

What the ICJ's Decision Means for Kosovars

By James E. Moliterno*

The International Court of Justice's advisory opinion favoring the legal status of the Kosovar declaration of independence came as an exhilarating surprise to many in Kosovo. The spirit of suspicion and negative perception of most internationals (US citizens being a notable but not exclusive exception) meant that a favorable ruling from an international court was unexpected.

Everywhere in Pristine is organized, well-designed graffiti: "EULEX (European Union Rule of Law Mission in Kosovo) Made In Serbia"; "No Negotiation"; "UNMIK," (United Nations Mission in Kosovo) with a circle and line through it as in an international "do not enter" sign. The UN administration of Kosovo has not been popular. And the transfer of some control to EULEX even more suspect. There are powerful suspicions that the EU negotiation with Serbia and Serbia's relatively rapid move through the process leading to accession is a major threat to Kosovar independence. At least, it is widely thought, any deal will return Serbian control over the lands north of the Ibar River dividing Mitrovica, where Serbia remains in *de facto* control.

When the brief Georgian war with Russia occurred in August 2008, many speculated that the UN, EU, and even US would eventually trade support for some of the disputed provinces of Georgia and allow some Serbia control in parts of Kosovo.

The willingness to suspect international bodies and the fear of Serbian influence in them is palpable.

The ICJ decision will require adjustments in thinking all around. Kosovars will have to adjust their mistrust of most internationals. Doing so will require that they take more responsibility for their own future, and minimize international blame for local problems. It is less clear whether change will come in Serbia. Moderate Serbian leaders have been edgy about appearing willing to let go any claims to Kosovo. The international community has understood that moderate Serbian leaders can only speak and act so moderately before their shaky support may be overcome by a resurgence of nationalist fervor. The moderate Serbian leaders likely will not be buoyed at home by the ICJ decision. The views of the nationalists in Serbia are unlikely to be moderated by the expression of international

* Vincent Bradford Professor of Law at Washington & Lee University. During 2004-2007, Professor Moliterno worked in a rule of law project in Serbia, designing and implementing lawyer ethics courses in Serbian law schools. During 2008-2010, he worked on a project in Kosovo, training Kosovar judges in principles of ethical conduct. In all, he has made 15 trips to the region for this work. Email: moliternoj@wlu.edu.

justice. Too many in Serbia continue to be skeptical about the mass killings at Srebrenica. Too many continued to defend Radavan Karadzic. Some, undoubtedly, continue to harbor General Mladic. None such will be moved by an international court's rebuke of their claim to the holy place where the battle with the Ottomans was lost in 1389.

There is risk in being too gentle with Serbia because of the perilous support its moderates enjoy. Serbian appeasement has failed before. The fragile, two-states-in-one system in Bosnia seems always on the brink of failure. The system was the direct result of Serbian-inspired nationalist aggressiveness in Bosnia and international passivity in its face. The ICJ decision makes a repeat of the Bosnian debacle in Kosovo less likely. It will dampen Serbian voices that claim continued control in Kosovo. It will provide support for the defense of Kosovo in the event of a now-less-likely aggressive stance by Serbia. At the same time, the decision is being used to prop up not-so-veiled threats by Republic Srpska's leaders that it may now leave Bosnia, as, in their eyes, Kosovo left Serbia. There is none-too-little irony here: while the Republic Srpska continues to assert that Kosovo's action was illegal, it uses the ICJ's blessing of Kosovo to support its own impending secession from Bosnia, which would be illegal if its view had carried the day in the ICJ.

The internally contrary views of the supported and supporter persist. The views of Serbia and Republic Srpska and their internal inconsistency persist. Russia criticized the opinion and is unlikely to change its position *vis-à-vis* Kosovo. Yet the Russian-supported break-away regions in Georgia hailed the opinion as signaling an enhancement of their own status.

The Serbian position in places like Spain and China may lose some of its salience. The time for Spain, in particular, to support Kosovo and distinguish its own regional troubles in the Basque regions and in Catalonia from the case of Kosovo and Serbia has come. Spain's withholding of support for Kosovo has appeared to be an expression of its view that its own internal, restless regions are analogous to Kosovo. Nothing could be further from reality. Now, if they are analogous, declarations of independence by the Basque regions and Catalonia would be lawful. Late, perhaps, but the time has come for Spain to distinguish its own affairs from those in Serbia.

Some months ago, I stood on a hilltop on the north side of Mitrovica. *De facto* if not legally under Serbian influence, this hill is the private property of an Albanian Muslim. I was reminded as I stood on the hill of the feeling I had had some months prior when I visited Sarajevo. Walking the old Muslim streets of Sarajevo, I could feel the pressure of the surrounding hills and could sense the feeling of helplessness that must have overcome its residents when Serbian artillery stood on those surrounding hills, controlling and terrorizing every aspect of daily life. On this hill in Mitrovica, the same could happen. Every person on the main streets, on the north side and south side of the Ibar River could be seen from this hilltop. I was told, as I watched houses being built on this hilltop, that its owner would build houses to be sold exclusively to Albanian Muslims. He understood the

strategic importance of this hill and had resisted offers to sell the hill to Serbian-Kosovars from the north. The ICJ opinion, happily, makes it somewhat less likely that a strategic military use of that hilltop will ever take place.

In the wake of the ICJ decision, the tragedies that befell Bosnia seem less likely in Kosovo. Aggressive, territory-capturing conduct seems less likely to be tolerated in the wake of the decision. That is for the good. Kosovars have been anticipating that their time of conflict is not quite finished. They have been anticipating that the relatively favorable EU reception of Serbia meant that Kosovar support in the face of aggressive conduct would be shallow. Now, the decision means that the Kosovars, too, will have to change their perspective and be more willing to trust international influence.

There continues to be much work to be done to raise levels of institutional competence in Kosovo. The anger and suspicion that is felt there are two-edged. On one hand, they motivate the people's diligence and vigilance. They understand that in order to obtain much-needed international standing, they must diminish levels of corruption and make institutions function. On the other hand, the same anger and suspicion create barriers to progress. They draw attention away from work and progress. They make it possible for slack effort by locals to be blamed on outsiders who are thought to be conspiring against Kosovo.

The ICJ decision should have the effect of enhancing Kosovar confidence in international justice and relieving the constantly felt need to blame others and suspect outsiders. Those who expected, despite the graffiti, that some negotiations with Serbia were inevitable will be strengthened by the decision. If there is still to be negotiation, as seems inevitable, the Kosovar hand has been immeasurably strengthened by the ICJ.