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The Kosovo Advisory Opinion of the International Court of Justice and its Political Consequences

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Key Points

- On 22 July 2010, the International Court of Justice (ICJ) delivered its Advisory Opinion on whether the unilateral declaration of independence by the Provisional Institutions of Self Government of Kosovo was in accordance with international law.
- The Court did not deliberate on the legality of the statehood of Kosovo. Its Advisory Opinion addressed the declaration of independence and concluded that it was not contrary to general international law.
- The Advisory Opinion was not followed by a wave of recognition of Kosovo's independence (the number has increased by one from 69 to 70 during the three months since the release of the Opinion).
- The Advisory Opinion marked the third time that Serbia was disillusioned by the decisions of the "international community" with regard to Kosovo.
- Although Belgrade might have perceived a loss, the Advisory Opinion has actually prompted the realization that Belgrade should revise its Kosovo policy. This domestic recognition has been followed by a more conciliatory attitude internationally.
- The Advisory Opinion has had no global spill-over effect on other entities declaring independent statehood.

Ever since NATO's Operation Allied Force in 1999 resulted in a withdrawal of Serb forces from Kosovo and the establishment of governance arrangements for the province that included an important external presence (with UN, EU, NATO and OSCE missions) as well as Kosovo's own Provisional Institutions of Self Government, the precise future status of Kosovo has been in doubt. Two extreme options were favoured by Serbia and Kosovo, respectively: either for Kosovo to continue as a part of Serbia or for it to achieve independent status (most likely by attaining statehood). On 17 February 2008, a group of Kosovo leaders issued a Declaration of Independence. Serbia responded with a request that the UN General Assembly seek an opinion on the legality of Kosovo's action from the International Court of Justice (ICJ). The Court delivered its Opinion on 22 July 2010. What did the Court say and what are the political consequences of its Opinion?

The World Factbook 2009.

Background

In 1999, following the NATO air campaign against the Federal Republic of Yugoslavia, the UN Security Council promulgated UNSC Resolution 1244, which established an interim administration for the province. The text reaffirmed "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act" and "the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo".

This commitment was to retain formal Serbian sovereignty over Kosovo while allowing for a significant degree of autonomy. This was, however, followed by Paragraph 11 of Resolution 1244, which stated that this interim arrangement would facilitate "a political process designed to determine Kosovo's future status". Importantly, the resolution did not set any limits in relation to the "future status" of Kosovo; the implication being that this was open to political resolution. In other words, the political process could pursue any outcome that was agreeable to both parties (Serbia and Kosovo).

Accordingly, a political process was initiated under the leadership of former Finnish President Martti Ahtisaari. Unfortunately, Ahtisaari's efforts were to no avail. The result was a political stalemate; there was no realistic prospect of the two sides agreeing to a resolution. By February 2008, this impasse was abundantly clear and the political process was abandoned. At that point, a group of Kosovo Albanian politicians who were key members of the Kosovo Provisional Institutions of Self Government issued a formal declaration of independence. By the time the ICJ published its Advisory Opinion, 69 states, including most European Union (see below) and NATO members, had recognized Kosovo as an independent state.

The Advisory Opinion

The Serbian Government rejected the declaration of independence and was determined to challenge it in law. In October 2008, the Serbian delegation to the United Nations in New York initiated a process that led to the General Assembly requesting an Advisory Opinion from the ICJ, with the intention of clarifying the situation. The question eventually presented to the Court by the General Assembly was as follows:

> "Is the unilateral declaration of independence by the Provisional Institutions of Self Government of Kosovo in accordance with international law?"

This question was, however, significantly different from a request for an opinion on the legal status of Kosovo. Those who believed the Court was going to make a statement of some sort about the statehood of Kosovo needed to examine the precise wording of the question the Court had been asked to address. This is exactly what the Court did. After examining the question, in Paragraph 51 of its Advisory Opinion, it stated that:

> "In the present case, the question posed by the General Assembly is clearly formulated. The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It

> does not ask about the legal consequences of that decision. 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 that have recognized it as an independent State".

The Court then followed its usual practice in advisory cases. First, it asked itself whether or not it had jurisdiction in the case – a key question being whether or not the General Assembly could pose a question on a subject about which the Security Council was seized.[1] It concluded that the General Assembly could ask such a question and that it did have the jurisdiction to provide an opinion. Second, it went on to consider whether or not it would exercise its right to provide an opinion. With requests for advisory opinions, the Court is under no formal obligation to deliver and may choose not to do so. To decline would have been unusual, however, because the Court has never done so. Not surprisingly, it decided that it would address the substantial issue at the heart of the case.

To do this the Court first asked itself whether or not declarations of independence were for any reason contrary to general international law. The conclusion was that they were not. Anyone can make such a declaration and to do so would not breach any general rule of international law. In the case of Kosovo, however, the existence of a UNSC Resolution specifically addressing the province's status meant that, while general international law was not breached, the provisions of that resolution imposed binding obligations, including on the Provisional Institutions of Self Government of Kosovo. These obligations required no change in the status of Kosovo unless such were to be agreed jointly by Serbia and the people of Kosovo as part of a final resolution on status.

Importantly, however, since the Court had been asked if the declaration of independence by the Provisional Institutions of Self Government was lawful, it felt obliged to consider whether or not those institutions had indeed made the declaration. It decided that they had not. While undoubtedly closely associated with the Provisional Institutions, the collection of individuals responsible for the declaration was actually an ad hoc collection of political leaders. Accordingly, despite their formal roles within the framework of Kosovo government, they did not as a group formally constitute the Provisional Institutions themselves. If they had been competent to represent the Provisional Institutions, their declaration may well have been considered contrary to UNSC Resolution 1244. Since they were not the Provisional Institutions, however, were they bound by the terms of UNSC Resolution 1244? The Court answered in the negative. Its opinion on the status of the group declaring independence led to its ultimate conclusion – that the declaration was not unlawful since it was contrary to neither general law, nor strictly in contravention of the Resolution.

One might be critical of the Court for having dodged the "real" question. One might even ask what the point of the whole legal process had been if that question was not addressed. Such criticisms are unfair, however. The Court is charged with reaching conclusions by reference to the law, as laid out in Article 38 of its Statute. It was asked a very specific question, to which it answered with due reference to the law. If the question was badly framed or, indeed, the wrong question altogether, that is by no means the onus of the Court. If the General Assembly had wished collectively to ask the Court its opinion on the status of Kosovo, one presumes it would have done so. It didn't.

The Political Consequences

As the ICJ did not take a position on the legal status of Kosovo, the Advisory Opinion cannot be regarded as signifying either approval or disapproval of Kosovar statehood. There are undoubtedly many who are disappointed, having expected the Court to offer its opinion on the status of Kosovo. Others would have been relieved if the Court had rejected the General Assembly's request, either on jurisdictional grounds or by simply exercising its right to not provide an opinion on the question presented.

Advisory opinions of the Court are legal and not political – except, of course, that in questions such as this, political controversy is never far away. And there certainly are political consequences. What is the impact on both Serbia and Kosovo? How might the opinion affect other states or territorial entities currently seeking recognition of statehood, especially in the former Soviet space?

Kosovo

Many in Kosovo itself predicted that following the Advisory Opinion (assuming it was in Kosovo's favour), a "wave of recognition of independence" would follow. This assumption has proved to be incorrect. By 22 July 2010 (the date the Court delivered its Opinion), 69 states had recognized Kosovo. At the time of writing (early October 2010) the figure is 70, Honduras having added itself to the list on 3 September. Therefore, there has been no such rush to recognition[1]. Nor has the Advisory Opinion had any

wider European influence in relation to other entities seeking recognition, notably Abkhazia and South Ossetia. The number of their recognitions has not changed, remaining at four (or five, if one counts their reciprocal recognition).[3] One theory is that states are recognizing or withholding recognition for reasons unrelated to the Court's position.

A particular problem for Kosovo is that EU member states are divided over the issue. Five of the 27 member states (Cyprus, Greece, Romania, Slovakia, and Spain) are withholding their recognition, and this will continue to present problems for Pristina in building relations with the EU. The Advisory Opinion seems to have neither helped nor hindered Kosovo politically.

Serbia

In contrast, the Advisory Opinion has had a significant political impact on Serbia. The opinion represents a major setback for Belgrade in its effort to prevent the independence of Kosovo. It is the latest of three such disappointments:

- When UN Special Envoy Martti Ahtisaari was working to achieve a negotiated settlement, Serbia under the influence of Prime Minister Vojislav Kostunica, held the position that as the statehood of Kosovo would be inherently unconstitutional, Serbia should not negotiate. As a result, it was not able to influence the results of that process.

- Following the declaration of independence in February 2008, Belgrade decided to apply sanctions on any state recognizing Kosovo, in order to deter states from doing so. Unsurprisingly, Serbia's policy had no effect, and sanctions had to be ended, not least because they damaged relations between Belgrade and the states recognizing Kosovo.

- It was the expectation of Serbia, several times expressed by Foreign Minister Vuk Jeremic, that the Court would declare Kosovo's declaration of independence unlawful.

While the eventual formal loss of territory may well be painful and difficult to digest, this series of disappointments should be conveying a clear message to Serbia: that there will be no return to the status quo ante. It is possible that this third, and legal, disappointment for Serbia may serve international stability in the longer term. The significant proportion of the Serb population which supports integration in Europe fully recognizes the need to accept that Kosovo will never return to Serbia. It wishes to put the Kosovo issue in the past, in order to speed up progress into joining mainstream Europe. The Advisory Opinion will hopefully contribute to both the population and the political establishment of Serbia "liberating themselves" from the burden of Kosovo, which has dominated the Serbian political agenda since 1999.

A possible result of the Advisory Opinion is a shift in political attitudes in Serbia. In 2006 the Serbian Constitution was amended to accommodate a Kosovo reference in its preamble, to the effect that:

> "The Province of Kosovo-Metohija is an integral part of Serbia's territory, it has substantial autonomy within the sovereign state of Serbia, and given the position of the Province of Kosovo-Metohija, constitutional obligations are placed on all state bodies to advocate and protect the state interests of Serbia and Kosovo-Metohija in relation to all internal and international relations . . ."[4]

The Former Serbian Foreign Minister, Vuk Draskovic, now in the opposition party, has remarked that "Serbia cannot… offer in negotiations with Kosovo Albanians… anything that is contrary to the constitutional preamble that the province of Kosovo-Metohija is part of the sovereign state of Serbia".[5] Revision is necessary, however, and it is perhaps easier to propose such a revision on the part of the opposition party than from within the government. Interestingly, this process seems to have started and the Advisory Opinion is certainly influencing these developments. The ICJ, an independent body with substantial legitimacy and legal authority has effectively deprived Serbia of the possibility of pursuing its objective via other opportunities. Indeed, four days after the Court delivered its Advisory Opinion, the Serb parliament backed a government move seeking new talks on Kosovo at the United Nations.[6]

In the meantime, in September 2010, the EU expressed its readiness to facilitate the process of dialogue between Serbia and Kosovo. EU members and Serbia co-sponsored a UN General Assembly Resolution. The document welcomed,

> "the readiness of the European Union to facilitate a process of dialogue between the parties; the process in itself would be a factor for peace, security and stability in the region, and that dialogue would be to promote cooperation, achieve progress on the path to the European Union and improve the lives of the people".[7]

Some assume that Serbia has to reconcile with Kosovo, while some EU members, notably Germany and the UK,

request it as a precondition of the continuation of Belgrade's approach to the Union, including the prospect of membership. The influence of Brussels is certainly significant but attributing the change of Serbia's attitude to that factor is most likely premature.[8] It has much more to do with the realization, following the three above-mentioned "defeats", that Serbia had no solution for its Kosovo problem without some limited cooperation with international bodies. The eleven years that have passed since Belgrade lost control over Pristina have certainly helped mitigate the expectation of the Serb population that they will regain sovereignty over Kosovo and Metohija.

Wider Political Impact

It is open to question whether the Advisory Opinion will have a noticeable impact on the wider world, especially Eastern Europe where Kosovo has been seen as a precedent for establishing statehood through external military intervention. A day after Kosovo's declaration of independence, Serbian president Boris Tadic noted this issue at the UN Security Council: "Are we all aware of the precedent that is being set and are we aware of the catastrophic consequences that it may lead to?"[9] In fact, the legal and political reality may well be different. Lawyers can point to the Court's conclusion that "general international law contains no applicable prohibition of declarations of independence".[10] On the other hand, political analysts may conclude that while it is not prohibited to declare independence, that is not the crux of the matter. Declarations of independence are of little consequence unless they have the necessary international support, be it political recognition, economic assistance or military backing.

There seems no reason to regard Kosovo as a precedent, primarily because the Court did not touch upon the issue of statehood. Even Moscow found it necessary to point out that "it is crucially important that the Court has only assessed Kosovo's Declaration of Independence, underlying that it has not considered more widely Kosovo's right to unilateral secession from Serbia."[11] Russia is in a sensitive situation as the epicentre of the post-Soviet space. On the one hand, it would be in favour of more states recognizing the independence of Abkhazia and South Ossetia. These cases are neatly juxtaposed. As the first Deputy Chairman of the State Duma's International Affairs Committee said, "Kosovo's self-proclaimed independence is recognized as normal, while the independence proclaimed by Abkhazia and South Ossetia is not recognized by an overwhelming majority of the international community."[12] On the other hand, Russia would not support unilateral declarations of independence as solutions for other territorial disputes in the former Soviet Union, such as Transnistria or Nagorno-Karabakh. In fact, Moscow has discouraged both entities from pursuing the secessionist option. And it would strongly oppose any claim to independent statehood by any part of the Russian Federation.

With this in mind, what might be the scope for future declarations of independence? Rebel groups and separatist movements seeking independence will certainly refer to past arguments, which they have reason to assume, meet the expectations of the world at large. Following the Advisory Opinion, we may see a "standardization" of the arguments proffered. Two options are possible: a claim for self-determination with an emphasis on "communal identity and historic continuity"; or unilateral secession without constitutional authorization if massive violations of human rights occur.

In the case of self-determination, it is difficult to imagine this gaining any traction in respect of peoples who are not oppressed. The second scenario is more likely and might provide a degree of political legitimacy for secession. Russian president Dmitry Medvedev, in the context of Abkhazia and South Ossetia, specifically referred to the prevention of genocide and the elimination of a people.

Fundamentally, the tactic of political movements seeking independent statehood on the basis of the right to self-determination will not change. The effort will consist of two complementary elements. First, a political struggle based on the basis of moral (and possibly legal) arguments demonstrating the oppressive character of state authority. Second, a combination of peaceful and forceful methods to undermine the state that deprives the movement/secessionist group of its "legitimate" claim to independence.

State formation is a natural process. The number of states will therefore most likely continue to increase. This will not happen without fights and controversies as it requires that existing states relinquish a part of their territory; one of the most difficult decisions a state may have to take.

NB: The views expressed in this paper are entirely and solely those of the authors and do not necessarily reflect the views of the GCSP.

Endnotes

1 Article 12§1 of the UN Charter states that "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests".
2 Among the major states that have recognized Kosovo's independent statehood there are the United States, five of the six largest EU member states, France, Germany, Italy, Poland and the UK as well as Turkey and Japan. There are, however, also some large states among those, which have not recognized Kosovo, including Brazil, China, Russia and Spain.
3 Russia, Nicaragua, Venezuela and Nauru have recognized the two entities/states since the Georgia-Russia war of August 2008.
4 Constitution of the Republic of Serbia, 2006, http://www.mfa.gov.rs/Facts/UstavRS_pdf.pdf
5 "Serbian ex-Foreign Minister Calls for Expunging Kosovo from Constitution", Radio Free Europe/Radio Liberty, 7 August 2010, http://www.rferl.org/articleprintview/2121325.html
6 "Serbia's Parliament Calls for New Talks on Kosovo", Radio Free Europe/Radio Liberty, 27 July 2010, http://www.rferl.org/articleprintview/2110590.html
7 UN General Assembly, A/64/L.65, 8 September 2010. http://www.un.org/Docs/journal/asp/ws.asp?m=A/64/L.65/Rev.1
8 See G. Berghezan, "Serbie: le Kosovo sacrifié sur l'autel européen?", Brussels, GRIP, 30 September 2010, p.10. http://www.grip.org/fr/siteweb/images/NOTES_ANALYSE/2010NA_2010-09-30_FR_G-BERGHEZAN.pdf
9 UN Security Council meeting, 18 February 2008.
10 S. Wolff, "ICJ and Kosovo. Does the Court's Opinion resolve anything?", 29 July 2010. http://www.balcanicaucaso.org/eng/All-news/ICJ-and-Kosovo-does-the-Courts-Opinion-resolve-anything.html
11 "UN court ruling doesn't change Moscow's stance on Kosovo", *Russia Today*, 23 July 2010, http://www.rt.com/Politics/2010-07-23/kosovo-independence-moscow-stance.html/print
12 Comment of Leonid Slutsky, first Deputy Chairman of the State Duma's International Affairs Committee, Ibid.

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