



Research Institute on State-building in Kosovo

Report of the Academic Conference held in Pristina, 4 July 2010

'What effects will the ICJ advisory opinion have on Kosovo's independence? What should the position of Kosovo be?'

CONFERENCE PROGRAMME

9.00 Registration and Coffee

9.30 Welcoming Remarks

Labinot Greiçevci, Conference Chair, Centre for EU Studies (Ghent University).

9.45 First Panel: *What post-ICJ advisory opinion on Kosovo's independence?*

Which should be the position of Kosovo?

-Public International Law Perspective-

Panel Chair: RISK Representative

Speakers:

Prof. Dr. Stefan Talmon

University of Oxford

Prof. Dr. Enver Hasani

University of Pristina

Dr. Marc Weller

University of Cambridge

Prof. Dr. Marc Cogen

Ghent University

Dr. Jean d'Aspremont

University of Amsterdam

11.15-11.30 Coffee Break

11.30.-12.30 Discussion

12.30-14.00 Lunch

14.00 Second Panel: *What post-ICJ advisory opinion on Kosovo's independence?*

Which should be the position of Kosovo? - Political Perspective-

Panel Chair: Ghent University Representative

Speakers:

Prof. Dr. Richard Caplan

University of Oxford

Prof. Dr. Marie-Janine Calic

Ludwig-Maximilians-Universität München

Prof. Dr. Judy Batt

University of Birmingham

Dr. Nicholas Whyte

Independent Diplomat (The Diplomatic Advisory Group)

Dr. Florian Bieber

University of Kent

15.30-15.45 Coffee Break

15.45-16.50 Discussion

16.50-17.00 Conclusions

The following report is a product of presentations and discussions as it is indicated in the agenda of conference. This report has been prepared by the coordinating team of the conference that consisted of researchers from the Centre for EU-Studies (Ghent University) and the Research Institute on State-building in Kosovo (RISK).

I. Introduction

This report presents discussions and conclusions of presentations made by various experts during the conference on *‘What effects will the ICJ advisory opinion have on Kosovo's independence? What should the position of Kosovo be?’* The conference was organized by the Center for EU Studies, Ghent University and Research Institute on State-building in Kosovo, and held in Pristina, 4th July 2010. It included well-known academicians from Universities of Oxford, Cambridge, Ghent, Munich and Amsterdam, as well as local experts and practitioners interested in the topic. In order to achieve the intended research objective, discussions and conclusions were divided in two parts.

In order to achieve sub-objective of the first part of conference, first panel presented various topics on Kosovo and the anticipated International Court of Justice (ICJ) advisory opinion. The panelists discussed and presented different scenarios of the research objective through the public international law perspective. Panelists presented the main Kosovo and Serbian arguments submitted before the ICJ and their impressions on the performance of both countries related to the topic. Second, panelists presented the history of various cases that were treated such as *‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’* or *‘Legal Consequences for States of the Continued Presence of South Africa in Namibia’* and other advisory opinions rendered by the ICJ. Also, the implications of ICJ advisory opinions were presented and it’s applicability on adversarial parties. Then, the discussions focused on the main arguments, strengths and weaknesses of Kosovo arguments presented before the Court. Several conclusions related to the Legal Consequences of the ICJ advisory opinion on Kosovo were discussed and possible strategies that might be followed by Kosovo.

In order to achieve sub-objective of the second part of conference, panelists presented various topics on political implications of the ICJ advisory opinion. The present political situation and positions taken by Kosovo and Serbia related to the topic were presented. It was stressed the importance of Kosovo to follow EU path and the way Kosovo handles homework duties as an important element that might reflect on further recognitions. The possible scenarios on political

landscape after ICJ advisory opinion were presented and EU's possible pressure on new talks between Pristina and Belgrade government were brought forth. Different suggestions on possible strategies such as 'Promoting Regional Cooperation', 'Keeping a clean government' should be promoted in order to enforce possible further recognitions. The following sections of this report do discuss the main findings, ideas and recommendations in relation to this topic.

II. Background and Context

On the 8th of October 2008, the General Assembly of the United Nations adopted its resolution A/RES/63/3 (A/63/L.2) (initiated and sponsored by Serbia and its allies), with which it requested the International Court of Justice (ICJ) to render an advisory opinion (AO) on Kosovo's Declaration of Independence. In other words, the ICJ was asked to render an advisory opinion on the question of accordance with International Law of Kosovo's Declaration of Independence (DoI). Consequently, over the past 20 months, the ICJ has worked on its advisory opinion on the issue at stake. The Court has recently announced that it will deliver its advisory opinion on 22 July at 3 p.m. It is assumed that this opinion will have several implications for Kosovo, for the Balkans and wider for the international law and relations. Therefore, the implications that this advisory opinion might have for Kosovo and wider in the context of international law and relations raises important research questions and one of the main - or general ones is the following: *What post-ICJ advisory opinion on Kosovo's independence? Which should be the position of Kosovo?*

III. Methodology

In terms of **methodology**, the predominant approach of the Conference has been one that is based on probable scenarios, or what Harold Lasswell calls, "developmental constructs," dictated by the very nature of the issue at hand, which lacking the ultimate result, is characterized at this stage by a multitude of questions and themes and dilemmas, etc. Therefore, the underlying philosophy and objective of the participants has been to identify the many relevant questions and answers rather than to confine to a single answer, which is probably also impossible under the

circumstances. Within this plural setting, the participants were bound by the inescapable necessity of assessing, from both the political perspective and the perspective of Public International Law, the consequences of this opinion for Kosovo, as well as the wider regional and international context.

IV. General Observations

The panel that has examined the issue from the lenses of Public International Law has identified several relevant aspects that surround the matter that is before the Court.

The prevailing observation has been that the issue before the Court involved highly political considerations and that, whatever the outcome, the *affected* parties, in particular Kosovo and Serbia, shall use it for political purposes.

Despite the political aspects of the question, the participants have been of the view that **it is unlikely for the Court to decline to answer the question put before it by the UN General Assembly**, given its role as the principal judicial organ of the United Nations and the fact that the request came from one of the principal organs of the organization, the General Assembly. Further, it is the first time that all five permanent members of the Security Council have participated in a proceeding before the Court, the first time the Court has been asked to consider the legality of a Declaration of Independence (DoI), and measured by the number of participants in the proceedings, it is the largest case in the history of the Court.

Although the Statute of the Court leaves discretion as to whether or not the Court will give an advisory opinion that has been requested of it, in the history of the Court there has been no refusal to render an advisory opinion, based on the discretionary power of the Court, to act upon a request for advisory opinion.

It has also been observed that **the Court is traditionally reluctant to give views which it knows do not correspond with the political realities**. Therefore, a declaration by the Court that

Kosovo came into being in violation of International Law will not be attractive, as Kosovo will of course not disappear in consequence. On the other hand, **the Court**, also known as a legally conservative body, **will also be quite reluctant to create law in an area where States have been hesitant to do so**. In particular, it has been suggested that the Court may not wish to endorse claims to self-determination that go beyond the colonial context.

While it has been suggested by some that the post-ICJ developments, including the manifestation of possible actions, will depend on the content of the advisory opinion, others have outlined concrete scenarios and possible actions or reactions by the interested parties.

The ICJ Advisory Opinion is unlikely to alter the political landscape significantly. Serbia and Kosovo will certainly not change their basic positions. States that have recognized Kosovo will not ‘de-recognize’ Kosovo, even if the ICJ ruling is judged to be unfavorable towards Kosovo. (It is more likely to be a mixed ruling that gives some comfort to the position of Belgrade and some support to the position of Kosovo.). A favorable enough opinion from Kosovo’s standpoint may encourage some more states to extend recognition but it is difficult to know how many more states will follow suit (some 30 anticipated). China won’t be among them. Nor will Russia. And nor will India. These are three major powers, the first two of which, as permanent members of the UN Security Council, can block Kosovo’s admission to the United Nations.

What is important is what the EU will choose to do, not that it has much power to cut this Gordian knot either. The Kosovo issue is a sore point for the EU, which wants to be able to achieve greater credibility with regard to its common foreign policy, especially now that the Lisbon reforms are being implemented, but is unable to do so in its own backyard in part because of the five outlier member-states that have not recognized Kosovo: Spain, Slovakia, Cyprus, Greece and Romania. Those member states that have not extended recognition are unlikely to alter their positions whatever the ICJ opines, largely because of domestic concerns, however real or exaggerated those concerns may be.

In all likelihood the EU will continue to do what it has been doing, which is to try to deflect attention away from the recognition issue and to focus attention on the ‘European perspective’—

i.e., the process of accession—however distant that prospect may be, for Kosovo in particular. The Advisory Opinion is unlikely to change the political landscape significantly but what it may do is to increase pressure for renewed negotiations—not over the status of Kosovo, which Kosovo and its backers would not accept, but over a host of other issues, one of which is the administration of northern Kosovo. Where will the pressure for new talks come from? From Belgrade, among others—this is why Serbia will not welcome the ICJ opinion as an opportunity to put the Kosovo question behind it by claiming the high moral ground and then moving on. To judge from Serbia’s diplomatic activity of the past six months, if ‘moving on’ means taking Kosovo off Serbia’s agenda that is not likely to happen. Rather, Belgrade will use what is favorable to it in the opinion to press for concessions from Pristina. Serbia may even seek another UN General Assembly resolution, this one calling for renewed talks.

V. Principal Scenarios and Strategies

Several scenarios have been advanced by the participants. A set of three principal scenarios has been particularly discussed. This would involve the following situations: (1) Question will be answered in the affirmative (*i.e.*, the DoI is in accordance with International Law); (2) Question cannot be answered because international law does not provide any rules on Declarations of Independence; and (3) Question will be answered in the negative (*i.e.*, DoI not in accordance with International Law).

- (1) Under the **first scenario** (*i.e.*, DoI in accordance with International Law or not in contradiction with International Law), Kosovo would *win*. Yet, the participants have warned that the narrow scope of the question and the potential answer might politically work in favour of *Serbia* which *could continue to claim* that the Court did not pronounce on these questions and thus Serbia’s view as to statehood and recognition would still be relevant, and that for that reason States should not recognize Kosovo as a sovereign and independent State. It has been also noted, however, that such arguments may be less persuasive depending in particular on *how well Kosovo will use a favourable Advisory Opinion* in the political discourse. Moreover, this would provide an opportunity for the

five EU member states which have so far not recognized Kosovo to do so. Greece and Spain might be ready to do this, given that their divergence from the EU majority has been politically inconvenient for them (especially in light of their weak economic situations). If these two were to revise their position, Slovakia might follow suit; but Romania and Cyprus seem to have adopted particularly hard positions against recognition that would not be easy to back down from. But recognition by Greece and Spain could alter the political dynamics within the EU significantly, and thus have an impact on Serbia.

- (2) **In the second scenario:** Question cannot be answered because international law does not provide any rules on the Declaration of Independence. This would ultimately mean that the Declaration of Independence is in accordance with International Law. Since there is no International Law on the subject there cannot be a breach of any obligation under International Law. In other words, whatever is not expressly prohibited under International Law is allowed. The legal consequences of this scenario – it is stated – would be much the same as in the first scenario (*i.e.*, questions of statehood and recognition will still be open).
- (3) The **third scenario** refers to the **negative answer by the Court** to the question put to it by the General Assembly (DoI by PISG not in accordance with International Law). What would be all known in this case is that DoI is not in accordance with International Law, meaning the PISG did breach an obligation incumbent upon it under international law when it unilaterally declared independence. Such a finding would imply questions of responsibility under International Law. Under International Law, the actor who has committed the breach of international law or its successor is under an obligation to make restitution that is it must re-establish the situation which existed before the wrongful act was committed, provided that restitution is not materially impossible and it is not disproportionate. The further question that can be made is (1) what kind of obligation is the obligation not to make a DOI; and (2) to whom is that obligation owed.

Whoever may invoke Kosovo's obligation to make restitution, only Serbia as the injured State would be allowed to take non-forcible countermeasures against Kosovo, *i.e.* acts that would otherwise be illegal under International Law which may be taken in response to an illegal act. It has been, however, suggested that there is essentially nothing to worry about in such a case, as Serbia is already making life difficult for Kosovo wherever it can. In this scenario those states (or at least most of them) which have recognized Kosovo will not de-recognize it, but further recognitions are likely to come to a halt for the time being. The USA will continue to support Kosovo. The division within the EU over recognition will not disappear for the foreseeable future. The incoherence this has produced in the EU's regional policy for the Balkans will become intolerable. This could lead to a change of policy, although it is hard to see in what direction unless a new consensus is forged among member-states. Given current positions among member states, 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 recognized Kosovo (*e.g.*, Italy, Austria) may go along with this, but we can be fairly sure that the UK, France, Germany, and the Netherlands (and others) will not. On the other hand, the strongest supporters of independent Kosovo will be hard pressed to persuade all the others that Kosovo must be offered the same chance of integration into the EU as the rest of the Balkans, even if they don't all recognize it as a state. Thus in the absence of unanimity on the fundamentals of the Kosovo question, EU policy will continue to drift and the Balkans will remain consigned to a place rather far down the EU's agenda. Serbia will ask for a UN General Assembly resolution perhaps demanding a new framework for status negotiations (probably involving partition), but the USA will not be willing to go along with this. It is hard to see the EU being capable of taking the lead on negotiations to redraw borders in the Balkans, even if it were willing to do so – which it won't be in the context of a split UN Security Council.

Nevertheless, the USA and the EU will urge Serbia and Kosovo to engage in dialogue over practical matters. In the long run, this might alleviate the everyday conditions of life of the Kosovo's Serbian minority. But for the foreseeable future, everyone will lose if the ICJ chooses this option: persistent ambiguity over status will block Kosovo's 'European

perspective' and will also bedevil Serbia's progress towards EU accession, while the EU will suffer continued erosion of its international credibility. The USA will lose interest in the matter.

If the Court sticks to the question, it will not say anything about: the statehood of Kosovo; the right of the people of Kosovo to self-determination; whether or not other States are under an obligation not to recognize Kosovo; and whether Kosovo can be a member of, or join, international organizations. In particular, the question of recognition is an entirely different question, as States may recognize a State that has come about by DOI, even if that DOI is not in accordance with International Law. States that have recognized Kosovo may thus argue that they are not prevented by International Law from doing so; the Court's Advisory Opinion could not be used against them.

The narrow scope of the question and the limited answer thus would also work politically in favour of Kosovo and States which have recognized Kosovo as an independent State as they can continue to claim that the Court did not pronounce on questions of statehood and recognition and that Kosovo, despite its DoI having been found not to be in accordance with International Law, nevertheless constitutes a State under International Law that may be and should be recognized.

VI. Other Scenarios or Sub-Scenarios

The three principal probable scenarios outlined and discussed above may be further divided into other sub-scenarios, in particular if the Court decides to divide the question into sub-questions or to expand its scope. Such would be the case **if the Court finds that the DoI has not contravened any applicable rule and principle of International Law**, as no such rules and principles exist in the general international law; yet, **however, the DoI constitutes an illegal act of the PISG under Resolution 1244** of the Security Council. Although at first this will seem to satisfy no-one, and simply return us to the *status quo ante* the ICJ, but it will offer opportunities to everyone. Essentially, a 'don't know/won't give an answer' response by the ICJ puts the issue

back where it properly belongs – in the sphere of politics (understood as a creative problem-solving approach to handling conflicts of interest).

Within the EU, the pressure would be on the non-recognizing member states either to change their position on recognition of Kosovo on pragmatic grounds, or to come up with a credible plan for integrating Kosovo without their formal recognition of it as a state. The former is likelier to prove the easier and more straightforward option, because the majority is not going to de-recognize Kosovo. Finding a common EU position on how Kosovo can be offered eventual EU membership while not being recognized by all as a state looks to me infinitely tricky. And without a common position, EU Balkans policy is stuck. If the whole EU recognized Kosovo, this would have an enormous impact on Serbia. Given the opportunities for movement forward in this scenario, the USA would continue to be actively engaged and work in concert with the EU.

a. Kosovo

In such a scenario, *the authorities of the Republic of Kosovo* would have to utilize the opinion in such a way as to respond that the Court has been asked to pronounce on the accordance of the DoI with international law, and that Resolution 1244 is an act of a political organ of the United Nations, not a rule or principle of international law.

b. Serbia

The *Serbian authorities*, on the other hand, could pursue the claim that nonetheless an act of a UN organ duly authorized by the UN Charter has been violated.

Another probable variation or sub-variation could be the Court's ultimate finding that the question of finding a political settlement involves highly political considerations, and this being the case, **the parties should pursue further talks with a view to reaching a mutually-agreed solution.**

a. Possible Reactions by authorities in Belgrade

In this, the *authorities in Belgrade* would intensify their call for status negotiations and continue to pursue more aggressively their request for renewed talks.

b. Possible Reactions by authorities in Pristina

On the other hand, the *authorities in Pristina* can respond in such a way that this is only a recommendation, lacking any legal content and having no legally-binding effect. The political process for the final status settlement required by resolution 1244 has been launched by, and conducted under the auspices of, the UN; and the process has been completed after the UN Secretary-General's full support of the Special Envoy's recommendation on independence and one final effort by the Troika. Further negotiations are thus pointless and could be disruptive to the peace and stability of the region, to which independence has so meaningfully contributed.

VII. Conclusions

Do not expect an overnight solution to the 'status chapter'. *None* of these scenarios offers a 'magic bullet' for Kosovo. While a certain wave of new recognitions may follow in all scenarios apart from the third scenario, accession to UN membership requires UNSC unanimity. That awaits change in Russia's position at least. UN membership is desirable, but for now may not be essential. A common EU position on Kosovo recognition is much more important, because it opens the way to immediate practical benefits, e.g., visa-free travel regime, SAA etc.

The overall conclusion of the conference has been that the importance of the Advisory Opinion cannot be underestimated. Its strength that is based on the authority of the Court as the principal judicial organ of the United Nations, as well as its impact, is perhaps to be especially manifested in the political arenas.

The broader conclusion has indicated that whatever way the Advisory Opinion will go, there will be no clear-cut winner. However, even if the Court answers the question in positive (meaning DoI is in accordance with International Law), Serbia is unlikely to abandon its opposition to Kosovo's statehood.

The legal and, more importantly perhaps, the political debate and the battle for the recognition of Kosovo will continue. The predominant methods for achieving the parties' objectives will in essence remain the same. Within the UN system, the debate is likely to occur in the General Assembly, the organ that has requested the Opinion. In any event, the practice suggests that the GA would pass a resolution once it receives the Court's requested Advisory Opinion. Although the GA's resolution constitutes only a recommendation, the Belgrade authorities have made clear that they aim to use it for their political objectives (*i.e.*, to resume talks on Kosovo's status). A counter-reaction by those UN Member States that have recognized and support Kosovo is not beyond the reach. Yet, the content of the resolution should in principle depend and in fact can significantly depend from the content of the Advisory Opinion itself. Beyond the UN, the battle will continue through direct and indirect means of lobbying (from Pristina and Belgrade, as well as their supporters), persuading or influencing non-recognizing States to take their desired decisions.

VIII. Additional General Recommendations

What should Kosovo do in the meantime?

First, once the ICJ opinion has been released, Kosovo should lobby for more recognition, for which purpose it will need the active engagement of the United States and leading states in the EU, such as Britain and France. It should also seek to join whatever other international organizations will admit it, including perhaps the European Bank for Reconstruction and Development and the Council of Europe.

Second, Kosovo needs to keep its own house in order, which means clean government, an accommodating posture towards Kosovar Serbs (and other minorities), as part of broader efforts to implement the Comprehensive Settlement Proposal.

Finally, Kosovo should seek to promote greater regional cooperation. The 'mini summit' held in Prizren on 26 June, that brought together the presidents of Kosovo, Macedonia, Montenegro and Albania, is precisely the kind of regional diplomacy it should be pursuing.

In this line of regional cooperation, are also important Kosovo's relations with Serbia. However, even in the most favourable case for Kosovo, namely ICJ's full support of the legality of Kosovo's independence, Serbia will most likely not accept such an opinion. Since the ICJ opinion is legally not binding, there is no guarantee either that it will lead to full international recognition immediately. As it stands now, the unresolved relationship with Serbia produces basic political, legal, and security related uncertainties that affect the business and investment climate. It should be noted that Serbian obstruction to Kosovo's independence causes direct and indirect costs for both countries (higher security costs, decline in investment). However, since Serbia is bigger, and its economy is stronger, these costs can be relatively small for Serbia and comparatively larger for Kosovo. Normalization inside the region is a prerequisite for the European integration process. Kosovo should take an active role in normalising her relations with Serbia and search for common ground on technical issues first. It is hardly conceivable that the EU would move towards more commitment towards the region if there was not substantial normalization process between Kosovo and Serbia and within the entire region. Kosovo should be forward leading and should appear to be the party demanding that negotiations happen. We know that neither side is particularly enthusiastic about talking to the other, but it is important for Serbia to be exposed as the recalcitrant partner and for every speech from a Kosovo official to talk about how much Pristina looks forward to the normalization of relations with Belgrade and to including Serbia in the circle of good relations Kosovo enjoys with the rest of its other neighbors. Urge Serbia to wake up to reality and reiterate that Pristina is ready and willing to solve the problems at anytime and anywhere. That would look very good – it would portray Kosovo as problem solvers, as the proactive party willing to reach a settlement with neighbors and expose Serbia's reluctance if they indeed are reluctant. The goal here is to reach an agreement with Serbia and it would be a good thing, and Kosovo should say this. In this respect the most important question for a dialogue is whether or not territorial adjustments between Serbia and Kosovo are possible and how to ensure that these would have no negative repercussions for Serbs living in Southern Kosovo, Albanians living in Serbia and other regional borders. It should be noted that border adjustments are controversial not just in Kosovo and Serbia, but also among many governments in the region and elsewhere which fear a knock on effect. Finally, it is thus important to emphasis that any such change would be only acceptable if

freely negotiated by the governments of Kosovo and Serbia as the change of a border between two countries and thus in line with OSCE and UN principles and closing the door to any other ways of border changes or partitions.