

# Applying Kosovo: Looking to Russia, China, Spain and Beyond After the International Court of Justice Opinion on Unilateral Declarations of Independence

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## A. Introduction

When the International Court of Justice (ICJ) released its advisory opinion regarding the legality of Kosovo's unilateral declaration of independence (UDI) on 22 July 2010,<sup>1</sup> Serbia was not the only State to express its dissatisfaction with the outcome.<sup>2</sup> The broader significance of the ICJ's finding that Kosovo's UDI in 2008 did not violate international law has profound relevance for other States.<sup>3</sup> The United States and its allies claim that

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<sup>1</sup> Accordance with International Law of the UDI in Respect of Kosovo, No. 2010/25, Advisory Opinion, 2010 I.C.J. 141 (July 22) (finding that (a) Kosovo's declaration of independence does not violate international law, (b) Kosovo's declaration of independence does not violate UN Security Council Resolution 1244, and (c) independence does not violate the Constitutional Framework for Provisional Self-Government), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=4> (last visited 15 Aug. 2010) [hereinafter Kosovo Decision].

<sup>2</sup> See Violeta Hyseni & Mark Lowen, *Serbia and Kosovo React to ICJ Ruling*, BBC, July 22, 2010, available at <http://www.bbc.co.uk/news/world-europe-10733676>; see also P.D., *To Recognise or not to Recognise*, *The Economist*, July 29, 2010, [http://www.economist.com/blogs/easternapproaches/2010/07/reactions\\_icj\\_kosovo\\_ruling](http://www.economist.com/blogs/easternapproaches/2010/07/reactions_icj_kosovo_ruling) (last visited 12 Aug. 2010).

<sup>3</sup> Unlike the United States system of *Stare Decisis*, ICJ decisions are not binding precedent. However, the opinions have influence on whether nations recognize the holding as a general principle of law, which courts can interpret as international law along with other criteria, see Statute of the International Court of Justice, Art. 38 (to decide disputes in accordance with international law, the Court shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law). For the entire statute, see [http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER\\_II](http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II) (15 August 2010).

Kosovo's situation is unique and does not serve as precedent,<sup>4</sup> but other nations facing separatist movements within their own borders may have reason to be concerned.<sup>5</sup>

With respect to Kosovo's situation, the ICJ opinion states, "The fact that a question has political aspects does not deprive it of its character as a legal question—[t]he Court is not concerned with the political motives behind a request or the political implications which its opinion may have."<sup>6</sup> While some of the finer points of the opinion may not apply to all separatist movements, the general legal principle that a UDI does not violate international law has delighted many separatist movements.<sup>7</sup> As one analyst notes, "A ruling by the World Court is like a statement issued by the United Nations. It doesn't have enforceability unless a consensus of world powers chooses to back it."<sup>8</sup> If the ICJ opinion truly has split the atom of sovereignty into the constituent elements of declared independence *and* actual statehood, then its decision should be applicable to several separatist movements around the world. Yet, a closer look reveals that, in similar cases, the world is unwilling to apply Kosovo to other situations, which is preventing the ICJ holding from becoming customary international law.<sup>9</sup>

While the ICJ claimed to have avoided any political bias, it appears that one of the most important distinguishing factors of the Kosovo situation is the power of the coalition that

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<sup>4</sup> Secretary of State Condoleezza Rice said on February 18, 2008, during the announcement of the United States' recognition of Kosovo's independence, "The unusual combination of factors found in the Kosovo situation -- including the context of Yugoslavia 's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration -- are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as a precedent for any other situation in the world today." For the entire speech, see [http://tirana.usembassy.gov/08pr\\_0219.html](http://tirana.usembassy.gov/08pr_0219.html) (last visited on August 6, 2010).

<sup>5</sup> See Patrick Worsnip, *Court's Kosovo ruling could Resonate Around Globe*, REUTERS, July 22, 2010, available at <http://www.reuters.com/article/idUSTRE66L59120100722> (last visited 6 Aug. 2010).

<sup>6</sup> See *supra* note 2 and accompanying text.

<sup>7</sup> See Patrick Goodenough, *As Separatists Welcome Int'l Court Kosovo Opinion, US Insists it's Not Applicable Elsewhere*, CNS NEWS, July 23, 2010, available at <http://www.cnsnews.com/news/article/69848> (last visited 8 Aug. 2010).

<sup>8</sup> Worsnip, *supra* note 5.

<sup>9</sup> This article focuses on the politics regarding the international reaction to the ICJ Advisory Opinion, but it is important to note that the opinion will not become international law until there is widespread, consistent state-action performed based on the belief that the action is required by international law; in customary international law, *opinio juris* and state practice are necessary to establish a legally binding custom. *Opinio juris*, specifically, refers to a sense on behalf of a state that it is bound to the law in question; see ICJ Statute, *supra* note 3, Article 38(1)(b), (the custom to be applied must be "accepted as law").

supports its move for independence.<sup>10</sup> Some of the world's most powerful States bitterly opposed the outcome of the ICJ opinion, based on their own domestic concerns. However, these states may have little to fear because, without an international intervention in the situation and popular support from the world, the Kosovo situation is unlikely to gain international support or recur with respect to other separatist movements, therefore never becoming part of customary international law. This essay evaluates the current stance of three major states contending with separatist movements of their own, (Russia, China, and Spain) and analyzes the impact of the ICJ's opinion on them. The essay also discusses the positions of the United States and other States, particularly European Union (EU) member states, in favor of Kosovo's independence. The essay ultimately concludes that the ICJ's opinion will be influential within the international community, but not the primary means by which separatist movements can achieve their independence.

## B. Background

Kosovo was an autonomous province within the Republic of Serbia, which was part of the Socialist Federal Republic of Yugoslavia (SFRY). In 1989, Slobodan Milosevic ended Kosovo's special autonomy and, during the 1990s, Kosovar Albanians struggled to restore this autonomy. As a result of these efforts, Serbia initiated police and military actions against the Kosovar Albanians, committing widespread atrocities throughout the region and prompting NATO's intervention.<sup>11</sup> On 10 June 1999, the UN Security Council passed UN Security Council Resolution 1244.<sup>12</sup> The resolution placed Kosovo under the United Nations Interim Administrations Mission in Kosovo (UNMIK), a transitional UN administration, and provided a general framework for resolving the political and legal status of Kosovo. Headed by the Special Representative of the Secretary-General, UNMIK began to determine Kosovo's final status, but Serbia and Kosovo could not agree on how to proceed.<sup>13</sup> The UN Special Envoy, Martti Ahtisaari, submitted the *Comprehensive Proposal for the Kosovo Status Settlement* ("The Ahtisaari Plan") with the idea that Kosovo should

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<sup>10</sup> Kosovo is currently recognized by 69 United Nations Member States, including the United States and 22 EU states. For a complete list or more up to the date information, please visit <http://www.kosovothankyou.com/> (last visited 6 Aug. 2010).

<sup>11</sup> See NATO/OTAN, "NATO's role in relation to the conflict in Kosovo," July 15 1999, <http://www.nato.int/kosovo/history.htm> (last visited 12 Aug. 2010). See also Christopher J. Borgen, *Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition*, 12 ASIL INSIGHTS 2 (2008), available at <http://www.asil.org/insights080229.cfm> (last visited 10 Aug. 2010) (also note that the ethnic makeup consists of the Albanian population as the majority and the Serb population and others as the minority).

<sup>12</sup> S.C. Res. 1244, United Nations Doc. S/RES/1244, Security Council Resolutions 1999 (June 10, 1999), See Taipei, *Taiwan recognizes Kosovo in move likely to anger China*, REUTERS, Feb. 20, 2008, available at <http://www.reuters.com/article/idUSTP33781020080220>.

<sup>13</sup> See Borgen, *supra* note 11.

become independent under the supervision of the international community.<sup>14</sup> On 17 February 2008, Kosovo declared independence from Serbia in a statement proclaiming, "Kosovo to be an independent and sovereign state."<sup>15</sup> This declaration being a highly controversial act, the General Assembly, on behalf of Serbia, requested an advisory opinion from the ICJ to speak to the legality of Kosovo's declaration.<sup>16</sup> On 22 July 2010, the ICJ issued an opinion stating that declarations of independence do not violate international law, thereby rejecting Serbian claims that the declaration had violated its territorial integrity.<sup>17</sup> The ICJ carefully addressed the narrow question of unilateral declarations of independence, but avoided the more involved question of secession.<sup>18</sup> The influence of the opinion on the world and the potential interpretations of the opinion, though largely speculative, are at issue.

### C. Russia

#### *I. Refusal to Recognize Kosovo's Independence*

Russia's relationship with Kosovo's UDI is complicated, and has two contradictory sides. Russia is one of Serbia's strongest allies,<sup>19</sup> and it has openly criticized Kosovo's UDI and the ICJ opinion.<sup>20</sup> Russia has refused to acknowledge Kosovo's independence and, with a

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<sup>14</sup> United National Office of the Special Envoy for Kosovo, *The Comprehensive proposal for Kosovo Status Settlement: Report of the Special Envoy of the Secretary-General on Kosovo's future status*, U.N. Doc. S/2007/168 (Mar. 26, 2007), available at <http://www.unosek.org/docref/report-english.pdf> (last visited 10 Aug. 2010).

<sup>15</sup> *Full text: Kosovo declaration*, BBC NEWS, Feb. 17, 2008 (the text of Kosovo's declaration of independence, signed in parliament by Speaker Jakup Krasniqi, Prime Minister Hashim Thaci and President Fatmir Sejdiu), available at <http://news.bbc.co.uk/2/hi/europe/7249677.stm> (last visited 16 Aug. 2010).

<sup>16</sup> See Accordance with International Law of the UDI by the Provisional Institutions of Self-Government of Kosovo, (Req. for Advisory Op.) (Order of 17 Oct. 1008), available at <http://www.icj-cij.org/docket/files/141/14799.pdf>; see also Statute of ICJ, *supra* note 3, at Chapt. IV, Art. 65(1) ("The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."), available at [http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER\\_IV](http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_IV).

<sup>17</sup> See *Kosovo not illegal, says UN Court*, BBC NEWS, July 22, 2010, available at <http://www.bbc.co.uk/news/world-europe-10730573> (last visited 10 Aug. 2010).

<sup>18</sup> See Kosovo Decision, at 3. ("Issues relating to the extent of the right of self-determination and the existence of any right of 'remedial secession' are beyond the scope of the question posed by the General Assembly.").

<sup>19</sup> See Serbia-Russian Federation: Bilateral Political Relations, Ministry of Foreign Affairs, Republic of Serbia, available at [http://www.mfa.gov.rs/Policy/Bilateral/Russia/basic\\_e.html](http://www.mfa.gov.rs/Policy/Bilateral/Russia/basic_e.html) (detailing history and nature of recent Russian-Serbian relations); see also *Relations Between Serbia, Russia, Excellent*, November 4, 2007, available at [http://www.b92.net/eng/news/politics-article.php?yyyy=2007&mm=11&dd=04&nav\\_id=45119](http://www.b92.net/eng/news/politics-article.php?yyyy=2007&mm=11&dd=04&nav_id=45119).

<sup>20</sup> See Ministry of Foreign Affairs of Russia, "Concerning Russia's Presidency of the UN Security Council," Aug. 2, 2010,

permanent seat on the UN Security Council, Russia's veto (along with China's) is speculated to be one of the key reasons why Kosovo has not had a successful status declaration by the UN Security Council.<sup>21</sup> Even after the release of the ICJ opinion, Russia has promoted a narrow interpretation of the opinion and reiterated its objection to Kosovo's independence.<sup>22</sup>

At least in part,<sup>23</sup> Russia's aversion to Kosovo's independence stems from its concerns of potential parallels that could be drawn between Chechnya and Kosovo.<sup>24</sup> Chechnya, a primarily Muslim region within Russia that has previously tried to break away, attracted international attention when Russia brutally sought to repress secession movements from 1994 to 1996 and again from 1999 to 2000.<sup>25</sup> Were the ICJ's Kosovo opinion to be interpreted as international support for and recognition of separatist groups in general, there is the risk that it would reignite secessionist sentiment in Chechnya. The leading separatist group in Chechnya already has responded positively to Kosovo's UDI and compared its fight against Moscow to Kosovo's fight against Serbia.<sup>26</sup>

## *II. Using Kosovo as Justification*

Contradictorily, Russia used Kosovo's independence as the primary justification for its interference in Georgia and support for South Ossetia and Abkhazia. Russia stated that it "would be impossible, after [Kosovo], to tell the Abkhazians and Ossetians (and dozens of other groups around the world) that what was good for the Kosovo Albanians was not

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[http://www.mid.ru/Brp\\_4.nsf/arh/F5C64DB9923A7937C32577730055952B?OpenDocument](http://www.mid.ru/Brp_4.nsf/arh/F5C64DB9923A7937C32577730055952B?OpenDocument) (last visited Aug. 17, 2010).

<sup>21</sup> See *Russia reportedly rejects fourth draft resolution on Kosovo status*, SETIMES.COM, June 29, 2007, available at [http://www.setimes.com/cocoon/setimes/xhtml/en\\_GB/newsbriefs/setimes/newsbriefs/2007/06/29/nb-07](http://www.setimes.com/cocoon/setimes/xhtml/en_GB/newsbriefs/setimes/newsbriefs/2007/06/29/nb-07).

<sup>22</sup> See Ministry of Foreign Affairs of Russia, "Concerning Russia's Presidency of the UN Security Council," Aug. 2, 2010, [http://www.mid.ru/Brp\\_4.nsf/arh/F5C64DB9923A7937C32577730055952B?OpenDocument](http://www.mid.ru/Brp_4.nsf/arh/F5C64DB9923A7937C32577730055952B?OpenDocument) (last visited Aug. 17, 2010).

<sup>23</sup> Note Russia's close ethnic and diplomatic ties with Serbia, *supra* note 19.

<sup>24</sup> See Michael Stott, *Russia's Chechen Rebels Hail Kosovo Independence*, REUTERS, Feb. 18, 2008, available at <http://www.reuters.com/article/idUSL1838576020080218> (Chechnya first began drawing analogies between its situation and that of Kosovo after Kosovo's 2008 UDI).

<sup>25</sup> Brendan Fogarty, *Chechnya Redux? Violent Conflict in Ingushetia*, 31 HARVARD INT'L R. 8 (Winter 2010).

<sup>26</sup> See *Russia's Chechen rebels hail Kosovo independence*, REUTERS, Feb. 18, 2008, available at <http://www.reuters.com/article/idUSL1838576020080218>.

good for them. In international relations, you cannot have one rule for some and another rule for others.”<sup>27</sup>

The situation of these regions and that of Kosovo share many similarities. They are part of States that were created after the breakup of a larger State, have conflicts that are based in ethnic separatism that has come to symbolize an East versus West conflict, and all of the regions were the objects of interventions from third parties claiming that the intervention was intended to calm the fighting and liberate oppressed groups.<sup>28</sup> There are also significant differences between the groups, including the differing relations between the respective separatist movements and Georgia and Serbia, and the neutrality of the “peacekeeper” involved in each situation. However, with the similarities between Kosovo’s past and South Ossetia and Abkhazia’s present, as well as the ICJ’s Kosovo decision, independence from Georgia seems like a logical step.

The rationale of the opinion could be applied to similar situations and would likely result in the same outcome. Yet without widespread, consistent state-action and *opinio juris*, South Ossetia and Abkhazia’s claim for independence cannot find ground in customary international law. In the case of South Ossetia and Abkhazia, there are two important political factors that would change the outcome and prevent widespread support: first, the invading force in South Ossetia and Abkhazia was only Russia, unlike Kosovo, where NATO forces had more widespread international support; and second, Western countries have not only avoided providing support for South Ossetia and Abkhazia in their quest for independence, but have also offered support to Georgia to help counter the Russian occupation of the territories.<sup>29</sup> These factors are the primary reasons for the difference between international support for Kosovo’s independence and international condemnation of South Ossetia and Abkhazia’s independence.<sup>30</sup>

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<sup>27</sup> Dmitry Medvedev, *Why I had to Recognise Georgia’s Breakaway Regions*, FINANCIAL TIMES, Aug. 26, 2008, available at <http://www.informationclearinghouse.info/article20628.htm>.

<sup>28</sup> *Id.* But see Christopher Hitchens, *South Ossetia Isn’t Kosovo*, SLATE, Aug. 18, 2008, available at <http://www.slate.com/id/2197704>.

<sup>29</sup> *Clinton promises ‘steadfast’ US support for Georgia*, BBC NEWS, July 5, 2010, available at <http://www.bbc.co.uk/news/10504732>.

#### D. China

China, typically less outspoken on such matters, has taken a firm stance against Kosovo's UDI that includes its participation in the country's first proceeding in front of the ICJ.<sup>31</sup> China's position on Kosovo is due in part to its domestic concerns, but China's position is also in line with its stance on the importance of domestic non-interference.<sup>32</sup> In its opposition of Kosovo's declaration of independence, China said, "throughout the Kosovo crisis that had evolved from an internal ethnic conflict into a threat to international peace and security, the maintenance of the SFRY's sovereignty and territorial integrity had remained at the centre of the issue."<sup>33</sup> Controlling self-determination by separatist groups is of principal importance to China due to several regional conflicts, including Tibet, the Uyghurs of Xinjiang Autonomous Region, and several other minority groups throughout the country.<sup>34</sup> In addition, China's complicated relationship with Taiwan means that China views any successful separatist movement in another country as a threat to its own sovereignty and a potential example for Taiwan.

While China has been quick to shut down any discussion of applying Kosovo's situation to Tibet or Xinjiang, it has less control over Taiwan. Additionally, Taiwan's level of autonomy poses a higher threat to receiving international recognition of its independence. China's fear of Taiwan following Kosovo's precedent is not completely unfounded; Taiwan maintains that it is completely independent of China, and although it lacks the crucial international support that Europe and the United States gave Kosovo, the ICJ opinion certainly opens the door for Taiwan to make a legal declaration of independence from China.<sup>35</sup> However, Taiwan most likely will not receive the international diplomatic support

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<sup>31</sup> Transcript of Oral Argument, at 28, Official Transcript from Monday, December 7 2009, International Court of Justice, available at <http://www.icj-cij.org/docket/files/141/15724.pdf> (last visited Aug. 17, 2010).

<sup>32</sup> See Ministry of Foreign Affairs of the People's Republic of China, *China's Independent Foreign Policy of Peace*, Aug. 18, 2003, <http://www.fmprc.gov.cn/eng/wjdt/wjzc/t24881.htm>; see also *China to Maintain Non-interference Policy on Ties with Myanmar*, XINHUA NEWS AGENCY, November 1, 2006, <http://www.china.org.cn/english/business/187143.htm>.

<sup>33</sup> See *supra* note 31, at 29 (China's oral argument); for China's response to the ICJ advisory opinion, see Foreign Ministry Spokesperson Qin Gang's Response to the International Court of Justice's Advisory Opinion on the Kosovo Case, <http://big5.fmprc.gov.cn/gate/big5/brisbane.china-consulate.org/eng/fyrth/t179113.htm> for China's response to the ICJ advisory opinion.

<sup>34</sup> See John Chan, *Kosovo independence brings new uncertainties in Asia*, UYGHUR NEWS, Feb. 22, 2008, available at <http://www.uyghurnews.com/canadian/Read.asp?UighurNews=kosovo-independence-brings-new-uncertainties-in-asia&ItemID=BV-3152008550472929493997> (After Kosovo's 2008 declaration of independence, Uyghur News published an article discussing the hope Kosovo's example set for some separatist movements, as well as China's responses to quiet the potential unrest).

<sup>35</sup> For an excellent editorial on the impact of the ICJ Kosovo opinion on Taiwan, see *ICJ, Kosovo and Taiwan's future*, TAIWAN NEWS, Aug. 3, 2010, at 6, available at

that was crucial to Kosovo's success, particularly because States would be forced to choose between endangering their diplomatic relations with China or supporting Taiwan's independence.<sup>36</sup> Given the economic strength of China as well as its continuing growth as a preeminent nation politically, it is unlikely that many States would directly contravene the stated interests of China.

In regards to its mainland separatist regions, China will probably take away several key lessons from the Kosovo situation. One of the turning points in Kosovo's situation seemed to be NATO's invasion. As a result, China will likely ensure that regardless of whatever domestic conflicts are occurring, they are resolved from within rather than with the help of outside forces. Additionally, the Kosovo situation provides extra incentive for China to keep a tight lid on any human rights violations that may happen within its territory, in order to further dissuade outside forces from entering the situation.<sup>37</sup>

## E. Spain

### I. *The Indivisibility of Spain*

The ICJ ruling leaves Spain in an interesting position with respect to Catalonia and the Basque Country. The ICJ carefully limited its legal analysis to deal solely with UDIs, not whether a State can be declared legally indivisible.<sup>38</sup> However, Spain's sovereignty may be threatened if the major powers were to recognize the opinion as accepted legal principle to be applied to all nations.

The *Estado de las Autonomías*, Spain's attempt to reconcile the ideas of unity and autonomy, was a result of Spain's process of decentralization. This process was an effort to "transcend the historic rupture between 'the two Spains'" and began with the Basque elections of 1980.<sup>39</sup> The Draft Committee of the constitution understood that the regions, which included both Catalonia and the Basque Country, were more of a collected group of nationalities that existed before the creation of the constitution rather than parts of the

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[http://www.etaiwannews.com/etn/news\\_content.php?id=1330828&lang=eng\\_news&cate\\_img=46.jpg&cate\\_rss=news\\_Editorial](http://www.etaiwannews.com/etn/news_content.php?id=1330828&lang=eng_news&cate_img=46.jpg&cate_rss=news_Editorial).

<sup>36</sup> See *Beijing's Closed Politics Hinders New Diplomacy*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, Sept. 12, 2004, available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=15836>.

<sup>37</sup> See *Taipei, Taiwan recognizes Kosovo in move likely to anger China*, REUTERS, Feb. 20, 2008, available at <http://www.reuters.com/article/idU5TP33781020080220>.

<sup>38</sup> Kosovo Decision, at 19 (addressing scope and meaning of question put forth by General Assembly and decided by the ICJ).

<sup>39</sup> See Enric Martínez-Herrera & Thomas Jeffrey Miley, *The Constitution and the Politics of National Identity in Spain*, 16 NATIONS AND NATIONALISM 6, 7 (2010).

“indivisible Spanish people.”<sup>40</sup> The ambiguous wording of the constitution’s final draft even contained procedures for exercising the right to “self-government” in the Basque Country, Catalonia, and Galicia, which opened the doors for rising nationalist parties in the respective regions.<sup>41</sup>

Spain’s constitution is based on the “indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards.”<sup>42</sup> Although the constitution also recognizes the “right to autonomy of the *nationalities* and *regions* of which Spain as a collective subject is claimed to be ‘composed,’”<sup>43</sup> the ambiguous formula maintains that the “Spanish people,” as the subject of “sovereignty,” are from which all nationalities emanate.<sup>44</sup> Nevertheless, international recognition of a UDI by either the Basque country or Catalonia might further tip the scale towards regional self-determination. Additionally, though self-determination does not allow for the automatic right of secession, some scholars argue that a State’s oppressive actions can lead to a rejection of the principle of territorial sovereignty in favor of self-determination as a justification for unilateral secession.<sup>45</sup> In light of this careful

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<sup>40</sup> *Id.* at 8.

<sup>41</sup> See Ferran Requejo, *Revealing the dark side of traditional democracies in plurinational societies: the case of Catalonia and the Spanish ‘Estado de las Autonomías*, 16 *NATIONS AND NATIONALISM* 148, 155 (2010) (discussing the Spanish Constitution’s establishment of one of two routes for each ‘community’ to achieve self-government, which depended on whether the ‘communities’ had already possessed some form of political autonomy in their history); see also Martínez-Herrera, *supra* note 39, at 10 (claiming that the final draft of the Constitution did not impose a solution on the issue of future territorial organization of the Spanish state, which “planted” the “juridical seed for the deconstruction of the ‘Spanish nation’ as ‘collective subject,’ and therefore as ‘source of rights and of sovereignty’”).

<sup>42</sup> See Martínez-Herrera, *supra* note 38, at 9; see also Spanish Constitution (English translation), Preliminary Part, Section 2, available in pdf format at [http://www.congreso.es/portal/page/portal/Congreso/Congreso/Informacion/Normas/const\\_espa\\_texto\\_ingles\\_0.pdf](http://www.congreso.es/portal/page/portal/Congreso/Congreso/Informacion/Normas/const_espa_texto_ingles_0.pdf) (“The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to selfgovernment of the nationalities and regions of which it is composed and the solidarity among them all”).

<sup>43</sup> See Martínez-Herrera, *supra* note 39, at 8; see also Spanish Constitution, Article 2 (emphasis added).

<sup>44</sup> See *supra* note 43

<sup>45</sup> See Morag Goodwin, *From Province to Protectorate to State? Speculation on the Impact of Kosovo’s Genesis upon the Doctrine of International Law*, 8 *GERMAN LAW JOURNAL* 1 (2007), available at [http://www.germanlawjournal.com/pdfs/Vol08No01/PDF\\_Vol\\_08\\_No\\_01\\_1-20\\_SI\\_Goodwin.pdf](http://www.germanlawjournal.com/pdfs/Vol08No01/PDF_Vol_08_No_01_1-20_SI_Goodwin.pdf) (“So the argument runs, where a State is oppressive or refuses to allow for any form of internal self-determination, the principle of territorial integrity might be pushed aside and the right of a people to self-determination may justify unilateral secession.”), see also ‘safeguard clause’ of the 1970 Declaration in the 1993 Vienna Declaration, United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, (14-25 June 1993) 32 *ILM* 1661, 1665, available online at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en) (discussing where a state fails to provide meaningful autonomy where States fail “to conduct . . . themselves in compliance with the principle of equal rights and self-determination of peoples . . . [being] thus possessed of a

balance, Spain would have difficulty keeping the uniquely decentralized nation from falling apart if separatist movements moved towards self-determination by declaring independence, as oppression would only encourage the separatist movements.

When asked to describe their idea of Spain, both Catalans and Basques were almost equally split as to whether they considered Spain a multinational state or a nation.<sup>46</sup> With respect to this heated political environment, Spain's negative reaction to the ICJ ruling is understandable.<sup>47</sup> A recognized general legal principle that could be applied by Spanish "nationalities," which are already accustomed to relative autonomy and nationalist sentiment, could prove disastrous to an already tenuous relationship among the different Spanish regions. This reality is particularly evident in light of the escalation of Basque and Catalan nationalism since the late 1990s.<sup>48</sup> Whereas some countries may be concerned with their inability to conceal their actions towards separatist movements in light of the ICJ opinion, Spain's government is mostly worried about the potential influence of the decision on the Spanish separatist movements in a uniquely decentralized environment.<sup>49</sup>

## II. Catalonia

Recently, the Spanish Constitutional Court reached a decision regarding Catalonia's controversial autonomy charter, the Catalan Statute of Autonomy. The verdict came after four years of debate over the limits of Spain's decentralized method of rule.<sup>50</sup> The Catalan

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government representing the whole people belonging to the territory without distinction as to race, creed, or colour.”).

<sup>46</sup> See Martínez-Herrera, *supra* note 39, at 18-23.

<sup>47</sup> See *Spain in fresh Kosovo statement*, B92 NEWS, July 24, 2010, available at [http://www.b92.net/eng/news/politics-article.php?yyyy=2010&mm=07&dd=24&nav\\_id=68664](http://www.b92.net/eng/news/politics-article.php?yyyy=2010&mm=07&dd=24&nav_id=68664) (“The Spanish government will remain of the opinion that it does not recognize the seceded Serbian province as an independent country”). See also *Europe split on Kosovo independence*, EURACTIV.COM, Feb. 18, 2008, available at <http://www.euractiv.com/en/enlargement/europe-split-kosovo-independence/article-170353> (discussing positions of various nations including Spain: “The Spanish government, which has long been confronted with Basque and Catalan nationalists, reiterated: ‘We do not support a UDI.’ Deputy Prime Minister Maria Teresa Fernandez de la Vega added: ‘It should have been in agreement with the various parties, which is not the case, or in line with international standards, that is to say with a (UN) Security Council resolution.’”).

<sup>48</sup> See Martínez-Herrera, *supra* note 39, at 17

<sup>49</sup> See Marko Attila Hoare, *The ICJ ruling—a blow for freedom*, BOSNIAN INSTITUTE NEWS, July 30, 2010, available at [http://www.bosnia.org.uk/news/news\\_body.cfm?newsid=2755](http://www.bosnia.org.uk/news/news_body.cfm?newsid=2755) (referring to the outspoken opposition to this particular ICJ Advisory Opinion, the author writes: “[T]he disquiet is felt by brutal or undemocratic states that oppress their own subject peoples, and wish to continue to do so without fear that their disgraceful behavior might eventually result in territorial loss.”).

<sup>50</sup> See Ferran Requejo, *Revealing the dark side of traditional democracies in plurinational societies: the case of Catalonia and the Spanish ‘Estado de las Autonomías*, 16 NATIONS AND NATIONALISM 148, 155, 159-60 (2010) (discussing the reform of the Statute of Catalonia). See also Salvador Garcia-Ruiz, *The Spanish Constitutional Court*

statute dates back to 1979, and a commission of the Catalan Parliament convened to reform it in February 2004. In June 2010, the highest Spanish court issued the decision.<sup>51</sup> The judges rejected 14 of 223 articles in a relatively light-handed decision that otherwise approved the statute.<sup>52</sup> In particular, the Court refused to acknowledge Catalonia's self-recognition as a nation in the legal sense, emphasizing the "indissoluble unity of the Spanish nation."<sup>53</sup> Spain's decision allowed Catalans to claim Catalonia as their nation in a historical sense, as the constitution still labeled Catalonia a "nationality," but denied the attempt to create a legally recognizable nation.<sup>54</sup> Given these restrictions on Catalonia's autonomy, Spain's position on Catalonia may backfire because of the ICJ's opinion on UDIs. Therefore, Catalonia's efforts to strengthen its nationality could be its first decisive step in separating from Spain. In essence, the ICJ opinion could be interpreted to mean that Spain cannot so easily declare "indissoluble unity."<sup>55</sup>

Spanish Deputy Prime Minister Maria Teresa Fernandez de la Vega said that Spain would continue to oppose the independence of Kosovo and that a parallel between Spain and Catalonia and Serbia and Kosovo is "unrealistic."<sup>56</sup> With respect to the international efforts for civil administration in the area, the Kosovo situation is starkly different from Catalonia's relatively independent existence. Kosovo's independence arose out of recent events necessitating the international intervention to create a civil administration, as the Court determined that the law applicable to the situation consisted of Security Council Resolution 1244 and UNMIK regulations promulgating self-government.<sup>57</sup> Already, sixty-

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*ruling on the Catalan Statute and its political implications*, COLLECTIU EMMA, July 1, 2010, available at <http://emma-col-cat.blogspot.com/2010/07/spanish-constitutional-court-ruling-on.html> (last visited 10 Aug. 2010).

<sup>51</sup> See Garcia-Ruiz, *supra* note 50.

<sup>52</sup> *Id.* See also *A Nationality, not a Nation: The constitutional court limits Catalonia's powers*, THE ECONOMIST, July 3, 2010, at 50, available at [http://www.economist.com/node/16490065?story\\_id=16490065](http://www.economist.com/node/16490065?story_id=16490065) (last visited 14 Aug. 2010).

<sup>53</sup> See *supra* note 52.

<sup>54</sup> See *supra* note 52.

<sup>55</sup> Martínez-Herrera, *supra* note 39, at 9.

<sup>56</sup> See *supra* note 47 ("She [Deputy Prime Minister De la Vega] said that any kind of parallel drawn between the situation between Serbia and Kosovo and between Spain and Catalonia is 'unrealistic.'").

<sup>57</sup> See The Hague Portal, *ICJ rules on Kosovo's Declaration of Independence: The International Court of Justice finds that the declaration of independence of Kosovo did not violate international law*, HAGUE ACADEMIC COALITION, July 22, 2010, available at <http://www.haguejusticeportal.net/smartsite.html?id=11906> (also notes that the ICJ initially considered the legality of declarations of the prohibition of the use of force and principle of territorial integrity as confined to the relations between the States, also discusses the contrast of Kosovo's situation to previous ICJ condemnations of UDIs and how those cases were determined illegal in character because of their direct connection with unlawful use of force and other serious violations of international norms of *jus cogens* character). See also *Kosovo Decision*, *supra* note 1.

nine countries have recognized Kosovo's independence, whereas Catalonia lacks the same international recognition. Without political forces akin to those acting on Kosovo, Catalonia does not have the momentum and power to effectuate this kind of response. However, de la Vega's statement implicitly recognizes the parallels between the Spanish situation and the Kosovo situation. It is yet another indication of Spain's opposition to the opinion in order to avoid establishing unwanted precedent.<sup>58</sup>

### *III. The Basque Country*

Spain's relations with the Basque Country must be considered against the backdrop of political violence that shrouds its history.<sup>59</sup> Diplomatically, the Basque Country's interest in self-determination can be traced to 1979, when a mixed committee of representatives debated a proposed Statute of Autonomy.<sup>60</sup> The debate concerned the first article of the statute, which claimed that "national sovereignty resides in the Basque people, from whom 'the powers of the Basque Country emanate.'" <sup>61</sup> This claim veiled a right to self-determination. In the end, the government ordered that the reference to Basque sovereignty be excluded, and the explicit reference to Spain be included.<sup>62</sup> The quest for self-determination resurfaced in October 2003, when the Basque legislature passed the "Plan Ibarretxe," which declared that the Basque people have a right to determine their own future in accordance with the right to self-determination.<sup>63</sup> Spain has every reason believe that this affirmation of UDIs, particularly from the international community, would add momentum to this pursuit of independence.

The violent history of the Basque Country has left a strong sense of nationalism throughout the region, which is a major reason for Spain's strong position on the ICJ opinion. When

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<sup>58</sup> See Gaspar Pericay Coll, *Catalan nationalist parties react to the international recognition of Kosovo's independence*, CATALAN NEWS AGENCY, Jan. 23, 2010, available at <http://beta.catalannewsagency.com/tabid/78/ID/521/Catalan-nationalist-parties-react-to-the-international-recognition-of-Kosovos-independence.aspx>. ("[I]nsisting on not recognising Kosovo stresses the implicit parallelism that the Spanish Government fears. Besides, Catalan nationalist parties do not see a clear parallelism between both cases.").

<sup>59</sup> Martínez-Herrera, *supra* note 39, at 14.

<sup>60</sup> *Id.* at 15.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> See *The Ibarretxe Plan: Grave menace to the Economy of the Basque Country?*, UNIVERSIA KNOWLEDGE@WHARTON Nov. 21, 2003, available at <http://www.wharton.universia.net/index.cfm?fa=viewfeature&id=686&language=english> (last visited 12 Aug. 2010).

Kosovo declared independence, the Basque separatist movement cited the model for their own efforts.<sup>64</sup> When the ICJ issued its opinion, Aitor Estaban, a representative from Spain's Basque Nationalist Party (PNV) issued a statement: "I think that the main consequence is that Spain cannot keep saying that the international rules don't allow for a split of the country for a new Basque independent country into the European Union. So I think that should be already over and that's good news for us."<sup>65</sup> The ICJ indicates that this statement goes too far in interpreting the opinion, as the ICJ explicitly stated that separation from a State was beyond the question posed by the General Assembly.<sup>66</sup> Granted, a declaration does not constitute a "split from the country."<sup>67</sup> However, as with Catalonia, Basque can take the first step towards seceding from Spain by declaring its independence. The more violent of the separatist movements, the Basque nationalists may pose more of a threat to breaking away from Spain's democracy and might attract greater international attention. Therefore, Spain must continue to oppose this legal principle to prevent such action.

#### F. Perspectives of the United States and the European Union

On the other side of the issue, the United States and other prominent members of the European Union (EU) such as the United Kingdom and Germany, continue to push for Kosovo's recognition as an independent state. Pleased with the ICJ opinion, the United States government has long considered Kosovo's declaration of independence in accordance with international law and not a violation of Security Council Resolution 1244.<sup>68</sup> The United States government also takes the position that the Kosovo situation is

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<sup>64</sup> W. Rodman, John Bolton & Lawrence Eagleburger, *Warning Light on Kosovo*, THE WASHINGTON TIMES, BROOKINGS INSTITUTE, Jan. 31, 2008, available at [http://www.brookings.edu/opinions/2008/0131\\_kosovo\\_rodman.aspx](http://www.brookings.edu/opinions/2008/0131_kosovo_rodman.aspx). ("The Kosovo model already has been cited by supporters of the Basque separatist movement in Spain and Turkish-controlled area of northern Cyprus.").

<sup>65</sup> See *Reaction in quotes: UN legal ruling on Kosovo*, BBC NEWS, July 22, 2010, available at <http://www.bbc.co.uk/news/world-europe-10733837>.

<sup>66</sup> See Kosovo Decision, *supra* note 1, at 3 (refer to p.19 (#51), and p. 31 (#83)).

<sup>67</sup> See The Hague Portal, *ICJ rules on Kosovo's Declaration of Independence: The International Court of Justice finds that the declaration of independence of Kosovo did not violate international law*, HAGUE ACADEMIC COALITION, July 22, 2010, available at <http://www.haguejusticeportal.net/smartsite.html?id=11906>.

<sup>68</sup> See Philip Gordon, *International Court of Justice Advisory Opinion on Kosovo's Declaration of Independence*, UNITED STATES Department of State, Telephonic Press Conference, July 23, 2010, available at <http://www.state.gov/p/eur/rls/rm/2010/145104.htm>; Hillary Rodham Clinton, *Release of International Court of Justice Advisory Opinion on Kosovo's Declaration of Independence*, UNITED STATES Department of State, Official Statement, July 22, 2010, available at <http://www.state.gov/secretary/rm/2010/07/145042.htm> ("The International Court of Justice agreed today issued its advisory opinion and decisively agreed with the longstanding view of the United States that Kosovo's declaration of independence is in accordance with international law;" also declared, "Kosovo is an independent state and its territory is inviolable.").

unique and does not apply to other regions.<sup>69</sup> The ICJ opinion is not legal precedent, but it is important that the United States discourages use of the opinion as authority for separatist movements. Even though Kosovo is different from a separatist group that alone sought to unilaterally secede, Kosovo could still be cited by separatists as an example for their own efforts.<sup>70</sup> The United States must discourage the opinion's use as an example to avoid inciting a flood of UDIs and upsetting the countries struggling with these separatist movements.

The United States and key EU member states in favor of Kosovo's independence can only express to other countries, as opposed to enforce, their reasons for why Kosovo's independence is legal and necessary for peace in the region.<sup>71</sup> Those States supporting Kosovo, such as France and the United Kingdom,<sup>72</sup> believe that if other countries, including Serbia, do not recognize Kosovo's independence, it will be difficult for Kosovo and Serbia to move forward. Therefore, the pro-Kosovo states must continue to maintain a clearly defined position in favor of Kosovo's independence to influence other countries and promote Kosovo's long-term success. Recognition of Kosovo's sovereignty is a decision to be made individually by every state, but the United States and other States can use the ICJ holding to buttress their positions. Still, the influence of the holding remains to be seen.<sup>73</sup>

Most importantly, the United States and the European Union are focused on restoring peace and stability in the Balkan region, which involves looking forward to a day when Serbia—and maybe Kosovo—can join the European Union.<sup>74</sup> The ultimate goal for both

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<sup>69</sup> See *supra* note 68 and accompanying text.

<sup>70</sup> See Borgen, *supra* note 11 (cites the Russian Parliament's statement regarding the ICJ opinion as a reason for why separatist movements may cite the ICJ holding: "The right of nations to self-determination cannot justify recognition of Kosovo's independence along with the simultaneous refusal to discuss similar acts by other self-proclaimed states, which have obtained de facto independence exclusively by themselves); see also Nicholas Kulish and C.J. Chivers, *Kosovo Is Recognized but Rebuked by Others*, NY TIMES (Feb 19, 2008) available at <http://www.nytimes.com/2008/02/19/world/europe/19kosovo.html?pagewanted=2&hp>.

<sup>71</sup> *Id.* ("So long as the question of status and sovereignty and territorial integrity are clear, I think there are plenty of things these two governments can constructively talk about . . .").

<sup>72</sup> To view the official statements of the countries who recognize Kosovo, please see KOSOVO THANKS YOU, available at <http://www.kosovothanksyou.com/> (last visited 15 Aug. 2010).

<sup>73</sup> Borgen, *supra* note 11.

<sup>74</sup> See European Union Official Statement by EU High Representative Catherine Ashton, "Declaration by High Representative Catherine Ashton on behalf of the European Union on the ICJ advisory opinion," 12516/10, Brussels (22 July 2010), available in pdf format at [http://www.eutrio.be/files/bveu/media/documents/07-22\\_Statement\\_ICJ\\_CA\\_EN.pdf](http://www.eutrio.be/files/bveu/media/documents/07-22_Statement_ICJ_CA_EN.pdf) (states that the EU is "studying it [the ICJ opinion] with great care . . . [T]he focus should now be on the future. The future of Serbia lies in the European Union. The future of Kosovo also lies in the European Union. This is in line with the European perspective of the region and the relevant Council conclusions . . . good neighbourly relations, regional cooperation and dialogue are the foundations on which the

Serbia and Kosovo is to gain entry into the European Union, and the EU member states cannot admit Serbia and Kosovo until they are recognized by the international community as stable, independent countries.<sup>75</sup> Serbia, in particular, signed a Stabilization and Association Agreement (SAA) with the EU on 29 April 2008 that provided the framework for enhanced cooperation between the EU and Serbia with the anticipation of EU membership.<sup>76</sup> In December 2009, Serbia submitted an application to join the EU, but the EU has yet to accept Serbia because of key EU member states' resistance to enlargement, continuing controversies over ICTY cooperation, and the reluctance of some EU member states to allow the Kosovo dispute into the EU. The ICJ opinion will likely hinder this diplomatic objective, as Serbia intends to continue the fight, having vowed to take "all legal and diplomatic measures" to preserve Kosovo as part of Serbia.<sup>77</sup> The ICJ opinion will cause more countries to recognize Kosovo, which will pressure Serbia to change its position, although leaders have declared that they will reject EU membership if it is conditioned on recognizing Kosovo's independence.<sup>78</sup>

## G. Conclusion

A simple declaration of independence by one region may provide the impetus for change, and the ICJ's opinion validating this declaration has the potential to be highly influential if recognized worldwide. However, the ICJ's holding has not been acknowledged by all States due to a host of political forces, which are preventing the holding from becoming customary international law. The opinion's legal and political importance supports the strong sense that support for an independent Kosovo is a political choice rather than a legal one, despite the ICJ's efforts to separate the two questions.<sup>79</sup> These politics may

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EU is built . . . [T]he process of dialogue in itself [between Pristina and Belgrade] would be a factor for peace, security and stability in the region.").

<sup>75</sup> Steven Woehrel, *Serbia: Current Issues and UNITED STATES Policy*, 7-5700, RS22601 CONGRESSIONAL RESEARCH SERVICE (Report for Congress), 2, 7 (12 April 2010), available at <http://fpc.state.gov/documents/organization/142747.pdf> (discussing Serbia's path to the EU and how progress of Serbia's integration into the EU has been hindered by a failure to arrest remaining indicted independence of Serbia's Kosovo province).

<sup>76</sup> *Id.* at 7.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 7; see also EU Official Statement, *supra* note 74.

<sup>79</sup> See Goodwin, *supra* note 45, at 17 (discussing the support for either sovereignty or an independent Kosovo (citing Martti Koskenniemi, *The Police in the Temple—Order, Justice and the U.N.: A Dialectical View* 6 EJIL 334 (1995); Jason A. Beckett, *Rebel Without a Cause? Koskenniemi and the Critical Legal Project*, 7 GERMAN LAW JOURNAL 1045 (2006); available at [http://www.germanlawjournal.com/pdf/Vol07No12/PDF\\_Vol\\_07\\_No\\_12\\_1045-1088\\_SI\\_Beckett.pdf](http://www.germanlawjournal.com/pdf/Vol07No12/PDF_Vol_07_No_12_1045-1088_SI_Beckett.pdf), commenting on Koskenniemi's work in this area).

undermine the peace and security the ICJ sought when it restricted the opinion to a purely legal question.<sup>80</sup> For those States in opposition to the opinion, the political implications of international acceptance of the ICJ's legal opinion could prove disastrous, as separatist movements will want to apply the legal principle to their efforts.<sup>81</sup> Such actions could further divide the groups.<sup>82</sup> As a result, Russia, China, and Spain will likely continue to oppose the declaration in efforts to hinder the international recognition of this legal principle. For those in favor of Kosovo's independence, a strong stand for Kosovo's UDI is necessary to help persuade a wider recognition of the ICJ's holding and Kosovo's independence. Even though the ICJ opinion cannot be considered binding, the opinion will be highly influential in the international community, but not the sole authority enabling other separatist movements to become independent.

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<sup>80</sup> *See id.*

<sup>81</sup> *See Warning Light on Kosovo, supra* note 64 ("Current United States policy relies on the unconvincing claim that Kosovo is 'unique' and would set no precedent for other troublespots. Of course every conflict has unique characteristics. However, ethnic and religious minorities in other countries already are signaling their intention to follow a Kosovo example.").

<sup>82</sup> *Id.* ("Recognition of Kosovo's independence without Serbia's consent would set a precedent with far-reaching and unpredictable consequence for many other regions of the world.").