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## Special Report: Kosovo After the ICJ Opinion, Introduction

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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?”<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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.”<sup>4</sup> 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.”<sup>5</sup> The Secretary-General established the

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<sup>1</sup> 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].

<sup>2</sup> 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>.

<sup>3</sup> Kosovo Opinion, *supra* note 1, ¶ 51.

<sup>4</sup> *Id.* ¶ 57.

<sup>5</sup> 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.<sup>6</sup> UNMIK regulation 2001/9 of 15 May 2001 provided a “Constitutional Framework for Provisional Self-Government” of Kosovo.<sup>7</sup> This regulation was followed by rounds of unsuccessful negotiations at which Serbia and Kosovo considered the status of Kosovo.<sup>8</sup> 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.”<sup>9</sup>

### 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

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<sup>6</sup> Kosovo Opinion, *supra* note 1, ¶¶ 60–61.

<sup>7</sup> *Id.* ¶ 62.

<sup>8</sup> *Id.* ¶¶ 64–69.

<sup>9</sup> *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;<sup>10</sup> efforts at respect for human rights;<sup>11</sup> 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.

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<sup>10</sup> 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>.

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