

The International Position of Kosovo After the Advisory Opinion of the International Court of Justice

Panorama

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Kosovo – Partial Progress, Paralysis and Recognition

Over three years on from its declaration of independence from Serbia following the breakdown of negotiations over its final status, Kosovo continues to struggle for broader acceptance within the international system, despite the backing of many of the world's leading powers. Though it is recognised by 75 UN Member States (at the time of writing), the EU remains divided over the issue, leaving Kosovo's EU accession prospects shrouded in uncertainty. With lingering doubts about its economic viability and capacity to tackle organised crime and corruption, and in the midst of a spate of war crimes accusations against the Kosovo Liberation Army (KLA), Kosovo continues to struggle to secure new recognitions. The Kosovo question remains a source of considerable debate and conjecture, not only because of its relevance for other cases of contested statehood, but also because of its implications for the deployment of UN missions into crisis situations marked by secessionist tendencies. How the Kosovo issue is ultimately resolved, therefore, will have important ramifications for conflict resolution efforts elsewhere in the coming years.

Though Kosovo has secured membership of the International Monetary Fund (IMF) and the World Bank since unilaterally declaring independence on Febru-

ary 18 2008, five EU Members States – Spain, Cyprus, Greece, Romania and Slovakia – continue to withhold recognition. Each country fears that the Kosovo precedent could have damaging implications for their own internal politics; for the Basques and Catalans in Spain, Cyprus and the unrecognised Turkish Republic of Northern Cyprus, and Romania and Slovakia with their respective Hungarian minorities. Whilst these divisions did not prevent deployment of the status-neutral EULEX (EU Rule of Law Mission in Kosovo) – the largest EU civilian mission ever launched under the Common Security and Defence Policy (CSDP) – they do continue to impede Kosovo's EU accession prospects. Whilst other countries in the Western Balkans have secured visa liberalisation, Kosovo remains without a visa roadmap that would lay out the conditions required for joining the white visa list. Though the European Parliament has on several occasions called for a common approach towards Kosovo, the current stalemate looks unlikely to end anytime soon, leaving the EU with the difficult task of persuading Kosovo that it ultimately has a membership perspective.

The ICJ Ruling – An Opportunity Lost?

Vehemently opposed to Kosovo's independence, Serbia's primary course of action has revolved around its October 2008 request to the United Nations General Assembly to refer the issue to the International Court of Justice (ICJ) in order to consider whether "the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo [is] in accordance with international law?".

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The ICJ issued its much-anticipated advisory opinion on July 22 2010, in which it declared, by ten votes to four, that “general international law contains no applicable prohibition of declarations of independence” and therefore the events of 17 February 2008 “did not violate general international law.” Thus, the ICJ essentially ruled that Kosovo’s declaration was neither legal nor illegal; simply that international law doesn’t address such matters.

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Though non-binding, the ICJ’s ruling was expected to spark a flood of recognitions for the nascent state by removing some of the existing uncertainties regarding Kosovo’s status. That these failed to materialise can in part be attributed to Serbia’s successful diplomatic campaign and, more importantly, to the fact that the ICJ employed a narrow interpretation of the question posed. As the ICJ noted, the General Assembly “does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognised it as an independent State.” By refusing to address either “the status of the acts of recognition” or whether the declaration had indeed led to the establishment of State – namely, the declaration “severed from its legal effects” – the Court’s Opinion provides little guidance to the UN General Assembly (“the requesting organ”), as a dissenting opinion by Judge Bennouna argued. The ICJ’s ruling therefore failed to provide the clarity sought by many countries uneasy about recognising Kosovo’s independence, particularly with respect to questions concerning the right to self-determination or succession.

The persuasive power of the ICJ’s opinion has also been diluted by some of the legal intricacies employed by the Court. The assertion, for instance, that the declaration was adopted during a special session of the Kosovo Assembly by those acting “together in their capacity as representatives of the

people of Kosovo outside the framework of the interim administration,” not by the Provisional Institutions of Self-Government of Kosovo. As such, the declaration’s authors were deemed not to have exceeded the constitutional framework for self-governance established under UNMIK (UN Interim Administration Mission in Kosovo) regulations. Judge Bennouna, for one, notes that “there was no doubt in the minds of the Secretary General and his Special Representative in Kosovo that the declaration was in fact the work of the recently elected Assembly of the Provisional Institutions of Self-Government of Kosovo” and that “all those living in Kosovo must comply with the regime of self-government established by the United Nations.”

Kosovo’s International Standing – Repairing or Reiterating its Reputation?

With the expected post-ICJ windfall of recognitions having failed to materialise, attention has again turned to Kosovo’s diplomatic efforts to justify its independence. Prior to and since its unilateral declaration, Kosovo has struggled to persuade sceptics that it is an economically viable state, capable of prospering without international donor assistance and remittances from its extensive Diaspora. Kosovo remains one of the poorest regions in Europe, with unemployment at around 40%, average annual per capita incomes of approximately €2,000 and some 37% living in poverty. With tens of thousands of young people entering the labour market each year, Kosovo faces a challenging socio-economic dynamic. Though rich in natural resources, such as lead, lignite and copper, exploiting these reserves will require considerable investments in new technologies and transportation infrastructure, particularly to end the daily power blackouts that hamper industrial production.

Kosovo’s international standing has been further impacted by a report by the Council of Europe’s special rapporteur, Dick Marty, entitled *Inhuman treatment of people and illicit trafficking in human organs in Kosovo*, which was adopted by the Council of Europe’s parliamentary assembly in late-January. Marty’s report makes a number of serious allegations against Kosovo’s current Prime Minister and former political leader of the Kosovo Liberation Army (KLA), Hashim Thaci. Aside from the allegations of “disappearances, organ trafficking, corruption and collusion between organised criminal groups and politi-

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THE STABILISATION AND ASSOCIATION PROCESS (SAP). Serbia, Bosnia and Herzegovina, Albania and Kosovo (pursuant to UN Security Council Resolution 1244). On 21 June 2003, the Thessaloniki Summit of Heads of State and Government of the EU and the Western Balkans confirmed the EU membership prospects of the Western Balkan countries acknowledged at the Santa Maria da Feira European Council (19 and 20 June 2000) and added to the conclusions of the EU-Western Balkans Summit held in Zagreb on 24 November 2000. Thus, at the Thessaloniki meeting, the **Stabilisation and Association Process** was established as the EU's policy for the Western Balkans with a view to supporting these countries in their efforts to establish a progressively closer relationship with the EU that would culminate in their accession. Such a prospect acts as an incentive for these countries to undertake effective political, economic and social reforms. In exchange, the SAP allows the participating states to benefit from financial aid and technical assistance, as well as free access to the single European market. The components of the SAP that enable fulfilment of its objectives make up the so-called **Pre-accession Strategy** and are as follows:

- **THE STABILISATION AND ASSOCIATION AGREEMENT (SAA).** The SAP between the EU and a given country is formalised by means of an **SAA**, the objectives of which are the country's stabilisation and swift transition to a market economy, the strengthening of regional cooperation and, ultimately, the country's accession to the EU. Once signed, the SAA must be ratified by the EU's institutions, each Member State and the country concerned. During this ratification period, the trade relations with the signatory state are regulated by means of an **Interim Agreement on trade and trade-related matters**.
- **ACCESSION PARTNERSHIP (AP).** Approved by the European Council by qualified majority, at the proposal of the Commission, the AP implements the SAA and constitutes the framework for the economic, financial and technical cooperation to assist the country in the implementation of the reforms included under the SAA. Thus, the AP specifies the priority areas in which reforms should be undertaken, offers guidelines for financial aid and sets out the principles and conditions to frame the Partnership. To this end, the AP includes the **National Programme for the Adoption of the Acquis (NPAA). The Instrument for Pre-Accession Assistance (IPA)**, which, as of 1 January 2007, replaced all previous instruments (the CARDS programme, the specific pre-accession instrument for Turkey, and the PHARE, ISPA and SAPARD programmes) as the sole financial mechanism, is used to offer financial aid for these reforms. The IPA was allocated a total of €11.5 billion for the 2007-2013 period to cover its five components: transition assistance and institution building, cross-border cooperation, regional development, human resources development, and rural development.
- **REGIONAL COOPERATION.** Regional cooperation is an essential element of the SAP. Consequently, the EU uses the IPA to provide financial support (€430 between 2007 and 2010) for several regional cooperation initiatives. To this end, the **South-East European Cooperation Process**, whose operational arm has been the **Regional Cooperation Council** since 2008, provides the framework for regional cooperation initiatives, whilst a series of sectoral agreements and initiatives promote gradual regional inte-

gration among the pre-accession countries and between them and the EU. The main such agreements and initiatives are: the **Central European Free Trade Agreement**, the **Energy Community Treaty**, the **European Common Aviation Area Agreement**, the **South-East Europe Transport Observatory**, the **Education Reform Initiative of South Eastern Europe (ERI SEE)**, the **Migration, Asylum, Refugees Regional Initiative (MARRI)**, the **South-Eastern Europe Health Network (SEEHN)**, the **South-east European Cooperative Initiative (SECI)** and the **EU Strategy for the Danube Region**. Most of these initiatives moreover include Moldova and the Ukraine.

Other components of the SAP include the **political and economic dialogue** between the EU and the pre-accession countries, the results of which are integrated into the accession negotiations, and **participation in EU programmes, agencies and committees**.

THE ENLARGEMENT PROCESS. Turkey, Croatia, the Former Yugoslav Republic of Macedonia, Montenegro, Iceland. During the implementation of the Pre-accession Strategy, potential candidates on track to meeting the Copenhagen Criteria (democracy and the rule of law, a functioning market economy, and the ability to implement the Community acquis) may submit an **application for membership** to the European Council. If the Council receives a favourable opinion from the Commission, it may (unanimously) grant **official candidate** status to the country, thereby beginning the **accession negotiations**, which conclude – following a **screening stage** and a **monitoring and supervision stage** – with the definitive closure of the 35 chapters (one for each political sphere) contained in the NPAA. The conclusion of the negotiations leads to the signing of the **Accession Treaty**, which must be ratified by the candidate country and all EU Member States, at which point it enters into force, turning the candidate country into a full-fledged Member State of the Union. In the interim between the signing of the Treaty and its final ratification, the candidate country is considered an **Acceding State**.

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THE ENLARGEMENT PROCESS: EU POLICY TOWARDS THE WESTERN BALKANS (continuation)

COUNTRY	Signing of the SAA ¹	Signing of the Interim Agreement on trade and trade-related matters	Application for membership	Favourable opinion from the Commission of the candidacy for membership	Granting by the Council of official candidate status	Entry into force of the SAA	Entry into force of the Interim Agreement on trade and trade-related matters	Recommendation by the Commission to begin accession negotiations	Beginning of accession negotiations	End of negotiations
Croatia	29/10/2001	29/10/2001	21/02/2003	20/04/2004	18/06/2004	01/02/2005	01/01/2002	06/11/2004	03/10/2005 ²	Projected for June 2011
Former Yugoslav Republic of Macedonia	09/04/2001	09/04/2001	22/03/2004	09/11/2005	16/12/2005	01/04/2004	01/06/2001	14/10/2009	<i>Not yet begun</i> ³	-
Montenegro	15/10/2007 ⁴	15/10/2007	15/12/2008	09/11/2010	17/12/2010	01/05/2010	01/01/2008	-	-	-
Turkey	12/09/1963	23/11/1970	14/04/1987	13/10/1999	11/12/1999	01/12/1964	01/01/1973 ⁵	06/10/2004	17/12/2004	-
Serbia	29/04/2008 ^{4,6,7}	29/04/2008	22/12/2009	-	-	<i>In the process of being ratified</i>	01/02/2010	-	-	-
Albania	12/06/2006	12/06/2006	28/04/2009	-	-	01/04/2009	01/12/2006	-	-	-
Bosnia and Herzegovina	16/06/2008	16/06/2008	-	-	-	<i>In the process of being ratified</i>	01/07/2008	-	-	-

¹ SAA: Stabilisation and Association Agreement.

² Initially, accession negotiations with Croatia were scheduled to begin on 17 March 2005; however, the process was suspended pending a favourable ruling by the International Criminal Tribunal for the former Yugoslavia (ICTY), on 3 October 2005.

³ The beginning of the accession negotiations has been indefinitely postponed due to the Greek veto, which will not be lifted until a satisfactory settlement is reached in the dispute over the official name of the Former Yugoslav Republic of Macedonia.

⁴ Montenegro declared its independence from the federation that it had formed with Serbia on 3 June 2006. Previously, the EU had begun negotiations for an SAA with Serbia-Montenegro in October 2005. The negotiations were suspended on 3 May 2006 due to a lack of cooperation by Belgrade with the ICTY investigations.

⁵ The SAA signed between the European Economic Community and Turkey, known as the Ankara Agreement, establishes a multi-part process consisting of three long stages: a preparatory stage (1964-1970), a transitional stage (1973-1995) and a final stage (from 1996 until the full economic integration of Turkey into the EU). To complete the transitional stage, Turkey and the EU adopted, on 21 November 1970, an additional protocol for the full elimination of mutual customs duties, which entered into force on 1 January 1973. Subsequently, and to complete the final stage, on 22 December 1995, they signed a Customs Union Agreement, which entered into force on 1 January 1996.

⁶ The SAA and the Interim Agreement on trade and trade-related matters with Serbia were suspended from 15 September 2008 to 7 December 2009 due to a veto by the Netherlands, which demanded proof of greater cooperation with the ICTY.

⁷ In the case of Kosovo, and based on its specific status pursuant to UN Security Council Resolution 1244, the Stabilisation and Association Process Tracking Mechanism came into operation on 6 November 2002.

cal circles in Kosovo,” one of the most damning indictments is Marty’s assertion that “the international organisations in place in Kosovo favoured a pragmatic political approach, taking the view that they needed to promote short-term stability at any price, thereby sacrificing some important principles of justice.” Assertions that the interests of stability were placed before those of justice has further undermined the humanitarian discourse on which Kosovo’s independence has often been justified.

Serbia-Kosovo Talks – A Way Out of the Impasse?

Whilst Serbia’s pursuit of an ICJ ruling temporarily shifted the issue from the political to the legal arena, the question of Kosovo’s status is now firmly back in the realm of international and domestic politics following the ICJ’s ruling. Despite initially submitting a draft resolution to the UN General Assembly which stated that unilateral secession is not an acceptable means of resolving territorial disputes and calling for

dialogue to find mutually-acceptable solutions to “all open issues,” Serbia ultimately accepted a compromise on an EU-backed resolution that paved the way for dialogue between Belgrade and Pristina. After delays arising from Kosovo’s snap elections towards the end of 2010 and subsequent coalition negotiations, Serbia and Kosovo finally commenced talks in March 2011; the former led by Borislav Stefanovic, political director at the Foreign Ministry, the latter by Edita Tahiri, the deputy Prime Minister. Robert Cooper, a special advisor in the European External Action Service, chairs the talks; highlighting the EU’s determination to take the lead in securing a sustainable solution to one of the Western Balkan’s most intransigent problems and demonstrate the lure of possible EU membership. The initial emphasis of the talks is finding solutions to technical issues – such as electricity supplies, telecommunications, vehicle registration and access to airspace – that will improve living conditions for all, whilst setting aside status-related questions. However, as several examples highlight – particularly that of the Republic of Kosovo customs stamps which Ser-

bia refuses to recognise – technical issues often have a very distinct status connotation. The challenge for the EU – as the chief mediator – is how to continue moving the talks forward with demonstrable signs of progress and tangible outcomes, without the looming spectre of status issues – particularly those concerning the north of Kosovo and the status of Orthodox monasteries within Kosovo – paralysing the possibility of securing agreement on a number of fronts.

Further problems abound. Serbia faces general elections in 2012 that will further constrain the political space for difficult and often contentious concessions, whilst question marks linger over Kosovo's own newly-formed coalition government. The strong performance of *Vetvendojsije* ('Self-Determination') in the recent Kosovo elections suggests a shift towards a more assertive creed of nationalism; one that advances the unification of Albania and Kosovo. In addition, enthusiasm for further enlargement continues to wane across Europe, with countries preoccupied by their own economic problems and sceptical about the Union's capacity to absorb new members. Domestic and external factors will therefore continue to have a profound impact upon the dynamics of the very talks themselves, further complicating efforts to elicit compromises from both parties.

Resolving the North as a Prerequisite for a Sustainable Settlement

Whilst the Kosovo government, supported by its international sponsors, insists that status issues are not up for discussion, the future of the predominantly Serb-populated north of Kosovo, where Pristina's institutions have little influence, remains contested. Concessions on the north, however, could pave the way for a broader compromise on the issue of Kosovo's status. Whilst the ideas of partition or a land-swap – where Kosovo would give up the north in return for the predominantly ethnic Albanian part of south Serbia (commonly referred to locally as 'the Presevo Valley') – are often deemed the most straightforward solution, any further changes of borders in the Balkans on the basis of ethnic lines would have ramifications for Bosnia and Herzegovina and the Former Yugoslav Republic of Macedonia (FYROM). Another proposal concerns greater autonomy for the north, the basis for which can be found in a combination of the Ahtisaari Plan and the six-point plan of UN Secretary General, Ban Ki-

moon, which outlines pragmatic measures relating to policing, customs arrangements, the judiciary and infrastructure, plus local autonomy in education and culture, and special features for Mitrovica (such as the university and hospital).

Shared sovereignty over the north of Kosovo may provide the soundest basis for a sustainable settlement between Kosovo and Serbia

However, viewing the north as akin to a 'condominium' – "a political territory (state or border area) in or over which two or more sovereign powers formally agree to share equal dominium (in the sense of sovereignty) and exercise their rights jointly, without dividing it up into 'national' zones" – provides for a more innovative solution involving the sharing of sovereignty over the contested territory. The special legal and political framework of Brcko District in Bosnia and Herzegovina provides a regional example of such an arrangement. As an autonomous administrative unit, Brcko's powers of governance are derived from the country's two entities, the Republika Srpska and the Federation; with the district simultaneously belonging to both and its residents being citizens of either one. Brcko District – with its own assembly, administration, police and judiciary – has been hailed as an institutional innovation that successfully contends with a contentious and strategically important territory. Shared sovereignty over the north of Kosovo may provide the soundest basis for a sustainable settlement between Kosovo and Serbia.

The Kosovo Precedent?

Proponents of Kosovo's independence have long insisted that it constitutes a *sui generis* case, without precedent for other disputes of a similar nature; an inevitable outcome deriving from the unique context created by the demise of the former Yugoslavia, the atrocities that accompanied its fragmentation, NATO's ultimate intervention and years of UN administration. Nonetheless, these repeated insistences have not stopped other secessionist movements from invoking the Kosovo example as a means

of motivating or legitimising their own particulate claims. Ethno-national groups have sought to assert the international precedent that they believe Kosovo created. Indeed, many interpreted the ICJ's opinion as a victory for their respective cases. Secessionist movements within and beyond the EU's borders continue to insist that Kosovo is a model for their own respective causes.

The Caucasus – a region of growing strategic importance to the European Union – has witnessed serious instability in the period since. Russia's decision to recognise the independence of South Ossetia and Abkhazia in August 2009 demonstrated the West's incapacity to define what does and does not constitute a precedent. Deprived of legal and diplomatic weight, NATO has been powerless to prevent the de facto independence of these two breakaway regions. Armenia and Azerbaijan, meanwhile, have clashed over the disputed territory of Nagorno-Karabakh, whilst the Moldovan province of Trans-Dniester has called for international recognition of its independence. In the context of the violent breakup of the former Soviet Union and its own frozen ethno-national conflicts, therefore, the Kosovo precedent has immediately come to life.

The Kosovo case could also have profound implications for UN peacekeeping missions around the world. Andreas Zimmermann, a professor of public international law at the University of Potsdam, speaking about countries whose agreement is required before the UN can deploy, has cautioned that "it would be a dangerous precedent if these countries, after the Kosovo experience, concluded that the arrival of peacekeeping forces represented the first step in the secession of a crisis region which seeks independence." Zimmermann's concerns are such that he described the proceedings currently before the ICJ as being of the "utmost relevance for the functioning of the overall system of the United Nations and its ability to maintain and restore international peace and security."

Conclusions

The international position of Kosovo following the ICJ's advisory opinion remains bedevilled by damag-

ing splits within the EU and global concerns about the precedent that the Kosovo case may set; not only for other secessionist movements, but for UN peacekeeping missions and conflict resolution more broadly. Kosovo also faces a number of questions about its economic viability and commitment to upholding the rule of law. In order to overcome these impediments, Kosovo will need to engage Serbia in a process of dialogue and negotiation that can ultimately lead to a sustainable settlement that will allow both to advance towards membership of the EU; a key potential motivator of compromise and concession in the region. Resolving the issue of the north of Kosovo remains key in this regard and will require innovative solutions in sovereignty and autonomy that have come to define Europe itself. Failure to do so will leave Kosovo's international position paralysed and the Western Balkans vulnerable to further instability. The extent to which Kosovo will ultimately constitute a precedent, therefore, will depend upon its ability to overcome the obstacles to its regional, European and international integration.

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