

# The International Court of Justice's forthcoming opinion on Kosovo: what difference will it make?

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»» On 22 July, the International Court of Justice (ICJ) is expected to publish its opinion on the conformity of Kosovo's 2008 declaration of independence with international law. What will the Court's opinion be, and what difference will it make to the uneasy stalemate on Kosovo? The urgent need for normalising the situation was highlighted by an explosion and a shooting incident in the contested Serbian-controlled northern city of Mitrovica at the beginning of July, which caused one death and a dozen casualties.

The Court may decline to issue any opinion and throw the matter back to the UN member states to resolve, resenting – with justification – being asked to settle the case in law when the states themselves are unable to decide what the law actually is. For, since the dissolution of Yugoslavia in the 1990s, basic principles of international law such as the territorial unity and integrity of states, the self-determination of peoples, and international intervention to stop grievous violations of human rights including genocide, have been challenged and remain in flux. Key new concepts such as the legitimacy of 'remedial secession' have won quite substantial support but are far from being universally accepted. In the context of deep division of opinion, the ICJ will not be ready to issue an authoritative legal interpretation that will decisively settle this highly politicised issue one way or the other.

The Court most likely will give an opinion, as requested by the UN General Assembly, but it can be expected to take a narrow and conservative approach. Thus the ICJ will not overturn the traditional emphasis on the principle of territorial unity and integrity – which is no doubt what Serbia hopes for. But the Court could frame its opinion – as it has in the past – in terms so convoluted and arcane as to be open to multi-

## HIGHLIGHTS

- On 22 July, the ICJ is scheduled to publish its advisory opinion on Kosovo's declaration of independence, but the battle for recognition will continue
- The division among EU member states over Kosovo must be overcome if the EU's Balkans policy is to regain coherence and credibility
- Negotiated partition of Kosovo is mooted by some as a means of finally settling Serbia-Kosovo relations, but it is an unlikely solution
- Kosovo can best help itself by working much harder on building effective statehood and continuing to develop good cooperation with its neighbours

»»»»» ple interpretations if not incomprehensible. The narrow way in which the question was framed ('Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?') allows the ICJ to sidestep the big questions which have the most contentious political implications, such as the legality of Kosovo's statehood itself, the manner of its emergence as a result of NATO's 1999 intervention, and the recognition of Kosovo by (to date) 69 states.

The Court may well conclude that international law gives no clear guidance on the matter of Kosovo's declaration of independence, which could be argued to be a matter of domestic jurisdiction. While this may be encouraging for Kosovo, Serbia will feel in no way obliged to alter its position. On the other hand, even if a majority of the bench agrees that Kosovo's Provisional Institutions of Self-Government breached UNSC resolution 1244, this too will have little practical effect. The existence of states is generally regarded as a matter of fact, not law, and international law has very little to say on the manner of their emergence. Kosovo undoubtedly exists as a matter of fact and will not disappear, even if the declaration of independence itself, in the Court's opinion, turns out to have been illegal. Moreover, the bench would be divided on such an opinion, and dissenting judges are free to publish their own views, thus giving as much ammunition to Kosovo's as to Serbia's supporters.

Recognition is essentially a political matter for states to decide for themselves, and those states which have recognised Kosovo will not 'de-recognise' it. As in the past, states will disregard the Court's opinion, which is non-binding and purely advisory, if it goes against their own political interests. Even if the judgement is rather negative for Kosovo, we can expect a wave of perhaps thirty or more further recognitions soon after the publication of the opinion, whatever the content. States fundamentally opposed to Kosovo's independence will not recognise it, whatever the ICJ has to say. Indeed, Serbia's Foreign Minister Vuk Jeremic has recently stated that Serbia will not recognise Kosovo even if the Court finds its dec-

laration of independence lawful. And if the prime mover of the case has already decided to ignore the Court's ruling anyway, one is driven to ask what the purpose of the exercise was.

The Court may well 'invite' (it cannot require) the parties to engage in dialogue to tackle outstanding practical problems and settle the basis of their future relations in the interests of regional stability. Serbia itself has made clear it will seek a UN General Assembly resolution on re-opening 'negotiations'. Kosovo is deeply wary of engaging in any such exercise. The US and the EU have already been urging the parties to dialogue, but have excluded re-opening basic status questions. Some form of direct, face-to-face dialogue looks inevitable, but it will certainly be a painful process to get the two parties round the table on an agreed agenda when their respective interests, expectations and objectives remain diametrically opposed. Thus politics, not the Court's ruling, will determine when and on what terms any forward movement takes place.

One – if not *the* – key factor in breaking through the current political stalemate is overcoming the division within the EU on Kosovo. Member states have so far been divided, with Spain, Greece, Romania, Slovakia and Cyprus taking what looks like a rather fundamentalist position against recognition. But if none of the twenty-two other member states can be expected to reverse their recognition (which would be unprecedented in international practice), we have to look to the 'dissident five' to break the log-jam. Some see signs of readiness in Greece, and perhaps Spain, to realign themselves with the EU majority, in which case, Slovakia and Romania may follow suit. On the other hand, Cyprus is intractable; recently, it declared it would not recognise Kosovo even if Serbia itself did – a bizarre position that colourfully illustrates the obstacles in the way of coherent EU foreign policy-making.

The EU badly needs greater coherence in its Balkans policy. The 'Thessaloniki' promise that the whole of the Western Balkans belongs in the EU is simply not credible as long as there is divi-

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sion on Kosovo. Its unresolved status is a poisonous source of instability in the region and a serious obstacle not only to Kosovo's, but also to Serbia's prospects of eventual accession. Yet it is hard to see how a new EU consensus will be forged. Perhaps the 'friends of Serbia' will try to find a way to persuade the others that Serbia can be allowed to advance along the accession path without a resolution of the Kosovo issue. At least some of those who have recognised Kosovo (such as Italy and Austria) may be willing to explore the modalities of such a compromise, but we can be fairly sure that the UK, France, Germany, and the Netherlands (among others) will not.

Not only is there the unhappy precedent of admitting Cyprus as a divided country, it is also certain that Serbia, once in the EU, would use

every opportunity to block Kosovo's promised 'European perspective'. Both Greece and Slovenia – notwithstanding their fervent advocacy of accelerated EU enlargement to the Balkans – have blocked EU aspirants Macedonia and Croatia over strictly bilateral dis-

putes, and Serbia will do the same. Why then should Kosovo exert itself to meet the EU's stringent conditions, if the EU is not ready to pay it the minimal courtesy of recognising its statehood?

A further point no-one seems yet to have noticed is that if the EU were to engage in the extraordinary legal contortions required to pave Kosovo's path to EU membership as a non-state entity, a veritable flood of others within the EU (Bavaria? Scotland? Catalonia, the Basque country?) would be anxious to claim the same privileges – voting rights in the Council, representation in the European Parliament, and so on. Yet surely this is the very nightmare scenario that underlies the refusal of Spain, Romania and Slovakia to recognise Kosovo!

If all of this strongly suggests that the only serious, realistic way forward for the EU's Balkans policy is for all member states to recognise Kosovo, it does not of course follow that this will happen. Widespread 'enlargement fatigue' and preoccupation with the huge challenges to the future of the EU posed by the economic crisis and the profound strains in the eurozone are reasons enough to push the Balkans further down the EU's agenda. So we must look for change from within the Western Balkans itself to re-ignite EU interest in the region. What sort of change?

Firstly, the EU needs to see a radical breakthrough in relations between Serbia and Kosovo to produce a viable basis for both to be accepted as future EU members. The EU could only allow Serbia to join without recognising Kosovo if a durable bilateral arrangement were in place between Serbia and Kosovo that could be guaranteed not to create havoc in the normal internal workings of the EU. There are precedents: for example, the UK and Ireland joined with the Northern Ireland issue unresolved, but they took great care to keep the issue well away from EU business. However, the EU will look much more sceptically at Serbia and Kosovo, both far less mature and stable democracies than the UK and Ireland. Some have proposed as a model the 1972 Berlin Treaty, which regulated relations between the Federal Republic and the GDR in the Cold War period, allowing them to interact on a day-to-day basis while leaving the question of recognition to one side. However, quite apart from the special disciplining effect of the Cold War context, when one looks into the mutual obligations imposed by the 1972 Treaty (such as the commitment to develop normal relations based on equal rights, respect for the independence, territorial sovereignty, and full autonomy of each party in both the internal and external arenas, and so forth), one is driven to ask whether Serbia would find these any easier to accept than outright recognition of Kosovo.

Serbia has recently been mooted partition as a way to a durable settlement, but it is far from clear how serious they are about this. The US and

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»»»» the EU have ruled out partition as a topic of future dialogue between Serbia and Kosovo. The US, as Kosovo's staunchest international backer, is not ready to see its territory put in question. Both the US and the EU understandably reject partition because of its explosive potential for the whole Balkans region, above all for the precarious stability of Macedonia, and the barely-contained instability of Bosnia-Herzegovina. Still, some argue that partition has not yet fully exhausted its possibilities when thinking about the future of Serbia-Kosovo relations.

There is a symmetry in the predicament of the two sides that could conceivably be the basis for a deal. Look at it this way: Serbia could decide that it simply has no interest in recovering the whole of Kosovo, impoverished, implacably hostile and ungovernable from Belgrade. But Serbia does effectively control the northern part, now inhabited overwhelmingly by Serbs. Kosovo, on the other hand, could decide that it has no interest in seeking to recover control over the north, impoverished, implacably hostile and ungovernable from Pristina. The internationally-sponsored dialogue expected to start after the ICJ opinion is likely to include renegotiation of the status of the north to permit Serbia some permanent role in the area, which Kosovo will see as an intolerable, indefinite challenge to its statehood and sovereignty. It may therefore prefer to avert this by ceding that territory to Serbia, in exchange, naturally, for Serbia's recognition of Kosovo. This would oblige Serbia to cease its efforts to mobilise the remaining Serbian communities south of the river Ibar against the Kosovo state; but it would not preclude Kosovo being held to its commitment to implement the Ahtisaari plan provisions for those Serbian (and other non-Albanian) communities.

To make a settlement along these lines of work presupposes fundamental change in deeply ingrained political behaviour and perceptions of their interests by both sides, which is most unlikely. The US and the EU would only contemplate putting aside their deep reservations about partition if there was sufficient evidence of genuine will on the part of both Kosovo and

Serbia permanently to settle their mutual relations on this basis. The initiative for such a settlement would have to come jointly from Serbia and Kosovo. But if this were the case, then the US and the EU might feel more confident that the threat of a 'domino effect' in the region could be contained.

At present, however, it seems that Serbia is interested in securing a permanent foothold on Kosovo territory, not only in the north but throughout the Serbian-inhabited areas. Does Serbia really want to bring the politically turbulent, radicalised Kosovar Serbs of the north into Serbia itself – after all, these 'hard men' are no friends of President Tadic's Democratic Party and the current Belgrade government. Thus Serbia is not interested in a settlement based on a 'clean break' as suggested above. And as long as the EU remains divided over Kosovo, Serbia has no strong incentive to change its approach. But states' perceptions of their interests can and do change: for example, the UK has accepted that it has no interest in retaining Northern Ireland, once a majority of the people who live there decide they want to join the Republic of Ireland. So it cannot completely be discounted that a future government of Serbia might decide similarly, especially if it saw the status quo with Kosovo as an intractable obstacle to its EU integration – which it does not at present.

Kosovo's leaders argue that partition would change the terms of the Ahtisaari plan, whose far-reaching obligations to decentralisation and minority self-government they have found politically onerous. They say they could not sell the 'loss' of the north to their people, while still upholding the Ahtisaari obligations towards the remaining Serb communities. It's a pity they see these provisions as an unfortunate 'concession' rather than as the basis for building a cohesive body politic based on inclusive pluralism. But that is only natural when Serbia exploits the Kosovo Serb communities as an arm of Belgrade politics. But if Serbia were prepared to recognise Kosovo, and consequently to stop behaving in this way, then Kosovo should come to see generous minority rights as a source of strength rather than weakness.

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Now let us leave the realm of speculation, and return to what can be done today. The priority is to accelerate and deepen state-building in Kosovo. This is primarily the responsibility of its leaders themselves, and really does not depend on how many states recognise Kosovo or how soon it can become a member of the UN. The division within the EU does not prevent effective state-building – quite the reverse. EU financial and technical assistance has not been interrupted, and even the tricky question of visa liberalisation for Kosovo is being resolved by all member states' preparedness to recognise Kosovo passports, even if they do not recognise the state. Kosovo has no excuse for its poor performance in state-building: waiting for the ICJ opinion has been a diversion from these key tasks. In fact, were Kosovo now to make bold and determined progress in consolidating its *effectivité* as a state, this would do much to weaken the resistance to recognising it among the remaining five EU member states.

Finally, the region can help itself on the way to faster EU integration through better regional cooperation. The convolutions surrounding the participation of Serbia and Kosovo in ambitious regional conferences organised by Slovenia and Spain in the first half of this year were exasperating and disappointing. In the wake of that, however, a hopeful development was the 'mini-summit' of the four Presidents of Albania, Kosovo, Macedonia and Montenegro, held on 25–27 June in Kosovo – the third in a series previously hosted by Macedonia and Albania. Although the outcome of the summit was far from earth-shaking, it was nevertheless a welcome sign of the capacity of regional states to cooperate, and it gave a boost to Kosovo as host of its first regional summit. Discussion focused on fostering the movement of people and trade among these states.

There is already a raft of high-level bilateral agreements between these four countries that provide the basis for faster, more concrete developments in cross-border cooperation – an area in which substantial funding can be obtained from the EU's pre-accession funds. The ground is thus prepared for local-level and civil society initiatives 'from

below' to bring these formal agreements to life. International donors could help by prioritising projects in these states with a cross-border dimension. These four states have a common interest, as the smallest states in the region, in working together to increase their regional influence and demonstrating their capacity to coordinate and mutually support their EU-related reform programmes. Macedonia (waiting for a date to start accession negotiations) and Montenegro (waiting for EU candidate status) gain by demonstrating to the EU their readiness to act constructively with their neighbours, despite Serbia's attempts to bully them on Kosovo. Kosovo stands to gain a great deal, not only from the symbolism of hosting a regional summit, but also strategically, by working with its neighbours to develop really deep, effective and multiform cross-border relations that might, in due course, provide a model for its future relations with Serbia.

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