricardo Gosalbo-Bono, *The Significance of the Rule of Law and Its Implications for the European Union and the United States*, 72 U. PITT. L. REV. 229, 240–71 (2011).

¹⁹⁸ Jon Eddy, *Book Review*, 61 J. LEGAL EDUC. 335 (2011).

¹⁹⁹ See, e.g., Matthew S. Erie, *Legal Education Reform in China Through U.S.-Inspired Transplants*, 59 J. LEGAL EDUC. 60 (2009); Lovely Dadgupta, *Reforming Indian Legal Education: Linking Research and Teaching*, 59 J. LEGAL EDUC. 432 (2010); Luis Fernando Pérez Hurtado, *Content, Structure, and Growth of Mexican Legal Education*, 59 J. LEGAL EDUC. 567 (2010); Thomas Chih-hsiung Chen, *Legal Education Reform in Taiwan: Are Japan and Korea the Models?*, 62 J. LEGAL EDUC. 32 (2012).

factors are essential to any engagement of international legal education as a tool for sustainable legal reform.

1. Partnerships, not Parochialism

Successful, sustainable collaborations between law faculties in developing countries and academic or civil society institutions in the United States require more than just funding. At some point, funding resources will diminish or disappear. Relationships that are approached with the concept of “helping the weaker brother” inevitably generate friction once the lubrication of funded programming is removed.

Lasting partnerships must be built around mutual cooperation and engagement. Collaborative activities need to be designed with the unfunded period of the relationship in mind. My time at the University of Pittsburgh School of Law repeatedly demonstrated the value of approaching international legal education from this long-term perspective. By identifying personal relationships between faculty members at each university, planning for non-resource dependent programming, and creating open avenues of communication, CILE was able to maintain partnerships with academic institutions that had not received dedicated funding for nearly a decade. Synthesis, rather than substitution, should be the goal of U.S. international legal education practitioners.²⁰⁰

2. Flexibility, not Formality

While programs are the foundation of any good development project, they are also inherently resource-dependent and can include inflexible procedures that quickly become outmoded. Any attempt at effecting sustainable legal reform through international legal education must be inherently flexible as the legal profession is not a stationary target. The structure of legal education is frequently changing, and a nation integrating principles like the Bologna Declaration into their educational systems are often still figuring out what its needs are.²⁰¹ Faculty and students committed to pursuing worthwhile programming in cooperation with a U.S. partner will drive demand of specific programming in ways that change to reflect the needs of the changing legal profession. Partnerships built on a single program, a formal agreement, or a memorandum of understanding run the risk of failure as key participants move on, specific resources become unavailable, and

²⁰⁰ Channell, *supra* note 195, at 13; Erie, *supra* note 199, at 61–62.

²⁰¹ Julian Lonbay, *The Changing Regulatory Environment Affecting the Education and Training of Europe's Lawyers*, 61 J. LEGAL EDUC. 479, 484–85 (2012).

demand shifts to reflect a change in the legal profession. Schools simply interested in adding “notches on their belt” through formal partnership agreements are poor partners when it comes to actually effecting legal reform. It is the faculty members, administrators, and students desiring substantive value in a partnership who will make worthwhile programming happen, regardless of a piece of paper.

Formal partnerships have other weaknesses. Administrative costs can be significant and regular reporting, maintenance, and renewals create additional staff burdens. Sometimes, these agreements are unavoidable, and there are times that they can be useful in laying down a structured approach. Frequently, however, there is a tendency to put a partnership in writing and then place it on the shelf where it fails to deliver on its promise to act as a vibrant contribution to legal reform and rule of law development.

Inherent in this denouncement of pro forma agreements is the need for administrative support accompanied by a willingness to commit to change. Individuals drive change, not formal agreements. Find people who are committed out of a sense of purpose and you will find a partner that will stick with you, even during the unfunded spells.

3. Emergence, not Establishment

The key to sustainable influence in international legal education and rule of law development is finding people who will be committed to help effect that change over a long period of time. CILE’s commitment to its original State Department funded partners has continued to this day and is reflected best through its relationship with the University of Prishtina Faculty of Law in Prishtina, Kosovo, the University of Belgrade Faculty of Law in Belgrade, Serbia, and Moi University School of Law in Eldoret, Kenya.²⁰² All of the University of Pittsburgh School of Law’s Kosovar LL.M. graduates have returned to their home country, and a significant number are engaged in teaching law, either on a full-time or adjunct basis, at a number of law faculties and universities within Kosovo.

By working with its partners to identify, nurture, and develop the next generation of legal reformers, CILE has developed a sustainable relationship with the breadth of the legal profession in each of these countries.

²⁰² See, e.g., *Third CLDP Contract and 2010 Summer Program in Croatia Expand CILE Use of Vis Moot as a Legal Education Tool*, 2009 CILE NOTES 2, available at <http://www.law.pitt.edu/files/attached/cile/CILEnotes2009Final.pdf>; *Having an Impact: The Pitt-Moi Partnership*, 2012 CILE NOTES 4, available at <http://www.law.pitt.edu/files/attached/cile/cilenotes2012replacement.pdf>.

4. Concrete Suggestions for Sustainable Relationships

The preceding points are based on my personal experience as Assistant Director of CILE for more than five years. Rather than engage in a more thorough analysis of these points, I'd rather transition to some concrete examples of programming structures that can assist all institutions seeking to build sustainable relationships that have an impact on international legal education and legal reform.

First, students are your greatest resource—for both American and foreign institutions. In every class, there are always at least a few students willing to go above and beyond the normal expectations to achieve their own personal goals. The challenge is to let the student body, as a whole, know that there is support for those seeking to participate in international legal education programming. That support can take the form of summer internships, study abroad programs, or even simply connecting a student on a sightseeing trip with graduates in the area. When the students return, take advantage of their experiences; have them contribute to your newsletter or the law school's website; have them present at local organizations with similar areas of focus; have them hold an informational session for students to answer question about their experiences; and work with them to arrange a special lecture or event on the topic they studied. Students are your best publicity and can drive future interest in the program.

Second, American institutions, both civil society and academic, need to look for partnerships that help increase buy-in on their long-term goals. CILE has partnered with the University of Pittsburgh's University Center for International Studies (UCIS), which serves as a clearinghouse for all things international at the University of Pittsburgh. Many of CILE's partnerships with institutions in Kosovo, Serbia, and Ukraine have been maintained through the assistance of fellowships UCIS provides to CILE for the support of law students. Programs should always be presented in ways that attract the interest of new potential funders and that emphasize the opportunity for outside organizations to step into a proven program with identifiable results.

Finally, make sure partnerships are two-way streets. Kosovo and Serbia are good examples where CILE has provided benefits to their students, and those students—as graduates—have helped CILE find placements for American J.D. students interested in spending a summer in the Balkans to gain foreign legal experience. Keeping a two-way flow of participation is also the key to finding new areas in which to cooperate and identifying those areas where flexibility is essential to maintaining the relevancy of the relationship.

While this review of legal education programs is admittedly anecdotal, it reflects experience in maintaining and strengthening relationships between academic and civil society institutions and law faculties in transition countries. Putting these suggestions into practice will not guarantee that programming will

survive through the unfunded periods. But, without true partnerships, intentional flexibility, and a focus on emerging leaders, there is no chance that any relationship designed to cross cultural, national, legal, and educational divides will survive.

M. Developing a Telecommunications Program for the Republic of Kosovo

Martin Weiss, David Tipper, and Robert M. Hayden*

One of Kosovo's needs in the wake of the destructive war of the late 1990's is a modern telecommunications infrastructure and career opportunities for the unemployed. Telecommunications is a key infrastructure for any country wishing to be competitive in the global economy, and education is an important factor in building a competitive workforce that will stimulate investment in Kosovo.

The University of Pittsburgh (Pitt) and the University of Pristina (UP) took part in a collaborative project to build a program of study in telecommunications in Kosovo. This project lasted from May 2008 to June 2011 and was funded by USAID through Higher Education Development program. During the term of this project, Pitt assisted the Faculty of Electrical and Communications Engineering at UP in developing a modern curriculum to meet their needs; constructing a state-of-the-art laboratory to support the educational mission of the program; and educating three of UP's junior faculty members at Pitt's School of Information Sciences for one year, where they earned their Masters of Science in Telecommunications degree.

This project was designed to assist with Kosovo's challenges in human resource development and building a close industry-academia partnership in Kosovo's telecom sector. The ultimate goal of this partnership is to improve Kosovo's economy through private sector engagement and workforce development. As recent reports on the situation in Kosovo indicate,²⁰³ much work remains to be done, and it will likely take many years to achieve self-sustaining growth.

There were three key elements to achieve the partnership's overarching objective. The first was to develop and reinforce a relationship between local industry and UP's Faculty of Electrical and Computer Engineering. The second was to demonstrate practice-oriented instruction by inviting UP faculty members to

* Martin Weiss is a Professor and Associate Dean for Academic Affairs and Research, University of Pittsburgh School of Information Sciences; David Tipper is an Associate Professor and Director of the Graduate Telecommunications Networking Program, University of Pittsburgh School of Information Sciences; Robert M. Hayden is a Professor of Anthropology, Law, and Public and International Affairs and Director of the Center for Russian and East European Studies at the University of Pittsburgh.

²⁰³ USAID, KOSOVO ECONOMIC PERFORMANCE ASSESSMENT (2008), available at http://pdf.usaid.gov/pdf_docs/PNADL767.pdf.

Pitt for extended stays. The third was working directly with the UP faculty to develop and deliver a program of study in telecommunications.

Early in the project, UP faculty key to this program visited Pittsburgh for a series of intensive meetings. The faculty members were familiarized with Pitt's telecom program and the motivations that drive its structure and approach, as well as a deep familiarization with Pitt's laboratory environment. UP faculty members were also introduced to objectives-oriented curriculum design by the Industrial Informatics and System Engineering (IISE) faculty. With this background, the UP faculty undertook a radical redesign of their curriculum, which resulted in a focused set of educational experiences for their prospective students. In addition, this design enabled the UP faculty to develop a detailed set of laboratory requirements. It is important to point out that the redesigned curriculum was an *adaption* of Pitt's MST curriculum, not a wholesale adoption, as the UP faculty face different requirements and students with different knowledge and skills.

Soon after faculty returned to Pristina, the first meeting of the Industrial Advisory Council (IAC) was convened. The IAC consists of representatives of current and emerging telecommunications employers in Kosovo. The IAC members and the faculty engaged in an open dialog about the proposed curriculum. The IAC offered advice that included specific topics recommended for inclusion into the curriculum, a re-ordering of some courses, and a recommendation that the language of instruction be English. This "IAC" approach has served as a model for relations with local industry for other universities in the region.

In 2008, the labs at Pitt were completely overhauled, both conceptually and physically. The laboratory delivered to Faculty of Electrical and Communications Engineering at UP was a modernized version of this lab. The lab was expertly assembled in a newly renovated and secured space through investments by UP. The assembly of the lab gear was also financed by UP out of their internal funds.

Assessments were a key element of this project. Early on in the project, a member of Pitt's IISE faculty travelled to Kosovo to conduct a baseline assessment. This process was repeated at the end of the project to assess the progress of the Faculty of Electrical and Communications Engineering. The report noted that many weaknesses and threats in the baseline report were later identified as strengths. An external project examiner was also engaged, and he commented that the program had been successful, that it had resulted in an excellent educational program for the future, and that there was potential for a significant impact to the Kosovar labor economy.

The full impact assessment of this project will be possible by 2013, as program graduate outcomes in the marketplace can be more fully determined

**PART IV—TWENTIETH ANNUAL MCLEAN LECTURE ON
WORLD LAW: THE ROLE AND POSITION OF THE
CONSTITUTIONAL COURTS IN SOCIETY: THE CASE OF
KOSOVO**

The Honorable Dr. Enver Hasani*

On behalf of myself and on behalf of the institution I presently chair, I am delighted and honored to be the keynote speaker in the McLean Lecture series. I hope there will be much discussion on the Constitutional Court of Kosovo, which is the newest of its kind in Europe. For those who are not familiar with constitutional courts, they are modeled upon the idea of constitutional review, founded by Hans Kelsen, who has been regarded as one of the most important legal scholars of the last century. Constitutional courts are not part of the regular judiciary, but they oversee all public authorities, including the regular judiciary. The same is true with our court.

The Constitutional Court of Kosovo is part of the “Comprehensive Proposal for the Kosovo Status Settlement,” otherwise known as the Ahtisaari plan. The Ahtisaari plan is the international report upon which Kosovo declared its independence on February 17, 2008. This plan was the result of several years of negotiation between Pristina and Belgrade, as mediated by Mr. Martti Ahtisaari, former President of the Republic of Finland, who had been appointed by United Nations Secretary-General Kofi Annan as Special Envoy for the Future Status Process for Kosovo. It was supposed to eventually be ratified by the UN Security Council, but Russia exercised its veto, so the plan was unilaterally accepted by Kosovo, and Kosovo declared its independence. Based on this, Kosovo adopted its own constitution, which came into effect on June 15, 2008. In general, one would associate our Constitution as having been modeled upon the highest, Western legal standards on constitutional law. The courts are obliged to act in accordance with it.

The Constitution is a source of fundamental rights and freedoms for the people of Kosovo. This is evident in Chapter II, which provides that human rights and liberal, fundamental freedoms are inalienable, indivisible, and invaluable. This is the defining section of the entire text of the Constitution and is the foundation of the legal order of Kosovo.

The Constitutional Court of the Republic of Kosovo has other European counterparts. It is modeled upon the laws, more or less, of other southeast European

* President Judge of the Constitutional Court of Kosovo.

constitutional courts—all of them having similar, but separate laws. The Constitutional Court became operational in September 2009, although we were sworn in during June of the same year. Its main function is abstract ruling jurisdiction. However, the case law of the court is not based on the referrals regarding abstract ruling jurisdiction but on Article 103.7, which we refer to as “human rights jurisdiction” or “jurisdiction of human rights.” Our Constitution says in Article 53 that every ruling of every public authority in Kosovo (including the constitutional court) regarding human rights should be interpreted based on the case law of the European Court of Human Rights (ECHR). The ECHR’s website includes its decisions in English, Albanian, Serbian, and Turkish. Our working language, since we have international colleagues, is usually English. With the exception of one judge and two staff members from the administration, everyone speaks English. Most of them were educated abroad and can also speak French, German, or Swedish depending on the country where they were educated.

Statistics show that citizens have an increased confidence in the Constitutional Court due to efficient, effective, and impartial work. From 2009 to 2012, the Constitutional Court received many referrals. We saw an increase of 24.55% of submitted referrals in 2011 compared to 2010. We have received 450 referrals this year, and we expect that we will complete almost 90% of them, if not more, by the end of the year. This is an impressive figure by all standards for those who are familiar with Kosovo. It is also impressive for the region when you compare it to other constitutional courts. The current status of our cases, as of early November 2012, is 170 solved cases, five cases carried over from 2010, and 26 cases carried over from 2011. The total number of unsolved cases in 2012 is 76, which is not a large number.

All citizens of Kosovo, regardless of their ethnicity or religion, have equal access to the Constitutional Court. The number of community members submitting referrals has shown confidence in the Constitutional Court. This has to do with the Court’s various activities in the community, including outreach meetings. During the first months, we conducted outreach meetings with all authorized parties, including central authorities, municipal authorities, the legal community, and citizens, telling them what we are and what we are not. We did this because we were afraid that we might be overrun by cases because we were a new court and the existing court system did not have a good name, having shared the same destiny as other former communist countries. If people thought that we could be a court of first instance, which we are not, we could get overwhelmed.

The Constitutional Court is an exceptional court. We review cases when there has been a constitutional violation of human rights and fundamental freedoms of Kosovo citizens. In order for that to happen, parties are required to exhaust all legal remedies available within the system first. The last legal remedy is always the

Supreme Court. Within four months a decision of the Supreme Court, parties can come before us and allege their problem and violation. Most of the time, as you will see, cases are admissible on procedural grounds or because they present prima facie legitimate cases. Our Court does not change the result unless it was achieved through unconstitutional means, which rarely happens.

Other Kosovo courts may raise any issue before the Constitutional Court while there is a case of controversy before them. If the application of the law would cause a potential constitutional violation, they should stop the proceedings and bring the case before us, with a legal opinion from the trial court that would explain why it thinks the law is unconstitutional. So far, we have only had one case (the “expropriation cases”) where the Supreme Court was wrong and the law it had challenged was constitutional. The arguments they based their referral on were that the workload was too high and that it would be better if some of the expropriation cases could be heard by other trial courts of first and second instance. Of course, we didn’t accept that argument because it is not a constitutional argument.

So who are the commonly alleged violators of the Kosovo Constitution? The courts and the police are the subjects of the most cases, but private individuals are too, especially if you include the international presence, which is still in Kosovo. Municipalities, state bodies, and other public authorities have also been challenged as alleged violators.

What are the alleged constitutional violations? Most of the time, the alleged violation is the prevention of equality before law. Other alleged violations deal with the review of court decisions; decisions of the state; the right to work; clarification of judgments; the right to free and fair trial; the right to a pension; and the right to property.

With respect to decisions in continental legal culture, some (I would say pretty much most) countries make a distinction between judicial judgments and resolutions. A judgment determines the merits of the case. So far, 96 out of the more than 450 referrals we received this year have or will result in judgments. Resolutions result primarily from cases that have been deemed inadmissible on procedural grounds. These cases are either brought prematurely, before the party has exhausted other legal remedies, or the parties have missed the time limit, which is up to five months. These inadmissibility decisions reflect the highest number of decisions we see, which is standard in all European constitutional courts, both East and West.

Despite the large number of inadmissibility decisions, there has been an increase in issued judgments. This is the result of our outreach to the public and all authorized parties. Authorized parties are called that because they should follow certain procedures in order to file a case legally and properly before us. As far as implementation of the court’s decisions, the court has a good record compared with

other regular courts. Recently, we have seen tendencies from the Supreme Court to, in a sense, obstruct the implementation of our decisions; meaning that the Supreme Court has tried to say that it could remedy their decisions when we have reviewed their judgments and remanded them for reconsideration. In those instances, they seem to have thought that their legal interpretation was initially sound and that they could reach the same result pursuant to different legal means. In private discussions, we have convinced them that it is the Constitution that prevails, not other law. Our constitutional interpretation is the legal reasoning not *obiter dicta*. We told the Supreme Court judges that when we remand a case and give legal reasoning interpreting the Constitution, they should obey that and the end result should be fixing the constitutional violation that was found by Constitutional Court.

The way the Supreme Court does its job is a matter of their jurisdiction, not ours. We cannot change their decision; they must do it. They should follow the reasoning of the Constitutional Court and fix the constitutional violation. Unless that is done, it is considered an obstruction of justice and a misuse of the judicial function.

I would like briefly to discuss certain cases which I would say make up the core cases of our case law. There are five to ten that establish the current identity of and indicate the integrity of the Constitutional Court of the Republic of Kosovo. I will, however, mention only two.

The first case dealt with prepaid television service. We issued an interim order and by the time we re-opened the case for deliberation, it had become moot because the Ahtisaari Plan changed the law and was then consistent with our interim measure. The second is the *PAK* case, which involved the Privatization Agency of Kosovo. It addressed a human rights violation of the right to free and fair trial. The reasoning of the Court was very eloquent and stated that the Special Chamber, which acts within the Kosovo Supreme Court and is composed of and dominated by the internationals, does not have original jurisdiction, but that its jurisdiction stems from the laws of Kosovo and from the very independence declared on behalf of Kosovo. The Constitutional Court told the Special Chamber that it is not part and parcel of the constitution legal order of Kosovo and they therefore had no right to pick and choose the laws of Kosovo that they would apply. They have full discretion in the way they judge, but only in accordance with the laws in force and enacted by the Kosovo Assembly. The entire philosophy of the Constitutional Court in this case was based on the ruling of the International Court of Justice, which was based on the original powers of the sovereign—the people—or in legal terms, constitutional terms. They created an assembly, government, presidency, courts, and judges who enacted the laws and legal infrastructure of a country, which is sovereign and independent. This authority does

not derive from United Nations Resolution 1244, but from the vote which took place on the eve of the Declaration of Kosovo's independence.