

Creating A Constitutional Court: Lessons From Kosovo

*By Nicolas Mansfield**

On September 28, 2010, the new Constitutional Court of Kosovo ruled that the President of Kosovo was in violation of the Constitution by virtue of serving concurrently as the head of his political party. Three days later, the President resigned his post as head of state. It was the first time in local memory that such a figure in the Balkans had left office as the result of a domestic judicial decision. How did the Constitutional Court, in operation for barely a year with a majority of judges without any prior judicial experience, establish such prestige and authority in such a short period? This article reviews the process by which the Court was created, its initial development and its record in its first three years in an attempt to draw some initial lessons that may benefit reformers in other countries seeking to establish similar judicial institutions. While the Court remains a work in progress, with key institutional challenges ahead, its success and achievements to date can be attributed to specific steps in its creation and early development.

I. Building the Legal Framework

The seeds of the Court were laid in Vienna, where the Office of the Special Envoy of the Secretary-General of the United Nations for the Future Status Process for Kosovo (UNOSEK) was headquartered and which served as the locus for mediation efforts between Serbia and Kosovo representatives in 2006 and 2007. The UN Special Envoy, former Finnish President (and subsequent Nobel laureate) Martti Ahtisaari, prepared a settlement plan, the Comprehensive Proposal for Kosovo Status Settlement (generally referred to as the “Ahtisaari Plan”), which among other things set forth principles and mechanisms to be enshrined in a new Kosovo Constitution. One of its key provisions was a recommendation to create a new Constitutional Court of Kosovo. When the UNOSEK negotiations failed to produce consensus between the parties, Ahtisaari presented his plan to the Security Council along with his endorsement of independence for Kosovo. Russian and Chinese opposition prevented the adoption of the Ahtisaari Plan by the Security Council, but when Kosovo unilaterally declared its independence in February 2008 it proclaimed that it fully accepted the obligations in the plan.

* Mr. Mansfield is the Director of Rule of Law programs for the East-West Management Institute (EWMI), a not-for-profit organization based in New York dedicated to building just, prosperous and democratic societies worldwide. This study is published as part of EWMI's Occasional Paper Series.

The Ahtisaari Plan called for the creation of a nine member Constitutional Court to be comprised of six local and three international judges. Two of the six local members were to be selected with the approval of minority parliamentarians, ensuring that Kosovar Albanian members would not form a majority of the Court's membership.¹ The plan envisioned the Court's jurisdiction over three types of claims: 1) claims by ten or more members of the National Assembly challenging the constitutionality of any law or decision adopted by the Assembly;² 2) claims by municipalities challenging the constitutionality of laws infringing upon their responsibilities or diminishing their revenues;³ and 3) claims by individuals that the rights and freedoms granted to them under the Constitution have been violated by a public authority (following the exhaustion of all other remedies).⁴

The creation of the Court was critical because it was conceived as the ultimate institutional guarantor of the far-reaching individual rights provisions enshrined in the Constitution, including arguably the most comprehensive minority rights protections in Europe. The latter were seen as essential given the years of oppression visited upon the Albanian majority when Kosovo was under Serbian authority and the fears of post-independence retribution against the remaining ethnic Serb minority.⁵ The regular courts, plagued by corruption, inefficiency and poorly trained judges, were considered ill-equipped to guarantee the enforcement of these crucial individual rights.⁶

The Constitution of Kosovo, adopted in June 2008 following the declaration of independence, enshrined all the Ahtisaari provisions relating to the Constitutional Court and broadened the Court's jurisdiction to encompass certain specified claims brought by the Assembly, the President of Kosovo, the government and the Ombudsperson. The Constitution also included the right of regular courts to refer questions of constitutional compatibility of a law to the Court when raised in a judicial proceeding.

Immediately following the adoption of the Constitution, the Ministry of Justice began preparing a draft Law on the Constitutional Court ("Law on the CC"). An important early decision by both Kosovo and the key international actors was to broaden participation in the development of the draft law by convening a working group of key stakeholders. From the Kosovo side, the group included representatives from the government, the Office of the President, the University of Pristina Law Faculty, and independent legal experts. International representatives included legal experts from the International Civilian Office (ICO)⁷, the United States Agency for International Development (USAID), and the East-West Management Institute (EWMI), as well as representatives of the European Council. With a modest grant from the UK Department for International Development, EWMI served as the secretariat of the working group while also providing technical assistance.

The working group's deliberations were punctuated by two larger, multi-day gatherings that also included representatives of the National Assembly, several additional ministries, and outside experts from other Constitutional Courts in the region. At the first such gathering in July 2008, a decision was made to reject the initial Ministry of Justice draft law, which most participants viewed as significantly flawed, and establish a framework for a new draft that would be developed by the working group.⁸ This important decision allowed for a thoroughly inclusive

drafting approach from the very beginning of the process. Key threshold issues addressed at the conferences included the following:

1. **Level of detail in the law.** An initial point of deliberation was whether the law should be a very detailed and prescriptive text or whether it should be a shorter legal framework with gaps to be addressed in subsequent rules of procedure. The general consensus supported the latter approach, with the intention of giving the appointed members of the Court an opportunity for significant input into the Court's procedural rules. It was also decided that draft rules of procedure would be prepared by the Working Group in advance, which the members would be able to review and adopt upon their appointment.⁹
2. **The nationality and selection of the President of the Court.** The Kosovo representatives, including both ministers present, believed that the law should require that the President of the Court be a citizen of Kosovo (the Constitution is silent on this point), as opposed to being appointed from among the initial international judges. ICO representatives preferred that eligibility criteria for this position be left unspecified in the law. As there was no consensus on this issue at the conference, ultimately it was determined to leave it unaddressed in the law. As provided in the Rules of Procedure adopted by the Court, the President is selected by the members of the Court by secret ballot.¹⁰ The rules do not place any limitations on the nationality of the President.
3. **The role of panels.** A general consensus quickly emerged that a filtering mechanism be established to initially review referrals to the Court, the assumption being that the efficiency of the Court would necessitate such a system. Several options regarding the size and scope of review panels were discussed, but no consensus emerged and participants decided to postpone a decision until a later stage. Ultimately, the Working Group agreed to establish three-judge panels to review the admissibility of each referral to the Court. A decision of inadmissibility by the panel is circulated among other judges on the Court for review. If the panel deems the referral admissible, or if any single judge disagrees with a panel's determination of inadmissibility, the case is referred to the Court.¹¹
4. **Voting.** There was substantial discussion of the comparative merits of open versus secret voting by members of the Court. The regional experts noted that the predominant practice among European Constitutional Courts was not to publicly disclose the votes of individual judges and the ICO representatives endorsed this approach. These arguments proved persuasive and a consensus emerged to ensure secret voting. In practice, secrecy is not maintained if all of the dissenting judges issue a separate opinion (or opinions), as the rules of procedure provide that the judgment identify the names of judges submitting such opinions and each judgment lists the names of all the judges on the Court.¹² But in cases without separate opinions, the judgment will only reveal the number of judges in the majority, not their identities.¹³
5. **Dissenting and concurring opinions.** The participants discussed at length the need for allowing and publishing dissenting and concurring opinions. The Kosovan participants generally favored allowing published dissents, while the ICO representatives were opposed to doing so. The issue was left unresolved, and was not ultimately addressed in the

Law on the Constitutional Court. The Court subsequently determined that dissenting and concurring opinions should be published, as reflected in the rules of procedure.¹⁴ This practice has generally been viewed as adding to the credibility and transparency of the Court's decision making.¹⁵ Dissenting and concurring opinions are published with the judgment of the Court.¹⁶

The law drafting process benefited from two important features. The inclusive nature of the discussion and review of the draft text allowed conflicts to be openly debated. This was particularly healthy and productive with respect to debates between the Kosovans and the ICO, which at times were contentious. These debates sharpened the key issues and demonstrated to the participants that the opposing positions were not so divergent that they could not be reconciled. Secondly, the role of outside, regional experts was critical in helping the Kosovans understand the broader context of the issues presented and practical experience from other similar courts. These international experts also helped facilitate consensus on several issues through their role as disinterested outsiders.

Following the second large workshop, the drafting working group worked efficiently to finalize the draft law, which was presented to the National Assembly in December 2008. The Assembly adopted the draft law before the end of the month without any alterations. The creation of the law in less than six months through a broadly inclusive drafting process was a testament to the seriousness of the working group members.

II. Initial Implementation of the Law on the CC

The entry into force of the Law on the CC in January 2009 presented immediate challenges. With the appointment of the judges and the subsequent hiring of court staff expected to take months, no mechanism existed for the court to receive referrals in the interim. Given the Court's key role in the protection of individual rights and as the ultimate interpreter of the Constitution, supporters of the Court feared that an extended gap between the entry into force of the Law on the CC and the initial operation of the Court would damage the institution's stature and credibility. To address this problem, EWMI established an Interim Secretariat of the CC at the beginning of February 2009, under the authority of the President of Kosovo and with the financial support of UK DFID.

The Interim Secretariat was initially staffed with an interim Secretary General, Registrar and administrative assistant. EWMI established a case registration system overseen by the interim registrar and the Interim Secretariat created more than a dozen standardized forms related to the receipt and processing of case referrals. The Interim Secretariat also established various procedures and produced materials and resources for the use of the future permanent Secretariat so the latter would have the tools necessary to rapidly begin execution of its mandate. These included: 1) draft Rules of Procedure for the Court; 2) terms of reference for proposed administrative and professional positions; 3) a draft Administrative Instruction on staff salary scale; 4) forms for case processing; 5) a design for file folders for the registrar; 6) translation into Court working languages¹⁷ of several initial cases; and 7) transcripts of the proceedings of the working group that drafted the CC law.

The Interim Secretariat also established an official website for the CC, www.gjk-ks.org. The website has content in Albanian, Serbian, and English and provides citizens of Kosovo with information about the composition, function, and structure of the court. Visitors to the website can download the forms needed to file a petition and can now view court decisions. Interim Secretariat staff also carried out initial public education activities relating to the Court, including lectures to law students at local universities.

At the end of June 2009 the judges of the Court were formally sworn in. Dr. Enver Hasani was elected President of the Court by his fellow judges. The former Rector of the University of the Pristina and Dean of its law faculty, President Hasani quickly emerged as a dynamic force and his leadership, stature and ability to forge consensus on the Court have been essential to its initial success.

The Interim Secretariat continued to function and register incoming cases through the end of September 2009, after which the Court's permanent Secretariat was put in place, including a new permanent Secretary General and Registrar. The interim Registrar received and registered a total of 35 cases before the permanent Secretariat assumed its duties. In August, following the appointment of judges but before Court staff was in place, the Interim Secretariat processed eight referrals by sending a copy of each referral to the respective respondents and inviting them to file a response in accordance with the procedure provided for by the applicable law. The processing of the aforementioned eight cases marked the formal commencement of Court's function. By only processing eight cases, the Interim Secretariat prevented the Court from being overwhelmed by having to rule on all 35 pending cases within a short period of time.

The Interim Secretariat also advised the Court President on different options for the development of a Random Case Assignment System (RCAS). The key considerations in this regard were to create an effective system that distributes the caseload equally between the judges, providing for a sliding system whereby the composition of the Reviewing Panels constantly changes, while ensuring an appropriate ethnic and gender balance in each Reviewing Panel. In spite of the difficulties of incorporating all these elements into a single system, the Interim Secretariat managed to develop a RCAS that accounts for all the aforementioned considerations. An initial version of the RCAS that was approved in the Administrative Session of the Judges of the Constitutional Court in August 2009 was subsequently improved and is presently being utilized by the permanent Secretariat.

Allowing the Court to access its authorized national budget allocation provided a challenge to EWMi and the Interim Secretariat during the initial months of the Court's operation. The Interim Secretariat reviewed the budget of the Court in order to undertake the necessary actions to commence expenditures. The Interim Secretariat also advised the President that according to the applicable law, the Court could authorize public servants from other public institutions to manage the budget and conduct public procurement activities on Court's behalf. Consequently, the President authorized three officials from the Ministry of Public Administration (MPA) to manage the Court's budget and implement the public procurement procedures on its behalf. Shortly thereafter, the Interim Secretariat initiated a number of procurement activities to address the most urgent needs of the Court in coordination with the MPA officials.

The procedure for the review and approval of the Court's annual budget proved to be quite challenging due to a novel appropriation procedure, foreseen by the Law on the Constitutional Court, which vests the Court with a considerable degree of financial independence. EWMI assisted the permanent Secretary General and the President with the development of the first draft of the budget proposal. Following the preparation of the first draft proposal and its approval in the Administrative Session of the Judges, the President, Deputy President and Secretary General submitted the budget proposal formally to the Speaker of the Assembly, pursuant to a legal provision that entitles the Court to submit its budget proposal directly to the Assembly. This important provision obviates the need to go through the regular budget appropriation procedure that involves mandatory review and revision of the proposal by the Ministry of Economy and Finance. The handover of the budget proposal was followed by a press conference at which the Speaker of the Assembly endorsed the financial independence of the Court and offered his commitment in ensuring that the Court's budget proposal is approved by the Assembly.

Despite the Court's diligence in developing and presenting its budget, the Ministry of Economy and Finance (MEF) and the Assembly's Committee on Budget and Finance disregarded the applicable law regarding the review and approval of the Court's budget. Ignoring the Court's budget submission, the MEF included its own budget proposal for the Court in the draft budget it presented to the Assembly.

The MEF's action presented an early and significant challenge to the Court's independence, and the Court moved aggressively to assert its rights as provided by law. Court officials and a EWMI representative met with the working group of the Assembly's Committee on Budget and Finance, and at the request of the Court President, EWMI prepared a legal opinion on the applicable law governing the review and approval of Court's budget. The Court President publicly presented this opinion to local and international stakeholders in a concerted effort to protect the Court's budgetary independence. The Court's efforts ultimately were successful, as in December 2009 the Presidency of the Assembly instructed its Committee on Budget and Finance to process the Court's budget proposal on the basis of the Law on Constitutional Court, as the Court had insisted¹⁸. This important precedent has been followed in subsequent annual state budgets, and the MEF has not attempted again to propose a budget for the Court. The Court's budget has been relatively stable in the two succeeding years.¹⁹

III. Selecting Judges and Court Staff

The selection of the international and domestic members of the Court was a key moment in the Court's development. The Ahtisaari Plan called for the appointment of the three interim international judges by the President of the European Court of Human Rights, upon consultation with the International Civilian Representative.²⁰ The Constitution as adopted reversed this provision, providing for the appointment of the international judges by the International Civilian Representative, upon consultation with the President of the European Court of Human Rights.²¹ This shift was significant, allowing for international officials on the ground with an understanding of the local context to make these key selections. In its selection criteria, the ICO placed a priority on a candidate's ability to serve as a mentor to domestic judges and his or her commitment to long-term residence in Kosovo. The goal was to select judges who were

committed to the development of the Court as an institution and would not simply fly in and out for hearings and deliberations.

The three judges selected by the ICO had all served on the bench in their respective countries (the United States, Portugal and Bulgaria), and, importantly, all had previously served on international courts (two on the State Court of Bosnia-Herzegovina and one on the European Court of Human Rights in Strasbourg).²² The experience of the past two years has demonstrated the wisdom of these appointments, as the Court has experienced a degree of collegiality between its national and international members that is rare among such institutions.

The selection of the first national members of the Court was also internationally driven, with both USAID and ICO playing a key role in identifying candidates, who were formally appointed by the National Assembly. Of the six national members appointed, none had prior judicial experience, although all were lawyers. Their backgrounds reflected experience in academia, government ministries, civil society organizations and private law practice. In keeping with the Constitution's requirements regarding minority representation on the Court, one of the members was an ethnic Serb and another an ethnic Turk. Two of the original national members were women, establishing a gender division of six men and three women with the international members included.²³ As noted previously, the key national member appointed was Dr. Hasani, who was elected President of the Court in a secret ballot of the nine members.

Another important early initiative of the ICO was the appointment of three international legal advisors to the Court. As was the case with the international judges, the legal advisors selected represented different legal traditions (Ireland, the Netherlands, and Bosnia and Herzegovina) and brought with them a commitment to the development of the Court. In addition to their essential technical support to the Court, particularly critical on a Court dominated by judges without prior judicial experience, the international legal advisors have also been very active in constitutional litigation training programs for the bar and in mentoring national legal advisors subsequently hired by the Court.

IV. Building Camaraderie, Developing a Vision

The Court President and the Court's international members and supporters recognized from the outset the importance of developing genuine camaraderie among its members and staff. Given the Court's diverse ethnic composition and the politically charged atmosphere in which it found itself, collegiality, mutual respect and good faith were seen as essential ingredients to the Court's survival and success. At a less intangible level, the Court also recognized the importance of setting forth a clear road map for its development. With assistance from EWMI, the Court undertook several early initiatives that proved useful in addressing both of these goals.

A. The Development of the Court's Strategic Plan for 2010-2013

In October 2009, the Court decided to develop a strategic plan that would establish short-term, mid-term, and long-term goals for the Court, guide the newly recruited administrative personnel in reaching these goals, and enable the Court to direct and coordinate the interna-

tional assistance offered by different donors. With technical assistance from EWMI, the Court first completed a needs assessment and then prepared a strategic plan to identify steps to address its needs. In developing both the needs assessment report and the strategic plan, the Court engaged in a very inclusive process, involving the judges and the professional and administrative staff. Separate, facilitated workshops were conducted off-site for both exercises, which allowed the judges and staff to work and socialize in informal settings and begin building a spirit of common purpose and camaraderie.

The Needs Assessment Report identified five key issue areas: (1) Legal Framework; (2) Human Resources; (3) Communication; (4) Technology and Infrastructure; and (5) Budget and Finance. In preparing the strategic plan, the Court's judges and staff agreed on an overall vision and mission for the institution, as well as the governing values and principles. In addition, the participants developed goals for each of the five issue areas identified in the needs assessment and strategies to achieve them.²⁴ Key assumptions, risks and challenges were specifically identified. In a subsequent effort completed by the Court itself, action plans identifying specific implementing activities were developed for each of the issue areas.

The strategic planning session was facilitated by a local outside moderator with experience assisting Kosovo institutions with planning exercises. The presence of an independent, objective voice was very useful in helping the Court shape its own vision. Because all Court staff participated actively in the development of the plan, it genuinely reflected the commitment and intentions of the Court itself. The subsequent implementation of the elements of the strategic plan—by September 2012, more than 90% of the action items had been accomplished—is a reflection of the seriousness with which it was developed and adopted.

B. Revising the Rules of Procedure

One of the key priorities identified in the strategic planning process was the need to revise the Court's Rules of Procedures. As noted previously, the Interim Secretariat of the Court drafted provisional rules before the Court was established so as to allow the Court to operate immediately upon the investiture of the judges. The judges decided to review the initial rules after a six month period, providing adequate time to identify problems and necessary revisions. As a result, in March 2010, with technical support from UK DFID (through EWMI) and USAID, the Court held a workshop to revise the rules, moderated by an American judge.

The revision of the Rules of Procedure was a major activity that affected the efficiency of the Court as well as the roles of the members of the Court and the Secretariat. In keeping with the inclusive tradition established in conducting the needs assessment and developing the strategic plan, the Court (with EWMI assistance) solicited input from both judges and the Secretariat, and it was on this basis that proposed revisions were identified.

The workshop resulted in the development of revised Rules of Procedure, which were subsequently adopted formally by the Court. Perhaps the most important revision addressed the provisions governing the Court's authority to impose so-called interim measures. This authority stems from Article 116 of the Constitution, which provides that when a case is pending the

Court may temporarily suspend the contested action or law until the Court renders a decision if the Court finds that application of the contested action or law would result in unrecoverable damages. Determining when such measures were appropriate was an early challenge for the Court, and the revised Rules of Procedure set a clear standard for the imposition of interim measures designed to ensure a consistent application of this authority in the future. Other important rules revisions addressed the function of dissenting opinions, the role of review panels with respect to determining the admissibility of the case, and case management rules.

The inclusive approach employed by the Court and its supporters in developing the strategic plan and the revised rules of procedure contributed to an atmosphere of collegiality that has characterized relations between members of the Court and between members and staff. The voting patterns in the Court's decisions in its initial three years are significant indicators of this phenomenon. The Court has yet to split into ethnic voting blocs in any of its notable decisions involving published dissents, nor have there been any such cases in which the three international judges sided unanimously against their national counterparts.²⁵

V. The Court's Jurisprudence: The First Three Years

As a result of several high profile case referrals, the Court found itself thrust into the limelight not long after it began to function in the fall of 2009. Needless to say, the obligation of the Court to address complex and politically charged cases just as it was becoming fully functional posed serious risks. Fumbled or delayed decisions would have significantly damaged the young institution's reputation. In the event, the Court proved up to the task and issued a series of important, well-reasoned and well received decisions in its first year.

Cemailj Kurtisi v. Municipal Assembly of Prizren, commonly referred to as "the Prizren logo case," was one of the first significant cases decided by the Court and has had a lasting positive impact on the Court's reputation. The case involved a challenge by a member of the Prizren Municipal Assembly to a recently adopted municipal statute establishing a new official emblem for the municipality. The statute provided that the emblem would be "The House of the League of Prizren" along with the notation "1878 – Prizren." 1878 was the year of the founding of the League of Prizren, a gathering of Albanian leaders seeking to establish an autonomous Albanian state.²⁶ The applicant claimed that the emblem did not reflect the multiethnicity of Prizren and violated constitutional provisions protecting the rights of minorities.

In a unanimous decision, the Court ruled in favor of the applicant and struck down the municipal statute. The Court noted that "[n]o one in Prizren could doubt that the inclusion of "1878" sought to favour the Albanian Community to the exclusion of the non-majority Communities."²⁷ Noting the symbolic importance of emblems, the multiethnic composition of Prizren and the need for an emblem that respects all citizens in the municipality, the Court found that the adopted emblem violated the constitutional rights of minority communities.²⁸ The Court also invoked international human rights instruments, particularly the Council of Europe Framework Convention for the Protection of National Minorities, which is directly incorporated in the Constitution.²⁹

Given the emphasis on minority rights in the Constitution and the Court's central role in protecting them, the Prizren logo case marked an important early test for the Court. A voting split among members along ethnic lines would have sent a troubling signal that politics would trump law in the Court's deliberations. The Court's forceful and unanimous decision had the opposite effect. The decision was widely reported and received immediate praise from the international community.³⁰ The reaction to the judgment by some Albanian nationalists, which included an attempt to vandalize the Court's premises, only burnished the Court's image as an independent and principled institution. The President of the Court, who was the subject of attacks in the press for the decision, remained unflappable. Importantly, Prizren did not challenge the decision and moved promptly to implement it.

Three months after the decision in the Prizren logo case, the Court was called upon to rule on a case with even greater national implications. Thirty-two deputies of the National Assembly petitioned the Court to determine whether the President of Kosovo, Fatmir Sejdiu, had violated the Constitution by serving as President of the Republic while concurrently serving as President of the Democratic League of Kosovo (DLK), a prominent political party within the ruling coalition government.³¹ The Court first addressed whether the referral was time barred by Article 45, which requires that referrals relating to violations of the Constitution by the President be filed within thirty days of the alleged violation being made public. Finding that the violation was ongoing, the Court ruled that the time limit for referrals did not apply.³² The Court also rejected the President's claim that the stated desire of five of the 32 deputies to withdraw from the referral after it had been filed with the Court rendered the referral inadmissible.³³

In terms of the merits of the case, the President claimed that while he retained the title of Chairman of the DLK, he had formally "frozen" his exercise of his role as head of the party when he became President of Kosovo. He emphasized that Article 88(2) of the Constitution only provides that the President "cannot exercise any political party functions," and does not prohibit the mere holding of a political party office. In a 7-2 decision, the Court rejected this argument. The Court found that simply by allowing a political party to claim that the President of the Republic is its Chairman, a "symbiotic relationship" exists between him and his party that benefits them both and amounts to the "exercise" of a political party function by the President. The Court concluded that the endorsement of a party by a powerful figure such as the President is "a substantial political asset to further its political agenda and the election of its candidates for public office."³⁴

The impact of the Court's decision was almost immediate. Within three days of its release, President Sejdiu tendered his resignation from office, so as to retain his role as Chairman of the DLK. The decision was of course widely reported and was a main topic of public conversation.³⁵ As in the Prizren logo case, there were no ethnic divisions in the Court's voting: the two dissenters were both international members.

In 2011, the Court was again inserted into a high-profile legal challenge questioning the constitutional legitimacy of an elected President. Thirty-four deputies challenged the election of Behgjet Pacolli to the presidency by a special session of the Assembly in February 2011. The petitioners' claim was based on the alleged failure to achieve the constitutionally required quo-

rum for the vote, the lack of an opposing candidate and the interruption of voting during the election procedure.³⁶

The case turned on the voting procedures in a contentious special Assembly session to elect a new President. The Constitution provides that the President shall be elected by a two-third's majority of all deputies of the Assembly, with a provision allowing for election by a majority vote if a two-third's majority is not achieved in the first two rounds of voting.³⁷ Pacolli, a wealthy construction magnate who had founded a political party that was aligned with the ruling Democratic Party of Kosovo, was the only proposed candidate. As a result of a boycott by opposition parties, only 67 of the 120 deputies were present at the beginning of the voting. The first round of voting resulted in 54 out of 67 deputies voting in favor of Pacolli's election. A second round produced 58 votes in favor. After a break, a third round was held, 62 out of 67 deputies voted in favor, and Pacolli was declared President.³⁸

After finding the referral admissible, the Court held that Pacolli's election was unconstitutional for two reasons. Noting that Article 86 of the Constitution refers to a third ballot runoff "between the *two candidates* who received the highest number of votes" in the previous ballot, and allows for the dissolution of the Assembly if "none of the *candidates*" is elected on the third ballot (emphases added), the Court ruled that the Constitution requires that a valid election requires more than one candidate.³⁹ The Court relied particularly on the fact that the pre-independence Constitutional Framework for Provisional Self-Government did not contain plural references to candidates, and twice under that instrument only a single candidate ran for President. The Court found it evident that the framers of the Constitution altered the previous language so as to ensure "a more democratic system" with multiple candidates.⁴⁰ In addition, the Court held that the two-third's majority provision in Article 86 meant that 80 votes (two-thirds of 120 members) were required for the election of the President, and as there were only 67 deputies voting in each of the voting rounds the election violated the Constitution.⁴¹

Two dissenting members of the Court disagreed with the majority's conclusion that more than one candidate was required. Noting that at least 30 deputies are required to nominate a candidate, the dissenters noted that the Court's ruling could prevent the election of a candidate supported by a majority of the deputies, or require 30 deputies to artificially nominate a second candidate when they intend to vote for the popular candidate.⁴² In addition, the dissenters disagreed with the majority's ruling on the quorum issue, accusing the majority of confusing a quorum with voting. The dissenters noted that the Court's ruling would allow a small minority of 41 deputies to prevent the Assembly from carrying out its work and this was inconsistent with the intention of the drafters of the Constitution.⁴³

The two cases involving challenges to elected Presidents firmly placed the Court in the public consciousness. The subsequent resignations of both Presidents highlighted the Court's authority and the significance of the wording of the Constitution, both important milestones in the development of the rule of law.⁴⁴ The decisions also demonstrated that constitutional interpretation was not necessarily self-evident, and that reasonable judges could disagree on matters of legal interpretation. The fact that the lack of unanimity on the Court in these cases reflected disagreements between the international members, who are inherently sheltered from

local political winds, served to emphasize that matters of law, not politics, were paramount.⁴⁵ Freedom House cited the decision in the Pacolli case as one of the factors resulting in the improvement in Kosovo's score for Judicial Framework and Independence in the 2012 *Nations in Transit* report.⁴⁶

In another important case in 2011, the Prime Minister filed a referral to the Court requesting an interpretation of the immunities afforded the President, National Assembly deputies and members of the government.⁴⁷ The Court was called upon to clarify a number of provisions related to the substantive scope of the immunities as well as the circumstances limiting when such public figures may be arrested or detained. One of the key questions to be resolved was the scope of the prohibition against arresting or detaining a deputy while he or she is "performing his/her duties as a member of the Assembly." The Court ruled that the prohibition was limited to instances when the deputy is participating in the work of the Assembly during its plenary and committee meetings.⁴⁸ The Court also held that neither deputies nor the President are immune from prosecution or civil lawsuits for actions taken and decisions made outside the scope of their responsibilities. The Court held that the President cannot be subject to arrest or detention during his or her term of office because of the nature of the functions of the President, which require his or her permanent ability to perform them; of course, the President may be dismissed by the Assembly pursuant to Article 91 of the Constitution.⁴⁹

In the above cases and several others of note, the Court established itself as a protector of minority rights and ultimate arbiter of the separation and delimitation of powers among the branches of government. These decisions have been essential in implementing the new constitutional framework in Kosovo and developing a culture of constitutionalism that is an important component of the rule of law.

VI. Managing the Caseload

The Court has proven relatively efficient in managing its caseload. While the number of referrals increased in each of the Court's first three years of existence, the Court has generally kept pace with the incoming cases and the caseload. In 2009, the Court's first year of operation, 70 referrals were filed, followed by 132 in 2010 and 164 in 2011.⁵⁰ In 2010, the Court issued decisions in 119 cases (including those carried over from 2009), and in 2011, the Court issued 132 decisions.⁵¹

Most referrals to the Court are from individuals claiming violations of their constitutional rights, the great majority of which are deemed inadmissible (usually as a result of a failure to exhaust remedies in the regular courts).⁵² In 2010, 125 out of 132 total referrals received were from individuals, as were 148 out of 164 referrals received in 2011.⁵³ While the Court itself does not calculate or publish the percentage of individual claims deemed admissible, one recent study of Court data concluded that in 2010, 89% of individual claims were ruled inadmissible, and in 2011, 92% of such claims were similarly dismissed without adjudication.⁵⁴ These rates of inadmissibility of individual claims are similar to those at other European constitutional courts with similar jurisdiction.⁵⁵

VII. Summary of Lessons Learned

A number of lessons can be distilled from the successful establishment of the Kosovo Constitutional Court that may be of use to reformers working to establish similar institutions in other countries. Some of the key points are as follows:

An inclusive law drafting process. The development of the Law on the Constitutional Court through an inclusive process that included a combination of local and international experts was an essential step. The broad array of voices ensured that the draft reflected knowledge accumulated by similar courts in other countries as well as the local legal and cultural context. This strengthened the quality of the law as well as its acceptance domestically.

The immediate establishment of a temporary Secretariat. There was an inevitable delay between the establishment of the Court by law and the Court's commencement of operation with a full complement of judges and staff, a gap that proved to be nine months. By having a temporary Secretariat established immediately upon adoption of the law—authorized by the President of the Republic and operated by an international organization, the East-West Management Institute—several key advantages were realized: the temporary Secretariat provided a locus for individuals to begin filing referrals as they were entitled to do by law, and it developed forms and provisional rules that allowed the Court and its permanent Secretariat to hit the ground running.

Effective team building. As a new institution with a combination of international and national judges, the majority of whom had no prior judicial experience, developing camaraderie and collegiality on the Court was an important priority. Two early initiatives of the Court – the development of its first strategic plan and its revision of the provisional rules of procedure – were conducted in an inclusive manner, in the form of offsite retreats, which gave the judges and staff a sense of common purpose and helped build relationships that have resulted in an effective Court culture.

The importance of the Court President. The Court has been extraordinarily fortunate to have Dr. Enver Hasani as its first President. His leadership and vision have been essential to the Court's success and his ability to bring people together and maintain collegial relations amidst sometimes contentious debates has served the Court well.

Ensuring financial independence. The Court's entitlement by law to submit its budget requests directly to the National Assembly was a novel provision in Kosovo, and it perhaps was not surprising that an attempt was made by some in the Assembly to ignore it. The Court's vigilant assertion of its legal authority was a critical step in ensuring that the law was followed and the Court's independence was preserved.

Without doubt, the Court faces many challenges ahead. The anticipated phasing out of the international judges in 2014 will have to be carefully managed and filling President Hasani's shoes at the end of his term in 2015 will not be easy. The departure of the international legal advisors will also have to be well planned. But the Court has already shown the ability to attract very capable local legal talent and it should be expected that this trend will continue. In any event, its members and staff should be justifiably proud of what they have accomplished in a very short time.

ENDNOTES:

- 1 See Comprehensive Proposal for Kosovo Settlement Status (hereinafter “Ahtisaari Plan”), Annex 1, Art. 6 (available at http://www.unosek.org/docref/Comprehensive_proposal-english.pdf) (accessed 7 November 2012).
- 2 Id at Annex 1, Art. 6.2.
- 3 Id. at Annex 1, Art. 6.3.
- 4 Id. at Annex 1, Art. 2.4.
- 5 In addition to Serbs, minorities represented in Kosovo include Bosniaks, Gorani, Roma, Turks, Ashkali, and Egyptians. According to a 2008 estimate, minorities comprised 8% of the population, with 92% of the population consisting of ethnic Albanians. See *CIA World Factbook*, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html> (accessed 8 November 2012)
- 6 The origin of constitutional courts in Europe dates to the Austrian Constitution of 1920, which for the first time established a court outside the formal judicial branch with the power to review the constitutionality of legislation. The Federal Constitutional Court of Germany, established in 1951, was the first such court with the authority to hear complaints by individuals alleging violations of their constitutional rights. These Austrian and German precedents have influenced the creation of constitutional courts with similar jurisdiction in Europe and throughout the world. See Justice Robert Utter and David C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective*, 543 Ohio St. L. J. 559, 585 (1993); Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989).
- 7 The ICO, headed by the International Civilian Representative (ICR), was established pursuant to the Ahtisaari Plan to advise and support the Government and institutions of Kosovo during a period of supervised independence. In September 2012, the 25-member state International Steering Group that oversaw the ICO concluded that the Ahtisaari Plan had been substantially implemented and decided unanimously to end supervised independence of Kosovo and to end the mandate of the ICR. See <http://www.ico-kos.org/index> (accessed 28 November 2012). On 10 September 2012, after concluding that the Comprehensive Status Proposal had been substantially implemented, decided unanimously to end supervised independence of Kosovo and to end the mandate of the International Civilian Representative, with immediate effect.
- 8 East-West Management Institute, *Brief Report on the Workshop for Establishing the Constitutional Court of Kosovo*, July 24-25, 2008 (on file with author).
- 9 Ibid.
- 10 Republic of Kosovo Constitutional Court Rules of Procedure (hereinafter “CC ROP”), Section 10.
- 11 Law on the Constitutional Court of the Republic of Kosovo, Law No. 03/L-21 (hereinafter “Law on the CC”), Article 22.
- 12 See CC ROP, Rule 57.
- 13 Id.
- 14 See CC ROP, Rule 58 (regarding dissenting opinion) and Rule 59 (regarding concurring opinions).
- 15 See Hill, Steven and Linden-Retek, Paul, *Supervised Independence and Post-Conflict Sovereignty: The Dynamics of Hybridity in Kosovo’s New Constitutional Court*, 36 Yale J. Int’l. L. 26 (Fall 2010), at p.40.
- 16 CC ROP, Rules 58-59. Judges are not allowed to prepare dissenting or concurring opinions to a decision on interim measures or a resolution on the admissibility of a referral. Id.
- 17 The working languages of the Court are Albanian, Serbian and English. Decisions of the Court are also published in Turkish.
- 18 The Assembly ultimately appropriated EUR 2.15 million to the Court for its first year of operations, EUR 1.05 million less than the Court’s request.
- 19 In 2010, the state allocated 1.27 million Euros to the Court, and in 2011, the state allocated 1.54 million Euros. The Court has also received some financial support from donors. The Constitutional Court of Turkey, through the Turkish International Cooperation and Development Agency, assisted the Court in building and equipping its court-

room at its premises in Pristina. *Kosovo Constitutional Court Annual Report 2009*, p.98, available at http://www.gjk-ks.org/repository/docs/RaportiVjetor2009Final_ANG.pdf (accessed 20 November 2012). The Constitutional Court of Turkey also funded the fitting, furnishing and installation of auxiliary container offices adjacent to the Court's premises. *Kosovo Constitutional Court Annual Report 2011*, p.29, available at <http://www.gjk-ks.org/repository/docs/Raporti%20Vjetor%202011%20Versioni%20Final.pdf> (accessed 20 November 2012) The Court's electronic Case Data Management System was developed for the Court by EWMI through a grant from UK DFID.

20 Ahtisaari Plan, Art. 6.1.3

21 Constitution, Art. 152.

22 The three international judges appointed were Snezhana Botusharova (Bulgaria), Robert Carolan (United States), and Almiro Rodrigues (Portugal).

23 The five initial national judges appointed in addition to Dr. Hasani were Kadri Kryeziu (elected Deputy President), Altay Suroy, Ivan Cukalovic, Gjyljeta Mushkolaj, and Iliriana Islami.

24 See Republic of Kosovo Constitutional Court, *Strategic Plan 2010-2013* (Prishtina 2010).

25 See also Hill and Linden-Retek, *supra* at fn. 15, at p. 35-36 (noting the apparent lack of either ethnic block voting or splits between international and domestic judges in the Court's early cases and attributing the Court's voting patterns to "the strong sense of collegiality within the court").

26 *Cemailj Kurtisi v. Municipal Assembly of Prizren*, Case No. KO 01/09, 18 March 2010, Republic of Kosovo Constitutional Court Bulletin of Case Law 2009-2010 (hereinafter "KCC Bulletin of Case Law 2009-2010"), p.90. (Court decisions are also available on the Court's website (www.gjk-ks.org) in four languages: Albanian, Serbian, English and Turkish).

27 Ibid.

28 The Court held that the emblem violated Article 3's guarantee of equality of all individuals before the law and Kosovo's existence as "a multi-ethnic society consisting of Albanian and other Communities." The Court also found that the emblem violated the rights of minority communities to use and display community symbols found in Article 58, and the state's obligation to ensure adequate conditions for the preservation of the identities of such communities. *Kurtisi*, Constitutional Court Bulletin of Case Law 2009-2010 at 91-93.

29 See RCC Constitution, Article 22(4).

30 The International Civilian Representative, Pieter Feith, publicly praised the decision shortly after it was issued as "another healthy development where the Constitutional Court is fulfilling its responsibilities." See Hill and Linden-Retek, *supra* at p.37, fn. 53.

31 *Naim Rrustemi and 31 other Deputies of the Assembly of the Republic of Kosovo v. Fatmir Sejdiu, President of the Republic of Kosovo*, Case No. KI 47/10, KCC Bulletin of Case Law 2009-2010, p. 241.

32 *Rrustemi*, KCC Bulletin of Case Law 2009-2010, pp. 245-246

33 The President's claim was based on Article 113.6, which requires 30 or more deputies to refer the question of whether the President has committed a serious constitutional violation. In rejecting the claim, the Court cited Article 23 of the Law on the CC, which provides that the Court "shall decide on matters referred to it in a legal manner by authorized parties notwithstanding the withdrawal of a party from the proceedings." The Court concluded that the deputies who signed the referral "should not be allowed to withdraw their signatures without articulated, serious and substantial reasons." *Id.* At 249.

34 *Id.* At 254. Two of the international judges filed a joint dissenting opinion in the *Rrustemi* case. The dissenters argued that the withdrawal of five deputies from the referral rendered it inadmissible. They also argued that the alleged violation was not ongoing and therefore the referral was time barred since it was filed more than 30 days after the petitioners became aware of the violation. Finally, the dissenters believed that the referral was not substantiated and the *travaux préparatoires* (preparatory papers) for both the Constitution and the Law on the CC should have been consulted before a decision was rendered. See Joint Dissenting Opinion of Judge Almiro Rodrigues and Judge Snezhana Botusharova, Case KI 47-10 (12 October 2010), available at http://www.gjk-ks.org/repository/docs/ki_47_10_dissenting_opinion_judge_snezhana_botusharova_and_judge_almiro_rodrigues.pdf (accessed 5 November 2012).

- 35 For example, Freedom House referred to the decision as “independent” and “groundbreaking.” See Freedom House, *Nations in Transit 2011*, available at: <http://www.freedomhouse.org/report/nations-transit/2011/kosovo> (accessed 4 October 2012).
- 36 *Sabri Hamiti and other Deputies v. Decision of the Assembly of the Republic of Kosovo, No. 04-V-04, concerning the election of the President of the Republic of Kosovo*, Case No. KO 29/11, 30 March 2011, KCC Bulletin of Case Law 2010-11, p. 130.
- 37 RCC Constitution, Article 86.
- 38 *Hamiti*, KCC Bulletin of Case Law 2010-11, p. 132.
- 39 *Id.* at pp. 140-143.
- 40 *Id.* at p. 142.
- 41 *Id.* at pp. 143-146.
- 42 *Hamiti, Dissenting Opinion of Judges Robert Carolan and Almiro Rodrigues*, KCC Bulletin of Case Law 2010-11, pp. 152-154.
- 43 *Id.* at pp. 151-152.
- 44 A broader political ramification of the *Hamiti* decision was an apparent compromise agreement between the leading political parties to amend the Constitution to allow for the direct election of the President. See Qeremi and Qorrolli, *supra* at p. 16.
- 45 For praise of the two decisions by local commenters, See Qerim Qerimi and Vigan Qorrolli, *The President's Cases: The Role of Kosovo's Constitutional Court in the Process of Democratic Consolidation*, available at <http://www.bgss.hu-berlin.de/bgssonlinepublications/Workshop%20Docu/advocatesornotariesofdemocracyfolder/paper4neu> (accessed 23 October 2012) (“the court, operating in an environment characterized by dominant perceptions of politicized judiciary, has largely established itself as a court of law that is above the politics.”)
- 46 See Freedom House, *Nations in Transit 2012 - Kosovo*, 6 June 2012, available at: <http://www.freedomhouse.org/report/nations-transit/2012/kosovo> (accessed 4 October 2012)
- 47 *The Government of the Republic of Kosovo concerning the immunities of Deputies of the Republic of Kosovo, the President of the Republic of Kosovo and Members of the Government of the Republic of Kosovo*, Case KO 98-2011, 20 September 2011, KCC Bulletin of Case Law 2010-11, pp. 342-374.
- 48 *Id.* at p.373.
- 49 *Id.* at pp.373-374. The Court’s decision on immunities was one of the specific judgments (along with that in the *Hamiti* case) cited approvingly by Freedom House in its decision to improve Kosovo’s 2012 score for Judicial Framework and Independence in the 2012 *Nations in Transit* report. See fn. 46, *infra*.
- 50 *Kosovo Constitutional Court Annual Report 2011*, *supra* note 19, at p.23; *Kosovo Constitutional Court Annual Report 2010*, p.141, available at http://www.gjk-ks.org/repository/docs/RAPORTI_2010.pdf (accessed 28 November 2012).
- 51 *Kosovo Constitutional Court Annual Report 2011*, *supra* note 19, at p.23; *Kosovo Constitutional Court Annual Report 2010*, *supra* note 50, at p.141.
- 52 In 2011, for example, 85% of the referrals filed with the Court involved complaints about the decisions of the regular courts. *Kosovo Constitutional Court Annual Report 2011*, *supra* note 19, at p.26.
- 53 *Kosovo Constitutional Court Annual Report 2010*, *supra* note 50, at p. 141; *Kosovo Constitutional Court Annual Report 2011*, *supra* note 19, at p. 24.
- 54 UK DFID Constitutional Justice Initiative, Project Completion Review (November 2012)(on file with author).
- 55 In the German Federal Constitutional Court, the percentage of constitutional complaints filed that are not accepted for adjudication in recent years is routinely over 90%. See <http://www.bverfg.de/en/organization/gb2011/A-IV-1.html> (accessed 28 November 2012). The Slovenian Constitutional Court, which like its German and Kosovo counterparts has jurisdiction over individual claims, has even lower admissibility rates: during the last five years (2007-2011), its annual inadmissibility rate for individual referrals has ranged between 95% and 99%. See <http://www.us-rs.si/media/annual.report.2011.pdf> (accessed 28 November 2012).