

What to expect from the ICJ opinion on Kosovo

Stefan Wolff

17 July 2010

More than two years ago, in February 2008, the Provisional Institutions of Self-Government of Kosovo unilaterally declared Kosovo's independence from Serbia. This was the culmination of an almost ten-year process of contested international administration of this region by the United Nations that followed NATO's controversial intervention in the conflict between ethnic Serbs and ethnic Albanians in 1999 (which itself had been ongoing for over two decades and seen significant violent escalation after 1996).

Despite intense international efforts by the UN and subsequently by a troika of US, EU and Russian mediators to achieve agreement between Kosovo Albanians and Serbia over Kosovo's future status, no consensus was reached either in the negotiations or on a resolution in the UN Security Council. Kosovo's declaration of independence was followed by partial international recognition (to date 50+ states, including all but 5 EU member states and the US) as well as strong condemnation from Serbia and Russia in particular, with many other states expressing serious concern.

Given the clear and wide-ranging implications of Kosovo's declaration of independence, its partial international recognition, and the equally persisting opposition to such recognition, the UN General Assembly adopted a resolution on 8 October 2008, requesting an advisory opinion from the International Court of Justice on whether Kosovo's unilateral declaration of independence was in accordance with international law.

On 22 July 2010, the International Court of Justice will publish its advisory opinion on this matter. This is one of the most significant cases that the court has dealt with in recent years, and the publication of its opinion follows lengthy deliberations, including written submissions by 37 UN member states and the Provisional Institutions of Self-Government of Kosovo, and oral statements by 28 UN member states and representatives from Kosovo during public hearings in December 2009.

While the Court's opinion is not binding on any of the UN member states, there is a wide consensus that the Court's ruling, like the declaration of independence itself, will have a significant impact on questions of ethnic conflict and self-determination far beyond Kosovo and the Western Balkans.

The much disputed 'Kosovo precedent' and the ICJ's advisory opinion will have potential ramifications in several ways:

1. For other de-facto states: in terms of increasing or decreasing their chances of obtaining broader international recognition of their self-declared independence (for example, Northern Cyprus, Nagorno-Karabakh, South Ossetia, Abkhazia, Transnistria, Somaliland).
2. For future settlement negotiations and settlements: in terms weakening or strengthening the position of states facing self-determination movements.
3. For the UN: in terms of its ability to manage ethnic conflicts, especially qua transitional administration of disputed territories.
4. For the EU: in terms of its role in Kosovo now and for the existing divisions within the EU over the recognition of Kosovo's independence.

A negative opinion of the Court on Kosovo (i.e., that the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo was NOT in accordance with international law) is unlikely to reverse the state of affairs as it now exists with more than 50 states having

recognised Kosovo's independence. Such an opinion would affirm conservative interpretations of international law favouring the principles of sovereignty and territorial integrity of existing states. It would not rule out negotiated secessions (such as the 'velvet divorce' of Czechoslovakia in 1992/3 or the agreement of conflict parties to accept the outcome of referenda on independence such as in East Timor in 1999, or in the future in Sudan or Bougainville).

By the same token, a positive opinion of the Court (i.e., that the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo WAS in accordance with international law) would not necessarily open the floodgates of secession elsewhere in the world. UN member states would not be compelled by such an opinion of the Court to recognise other self-declared independent states (such as Abkhazia or South Ossetia) nor would the case of such entities under international law necessarily be strengthened—Kosovo would more likely continue to be seen as a *sui generis* case, not a precedent for others, no matter how similar they may appear on the surface.

No matter how the Court finds, its opinion will be as contested as the case on which it was asked to pronounce itself. Nor is it likely that the Court's opinion will be able to resolve either the issue of Kosovo or the wider underlying questions that arise in cases of contested self-determination claims.