



## International Court of Justice Advisory Opinion on Kosovo's declaration of independence

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In July 2010 the International Court of Justice (ICJ) found that Kosovo's declaration of independence on 17 February 2008 did not breach international law. The court's Advisory Opinion was welcomed by Kosovo, other entities seeking independence and the UK government amongst others. Serbia, Russia and some other governments condemned it.

The opinion has however been widely misunderstood and mis-reported. It is both less and more important than it appears. Its legal scope is extremely narrow, as it is only an opinion, not a judgment, and it deals only with the declaration of independence itself, and not with whether Kosovo can be considered a legal state. But its political implications could nevertheless be very wide. It has not yet prompted many more countries to recognise Kosovo's independence, but it does seem to have contributed to a shift in relations between Kosovo and Serbia, and it may yet be used as ammunition by other entities seeking independence.

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## 1. Background

On 17 February 2008 the Serbian province of Kosovo, which had been under UN control since Nato bombing against Serb forces brought an end to the Kosovo war in 1999, unilaterally declared independence from Serbia. The move was strongly opposed by Serbia which immediately declared that Kosovo's 'unilateral declaration of independence' (UDI) was illegal under international law.

UDIs do not in themselves have major legal consequences: what counts is when other states recognise an entity as independent. As of 4 May 2011, Kosovo has been recognised by 75 states, including the UK and 21 other EU Member States.<sup>1</sup>

## 2 The case before the ICJ

Serbia deeply opposes Kosovo's independence, holding that Kosovo is still part of Serbia despite the February 2008 declaration of independence. It wanted to gain international backing for its position, so asked the UN General Assembly to ask the International Court of Justice (ICJ: the court of the United Nations) for an advisory opinion on whether the declaration was lawful given that the UN's provisional institutions (the UN Mission in Kosovo – UNMIK) were still in place.<sup>2</sup>

The General Assembly agreed to Serbia's request, but slightly broadened its scope. The question it put to the ICJ was: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"

## 3 What did the ICJ actually say?

The court issued its [advisory opinion](#) on 22 July 2010. It first looked at **preliminary questions**:

- Did it have jurisdiction to give an advisory opinion on this question? Yes (unanimously).
- Would it comply with the request for an advisory opinion? Yes (by a majority of nine to five).

The ICJ is not obliged to give an advisory opinion: the wording of Article 65(1) of its Statute leaves the court discretion. The ICJ has indicated that it will decline a request to give an Advisory Opinion only if there are "compelling reasons" to do so.<sup>3</sup>

The **substantive question** was "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?". The ICJ's response (by a majority of 10 to four) was that unilateral declarations of independence are not prohibited by customary international law. It identified only two very limited exceptions: (1) where the declaration stemmed from an illegal act, such as the use of force or acts contrary to *jus cogens*,<sup>4</sup> and (2) where the UN Security Council decided that the declaration was illegal (for example northern Cyprus and the Republika Srpska).

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<sup>1</sup> See [Kosovo Thanks You](#) website [viewed 4 May 2011]

<sup>2</sup> For background to Serbia's request to the UN General Assembly, and positions of the key players, see *Serbia's bid to secure a legal opinion on Kosovo's independence*, Library Standard Note SN/IA/4846, 24 September 2008

<sup>3</sup> *Western Sahara opinion*, 1975 ICJ Rep 12

<sup>4</sup> *Jus cogens*: a fundamental principle of international law which is accepted by the international community of states as a norm from which no derogation is permitted

The court also looked at whether Kosovo's declaration of independence violated the terms of **UN Security Council resolution 1244** (1999). This resolution authorised the UN to establish an international civil presence in Kosovo (UNMIK) 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". The ICJ said that resolution 1244 was designed for humanitarian purposes, stabilisation and reconstruction; to supersede the Serbian legal order; and to set up only a temporary, interim regime. It therefore contained no specific prohibition on an independence declaration. In any case, so the court said, the authors of the independence declaration were not acting as one of the new institutions but were outside the UN framework.

#### **4 What is the legal scope of the opinion?**

Firstly, it is not a binding judgment but an **advisory opinion**. The ICJ's advisory opinions are just that – advisory. Their purpose is not to settle, at least directly, inter-state disputes, but rather to offer legal advice. The UN body that requested the opinion (in this case the General Assembly) is free to give effect to the opinion, or not. However, advisory opinions are taken into account by international organisations and by states, and can contribute to the development of international law.

Secondly, the opinion **relates only to the declaration of independence** itself. It specifically states (in paragraph 51) that it is not about the consequences of the declaration or about whether Kosovo has achieved statehood. It is not concerned with self-determination, secession, statehood or international recognition – thus avoiding all the real issues facing the international community in this area.

Thirdly, it states only that declarations of independence are "**not prohibited**". Some argue that this still does not mean that they are *permitted* by international law.

In his dissenting opinion, Judge Simma criticised the majority's view as "**mechanical jurisprudence**" and a limited, abstract, obsolete view. Other commentators have suggested that the court was wrong about who made the declaration, saying that the original documentation making the declaration was clearly under the heading of institutions established by Resolution 1244.

#### **5 What are the political implications of the opinion?**

Serbia had hoped that an ICJ opinion would move the issue of Kosovo's status from the political to the legal arena.<sup>5</sup> But the narrowness of the opinion left plenty of scope for politics.

##### **5.1 ICJ involvement in 'political' cases**

The political motivation for an advisory opinion request is immaterial to the court, as long as the request is framed in a manner that permits judicial examination. Generally speaking, the ICJ has been unwilling to give an Advisory Opinion where:

- the request concerns a matter which is essentially a contentious dispute between States;
- the request concerns essentially factual matters; and
- a State concerned refuses to co-operate.<sup>6</sup>

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<sup>5</sup> 'Kosovo issue should be transferred from political to legal field', *Serbian Presidency Press Release*, 19 September 2008

<sup>6</sup> *Eastern Carelia Case*, (1923) PCIJ Ser B No 5

The ICJ has not shied away from delivering opinions on important and politically controversial subjects, including the legality of nuclear weapons and the legal consequences of the construction of a wall in the occupied Palestinian territory.

The majority of the court said that there was a legal question which it should answer, regardless of who sponsored the opinion, its legal consequences, or whether the General Assembly was the appropriate UN body to be concerned with Kosovo. International law does indeed set the boundaries for when an entity is a state; but a crucial factor is political recognition by other states. In giving a very narrow ruling that could easily be much more widely interpreted as endorsing Kosovo's statehood and giving the green light to entities seeking independence, the ICJ has arguably allowed its opinion to be used politically. The response of the UK government at the time certainly suggests so: "We believe that the Opinion's publication should mark an end to discussions on Kosovo's status."<sup>7</sup>

## **5.2 Recognition of Kosovo's independence**

Kosovo has used the ICJ's opinion to ratchet up its campaign for recognition as a state. Kosovo is currently recognised by 75 countries, but this is an increase of only six since the ICJ opinion was published.<sup>8</sup> Five EU countries with fears about their own minorities (Spain, Romania, Slovakia, Greece and Cyprus) have not recognised Kosovo's statehood.

## **5.3 Effect on Kosovo-Serbia relations**

The opinion sparked a new phase in Kosovo-Serbia relations. Serbia (under strong pressure from the EU) agreed to remove the inflammatory language from a draft UN resolution on Kosovo;<sup>9</sup> in return, the EU co-sponsored the amended resolution (which was adopted on 9 September 2010)<sup>10</sup> and agreed to accelerate its discussion of Serbia's application for EU membership. Direct talks between Kosovo and Serbia, facilitated by the EU, began in March 2011, although they technical rather than status talks.<sup>11</sup>

## **5.4 Implications for other countries seeking independence**

The UK government is among those who support Kosovo's independence, and argues that Kosovo is unique and does not set a precedent for anywhere else. However, the ICJ's general statement that unilateral declarations of independence are not prohibited by international law is likely to encourage other entities to make them. Those entities might not realise that the opinion is only about the legality of independence declarations themselves and does not mean that they will be recognised as states. Or they might wilfully misinterpret the legal scope of the opinion. Either way, further unilateral declarations of independence could easily lead to conflict.

## **5.5 Effects on UN peace-keeping operations**

The opinion may jeopardise UN peace-keeping operations. Five dissenting ICJ judges said that the Security Council (SC) was the only UN body concerned with Kosovo, and that it was therefore up to the SC to decide what to do there after the end of the provisional administration – not the Kosovans unilaterally, nor the General Assembly, nor the ICJ. The dissenting judges' concern may have been that the ICJ's opinion might suggest that SC

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<sup>7</sup> HC Deb 27 July 2010 c85WS

<sup>8</sup> [Kosovo Thanks You](#) website [viewed 4 May 2011]

<sup>9</sup> See "Serbia backs compromise UN resolution on Kosovo", *Reuters*, 9 September 2010

<sup>10</sup> UN General Assembly Resolution A/RES/64/298, 9 September 2010

<sup>11</sup> See "Is the status quo progress?", *European Voice*, 8 March 2011; "Pristina 'Will Not Discuss Division of Kosovo'", *Balkan Insight*, 26 April 2011

peace-keeping operations could lead to statehood. If this were the case, states would never consent to such operations on their territory, and that consent is vital to the success of the operations.

## **6 Further reading**

International Court of Justice, *Advisory Opinion: Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, 22 July 2010

International Crisis Group, *Kosovo and Serbia after the ICJ opinion*, Europe report no 206, 26 August 2010

House of Commons Library, *Recognition of Kosovo*, SN/IA/4690, 9 April 2008