



# BULLETIN

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Editors: Jacek Foks (Editor-in-Chief), Łukasz Adamski, Beata Górka-Winter, Leszek Jesień,  
Łukasz Kulesa, Marek Madej, Beata Wojna, Ernest Wyciszkiewicz

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## ICJ Advisory Opinion on Kosovo Independence Declaration

by Rafał Kownacki and Tomasz Żornaczuk

*The International Court of Justice (ICJ) gave on 22 July 2010 an advisory opinion on the legality under international law of the unilateral declaration of the independence of Kosovo. The ICJ found that the declaration was neither contrary to general international law nor did it violate the territorial integrity of Serbia. This ruling, besides having effect on the parties concerned, could also constitute a basis for interpretation in similar cases of conflict between peoples' right to self-determination and the right of territorial integrity of the state.*

**ICJ Advisory Opinion.** The proceeding before the ICJ was conducted at the request of the government of Serbia filed in October 2008 and authorized by the UN General Assembly. The Court was to assess whether the unilateral Kosovo independence declaration promulgated by the Parliament in Pristina on 17 February 2008 was in accordance with international law. Ten ICJ justices (against four dissenting) found that the declaration of Kosovo's self-government authorities was not illegal under international law. The collision of two fundamental principles of international law—of peoples' right to self-determination and of respect of territorial integrity of the state—has divided the international community in its assessments of the legality of Kosovo's declaration. The gist of the ICJ's advisory opinion is that—with international law containing no provisions prohibiting declarations of independence—the Court had no grounds for finding illegal the unilateral act at issue. A declaration of this kind is a factual event which, to give rise to an effect, requires the cumulative occurrence of all of the factors decisive to statehood. For this reason the ICJ did not assess the legality of the independence of Kosovo as such, since—even under the assumptions of the constitutive concept, which makes the legality of a state conditional upon its recognition by other international law actors—the recognition itself is a political act.

Neither did the Court find grounds for recognising the Belgrade government's claim that the territorial integrity of Serbia had been violated. Following NATO's "Operation Allied Force," the Security Council determined, in Resolution 1244 of 10 June 1999, the interim international status of the province. At that time Serbia had been deprived of control over Kosovo, the same having passed to an international administration under the aegis of the UN. Given the futility of Serbia-Kosovo negotiations, the declaration of independence merely confirmed that the Belgrade government had lost territorial sovereignty over the province, which, in fact, had not been an integral part of Serbia since 1999. Hence the declaration of independence did not violate Resolution 1244, because the latter, while establishing an exceptional interim legal regime, had not precluded independence as a final settlement of the status of the province—or, in the Court's opinion, it had admitted such a possibility. While examining the Kosovo Parliament's legal capacity to unilaterally declare independence, the Court found that this was barred neither by Resolution 1244 nor by the United Nations Mission in Kosovo (UNMIK) Regulation of 15 May 2001, which had determined the powers of the province's provisional institutions of self-government. Thus the judges of the Court in the Hague succeeded in dealing with a complex legal problem while keeping the ICJ outside a political discourse.

**Political Implications.** Although the ICJ pointed out that it was examining solely the legal aspect of Kosovo's secession from Serbia, the Court's opinion gives rise to multi-dimensional political consequences. First, it will strengthen the legitimacy of the authorities in Pristina. Following the Court's determination, Kosovo's Foreign Minister Skender Hyseni said that Serbia needed to treat Kosovo as a state and establish dialogue for the resolution of common issues. Then, the ICJ finding

will cause more states to recognise the independence of Kosovo—an attitude U.S. Secretary of State Hillary Clinton called for on the day of the promulgation of the opinion. This, presumably, will make Kosovo more welcome by international organisations.

In the political dimension, the ICJ opinion provides an additional argument for separatist movements, both in the Balkans and elsewhere. Although states supportive of the idea of Kosovo's independence emphasised that this country was a "special case," as witnessed by its established self-government and the specific historical determinants in the territory of the former Yugoslavia, similar arguments for breaking away from Bosnia and Herzegovina could be invoked by the authorities of Republika Srpska. Under the Dayton agreement, Republika Srpska has enjoyed broad autonomy since 1995 (including its own Parliament and government, control over the police, an education system, and other prerogatives) and its Prime Minister Milorad Dodik spoke outright, in the spring of 2010, of the possibility of a "peaceful divorce" from BiH. In the political aspect, the ICJ's opinion that the making of a declaration of independence is not contrary to international law undermines the arguments of the proponents of respect of territorial integrity of Georgia, thus strengthening the position of the authorities of Abkhazia and Southern Ossetia. These territories had declared their independence early in the 1990s and in 2008 they were recognized by Russia as international law subjects. Immediately after the ICJ determination, President of Abkhazia Sergei Bagapsh expressed hope that this development would prompt more states to recognise the independence of this territory. Although under the ICJ charter the Court's opinion is applicable only to the parties to the dispute and to a concrete case, in the political dimension it will provide a point of reference and determine the manner of interpretation in similar cases.

The Serbian authorities reaffirmed that despite the ICJ's finding against them "they will never recognise the independence of Kosovo and Metohija." Both President Boris Tadić and Minister of Foreign Affairs Vuk Jeremić pointed out that the Court had failed to answer the question concerning a concrete case of declaration of independence by the Kosovo Albanians and it merely gave an opinion on technical aspects of the general right to secede. Therefore, in the opinion of both politicians, further talks on Kosovo need to be conducted in the UN General Assembly. The Serbian authorities also argue that Kosovo's ethnically-motivated declaration of independence is contrary both to international law and to the UN operating principles.

The position of Serbia, which treats Kosovo as an integral part of its territory, could slow down considerably Serbia's integration with the European Union. Some states, including Great Britain, France and Italy, have linked this process with the need for Serbia's more pragmatic approach to the Kosovo issue and now the ICJ opinion reinforces their position. While in the short and medium term their efforts to encourage early recognition by the government in Belgrade of Kosovo's independence will prove futile, those EU member states that recognise the independence of Kosovo will be prompting Serbia to cooperate with the authorities in Pristina, making this the price of faster integration with the EU. The position of the EU as a whole on the Kosovo issue itself and on Serbia's European integration will be influenced by the response to the ICJ opinion of those member states which do not recognise Kosovo's independence, although it seems unlikely that the Court's opinion will cause Greece, Spain, Romania or Slovakia to promptly revise their positions. While they will most likely accept the independence of Kosovo over the next few years, the authorities of Cyprus will not. At the same time, these states will come under mounting pressure from other EU members to recognise the independence of Kosovo.

**Conclusions.** According to the ICJ advisory opinion, the making of a declaration of independence cannot be contrary to international law, which contains no such prohibition. The Court pointed out that a large part of the international community—including states which supported Serbia's position during the proceedings—achieved their independence precisely in this way. Decisive to statehood and to the state's capacity to participate in international relations is recognition by other states, which is a political act. To date 69 UN member states have recognised the independence of Kosovo. It is to be expected that more states will establish diplomatic relations with the government in Pristina in the wake of the ICJ advisory opinion. The opinion, while not universally binding, has a significance extending far beyond the single Kosovo case. In the political aspect it will serve to assess similar situations in other regions of the world, thereby reinforcing both separatist tendencies and the right to self-determination argument invoked by the still-unrecognised entities, including Southern Ossetia and Abkhazia.