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The ICJ's Advisory Opinion on Kosovo

Summary

- On July 22, 2010, the International Court of Justice (ICJ) issued its advisory opinion on Kosovo’s declaration of independence of February 17, 2008, observing that the declaration was not in violation of international law.
- The Court’s opinion may facilitate further recognitions of Kosovo but thus far there has been no significant increase in the number of countries extending recognition.
- Although the Court’s opinion was drafted with the specific and unique circumstances of the Kosovo case in mind, it has been followed with interest by separatist parties engaged in contested territorial struggles elsewhere around the world.
- Separatists are likely also to be watching with interest the next steps that may be taken with regard to Kosovo in the wake of the ICJ’s advisory opinion, especially any boundary adjustments that may be proposed and agreed upon between the Serbian and Kosovar governments.

Introduction

On July 22, 2010, the International Court of Justice (ICJ) issued its long-awaited advisory opinion on the legality of Kosovo’s declaration of independence of February 17, 2008. The expectation had been that the ICJ would offer a mixed ruling that would give some comfort to Serbia and some support to Kosovo. Instead, by a majority of 10 to four, the ICJ concluded that “the adoption of [the] declaration did not violate any applicable rule of international law.” While the advisory opinion will not resolve the longstanding dispute between Belgrade and Pristina, it will facilitate any further recognition of Kosovo. The ICJ opinion is also of interest to parties engaged in contested territorial struggles elsewhere, notwithstanding the fact that the opinion speaks principally to the specific and unique circumstances of the Kosovo case and the scope for application of the opinion beyond Kosovo therefore is limited.

The Advisory Opinion and its Significance

The ICJ opinion was issued in response to a single question put to it by the United Nations General Assembly in October 2008: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?” Serbia, which had initiated the procedure, was confident that the ICJ would rule in its favor for three reasons: first, Kosovo, although under international administration since June 1999, was a province of Serbia, and the U.N. Security Council had affirmed the “sovereignty and territorial integrity” of the then

Federal Republic of Yugoslavia in its Resolution 1244 (1999) establishing the international administration; second, the inherent conservatism of international law and diplomacy militates against acts of unilateral secession, which Kosovo's declaration of independence was widely interpreted to be; and third, the conservatism of the ICJ itself means that its members are generally reluctant to intervene in matters that divide the international community and where the relevant legal principles are to some degree uncertain or in flux. And, yet, it would have been difficult for the ICJ to ignore the fact that, by the time of its ruling, 69 states—including 22 of 27 European Union (EU) member states—had already recognized Kosovo's independence.

Historically, questions submitted to the ICJ have been quite broad but this particular one that the Court was asked to consider was a very narrow one. The ICJ was not asked what the legal consequences of the declaration of independence were, or whether the people of Kosovo had a right to self-determination, or whether Kosovo had satisfied the requirements of statehood. Confident that its advantage lay with a narrow focus, Serbia chose to challenge the legal authority of the U.N.-supervised Provisional Institutions of Self-Government of Kosovo (PISG) to declare independence. However, the ICJ shifted the focus away from the PISG. It concluded that the authors of the independence declaration were not the PISG but rather "persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration." This was an important differentiation because had the declaration been taken to be an act of the PISG, it could have been interpreted to have exceeded the remit of the PISG—as the U.N.'s special representative of the secretary-general (SRSG) had judged other acts of the PISG to have done in the past. The Court was thus able to argue that, as the authors of the independence declaration were acting outside the legal framework of the U.N. interim administration, their declaration did not violate that framework and, as no legal prohibition of declarations of independence exists, the declaration did not violate general international law.

The advisory opinion thus paves the way for more states to extend recognition to Kosovo, but so far the wave of new recognitions that Pristina had hoped for has not materialized. Even if more recognitions are forthcoming, they are unlikely to alter the political landscape fundamentally. Serbia has affirmed its opposition to Kosovo's unilateral declaration of independence and as long as Serbia continues to withhold its recognition of Kosovo, other countries will follow suit, including China and Russia. As permanent members of the Security Council, these two states are in a position to block Kosovo's admission to the U.N. and thus keep Kosovo in a sort of diplomatic limbo. The EU is keen to break the logjam, but as long as some of its member states continue to oppose recognition, it will be difficult for the EU to act effectively on this issue.

Pandora's Box?

There is some concern that, beyond Kosovo, other groups aspiring to statehood or seeking to consolidate their statehood claims may be encouraged by the advisory opinion—among them, Turkish Cypriots, Bosnian Serbs, Iraqi Kurds, Somalilanders, Abkhaz and South Ossetians. The Court was careful to formulate its response very narrowly—so much so that Judge Bruno Simma, while voting with the majority, issued a separate statement criticizing the Court for its "unnecessarily limited" analysis. However, the narrowness of the Court's response meant that the Court did not weigh in on larger questions -- such as those relating to secession, statehood and self-determination -- that might have had some bearing on these other contests. Although the Court's opinion, strictly speaking, is of little consequence for these struggles, there is anecdotal evidence to suggest that the opinion may be buoying the aspirations of separatists elsewhere.

In the wake of the ICJ opinion, Milorad Dodik, the prime minister of Bosnia's Republika Srpska,

declared that “the ICJ decision can serve us as guidance for our continuing fight over our status and our future.”¹ While the Bosnian Serb leadership formally accepts a unified Bosnian state, it has never abandoned its hopes of joining Serbia proper. Leading figures in the separatist regions of Abkhazia and South Ossetia in the Caucasus, meanwhile, say that they too are encouraged by the Court’s ruling. “The fact that Kosovo has been recognized in accordance with international law can be seen as a definitive precedent for Abkhazia, and I think it will serve as an important precedent for Abkhazia,” observed Irakly Khintba, a political analyst at the Abkhazian State University.²

Elsewhere in the Caucasus, Vahan Hovhannisian, the head of the opposition Armenian Revolutionary Federation parliamentary faction in the National Assembly of Armenia, has drawn similar conclusions for Nagorno-Karabakh in Azerbaijan: “The [ICJ] judgment clearly states that a unilateral proclamation of independence cannot be viewed as unlawful. For this, of course, there should be prerequisites, and Karabakh has at least the same prerequisites as Kosovo, if not more.”³

Of equal if not greater significance than the Court’s advisory opinion, however, may be the submissions that states filed with the Court as part of its proceedings. A significant number of states invoked the notion of “remedial secession” in their written and oral pleadings, arguing that Kosovo had a right to independent statehood as a consequence of the human rights and other abuses that it had suffered by the Serbian authorities while subject to Serbia’s rule prior to 1999. Although the Court acknowledged the use of this argument, it took the view that the subject was beyond the scope of the question initially posed by the U.N. General Assembly. Nonetheless, encouraged by the support that remedial secession received in the proceedings, it is reasonable to expect that parties engaged in contested territorial struggles elsewhere may seek justification for their causes with reference to the notion of a right of remedial secession.

Separatists elsewhere, however, are likely also to be mindful of the uniqueness of the Kosovo case in one important respect. They will appreciate that even if their own situations may appear to be comparable to those of Kosovars, the basis for international support ultimately is often political rather than legal. Kosovo has attracted recognition within Europe in large part because it is the view of many European states that the peaceful reintegration of Kosovo into Serbia is an impossibility and that independent statehood therefore represents the only plausible way forward. Outside of Europe, Kosovo has attracted recognition in part because of the diplomatic efforts of the United States and leading EU member states to promote recognition. This is not to suggest that the many objective factors that distinguish the Kosovo case have not been important considerations—including the fact that Serbia’s authority in Kosovo had been displaced by the U.N. interim administration for a prolonged period of time, that U.N. Security Council Resolution 1244 envisioned a final determination of Kosovo’s status that did not preclude independent statehood, and that it was widely agreed that all avenues of negotiating a settlement had, by the time of the unilateral declaration, been exhausted. However, as the experience of Somaliland suggests, in the absence of ample political support—especially from countries within the region—compelling objective factors are not always sufficient to tip the balance.

Separatists will also be watching with interest the next steps that are taken with regard to Kosovo in the wake of the ICJ’s advisory opinion. In view of the continuing impasse between Belgrade and Pristina, one proposal that is gaining renewed currency in some quarters is a “territorial adjustment” that would see the heavily Serb-populated north of Kosovo traded for the largely Albanian-populated parts of the Presevo Valley in southern Serbia. Consensual boundary changes have made important contributions to peace and stability between states in the past. But leaving aside the fact that the majority of Kosovo’s Serbs live scattered in the south of Kosovo, the fundamental concern with any prospective land swap is the knock-on effects that it could have in the Balkans—where, as noted above, Bosnian Serbs would welcome a boundary adjustment, as

ABOUT THIS BRIEF

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would Turks in northern Cyprus and possibly also Albanians in western Macedonia. Any territorial adjustments would be seen in many other conflict zones, notably on the African continent, as an invitation to disaster.

Conclusion

The ICJ's advisory opinion will help to dispel uncertainty regarding Kosovo's statehood and thus may make a contribution to peace and stability in the Balkans region, even if Serbia and Kosovo remain deadlocked for the foreseeable future. Although the Court's opinion was drafted with Kosovo's specific and unique circumstances in mind, separatists elsewhere are drawing inspiration from the opinion and from the submissions of the states before the Court. We are likely to see more debate about the claims of an emerging right of remedial secession—claims that may be invoked with greater frequency by peoples engaged in self-determination struggles outside the Balkans context.

Endnotes

1. Charles Recknagel. "Eastern Europe's Frozen Conflicts Look to Kosovo Ruling." Radio Free Europe/Radio Liberty, July 23, 2010. Accessible at: http://www.rferl.org/content/Eastern_Europes_Frozen_Conflicts_Look_To_Kosovo_Ruling/2108088.html.
2. Ibid.
3. Ibid.



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