

International Law - The Case of Kosovo in ICJ

Authors:

Mr. Sc. Bujar DESKU,

Mr. Sc. Behar RAMADANI

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Preface

This paper contains a summary, chronology and analysis of the entire process that has permeated the Kosovo under the international administration, to the advisory opinion of International Court of Justice

The focus of study analysis of this paper is the proclamation of independence of Kosovo and its dispute arising from Serbia, a substance that has made Kosovo a reference point as current issues of international law. So, from this, the ICJ Kosovo case, compare to the statements for and against the declaration of states of the world, the alleged legal arguments by the parties directly confronted, Kosovo and Serbia, and the final advisory opinion of the Court, made this issue a relevant and attractive subject for researches.

Although the study is taking a long period of time, axis of the theme is focused by resolution 63/3 adopted on October 8 2008, where the General Assembly has requested the International Court of Justice, to (answer) thought main advisory body to the UN court, to question whether the Declaration of Independence of Kosovo is in accordance with international law.

Subject to its content includes a brief summary of the scope of the International Court of Justice and its jurisdiction, moreover, will highlight how Kosovo is found in the agenda of the ICJ.

1. Kosovo in front of ICJ

After the declaration of the independence by the Kosovo institution on the 17 February 2008, the Republic of Serbia not being able to intervene militarily, because of the NATO presence in the region, chose the diplomatic way in order to prevent further unilateral recognitions of the states that were coming from all over the world for the newest independent state of Kosovo

The Serbian diplomacy on 8 October 2008 filed a resolution 63/3 in front of the General Assembly of United Nation, which was adopted by 77 votes in favor, 6 against and 74 abstentions. The resolution tasked the ICJ to render an advisory opinion on the matter that is the unilateral declaration of the independence by the Provisional Institutions of Self-Government of Kosovo in accordance with the international law¹.

The hearings of this case commenced as of 1 December 2009, where the states were asked by the Court to file their written statements and possibly written comments on this particular matter. The phase for the deposition of the statements was in 17 April 2009 whereas the intention to participate at the hearing was 15 September 2009. By this date Kosovo and other 30 states expressed their intention to participate in oral proceeding

¹ Letter dated 17 February 2008 from the Permanent Representative of Serbia to the United Nations addressed to the President of the Security Council (S/2008/103 of 17 February 2008), Dossier No. 117

before the Court. Out of these 30 states that will participate at the hearing, 16 of them will present the facts that they are in favor that the declaration of independence of Kosovo was in compliance with international law, and it is a *sui generis* case and cannot serve as a precedent for other cases of succession, and 14 countries presented their arguments that the declaration of independence was in contradiction with international law and will present a precedent for other countries.

During the Court proceedings, it is very important to mention one fact that for the first time in the history of the Court from its establishment, all five permanent members of the United Nation Security Council were present like: USA, Russia, China, France and United Kingdom.²

2. Kosovo's Preparation Phase

Upon the request that was made by the Kosovo institutions to the Court, in order to present their views to this hearing, and with positive reply by the Court, the Kosovo's institutions its President and the Prime Minister, authorized the Minister of Foreign Affairs to represent the Republic of Kosovo to this Court. In accordance with this decision the Ministry of Foreign Affairs of Kosovo took the responsibility to coordinate the entire process. The Kosovo Government in order to strengthen its representation team took the decision to appoint Sir Michael Wood, as a legal expert and head of the Kosovo legal team³.

As was requested by the Court's order of the 17 October 2009, Kosovo transmitted to the respective Court its written contribution that was divided into five parts comprising ten chapters.

3. Written Contributions to the Court

Part I contained a description of the Kosovo today and its development, since the declaration of independence.

Part II, was concentrated in the recent history of Kosovo and the negotiations for the final political status, which provided the immediate context of the Declaration of Independence. This part also included a brief history of Kosovo and its legal status as a part of former Yugoslavia pursuant to the Constitution of 1974, the period of unlawful removal of Kosovo autonomy in 1989, with continuation of the war period of 1998-1999, the Security Council Resolution 1244 (1999) the exclusion of FRY and the Serbian regime from Kosovo, the period of UNMIK administration, to the final status process that commenced in 2005 and lasted until 2007, ending with proposal of President Ahtisary recommendation that was in favor of a supervised independence.

²Archive of Ministry of Foreign Affairs of Republic of Kosovo, Report from the bilateral Department, December, 2009

³Legal Argument-Kosovo in the International Court of Justice (ICJ) , archive of MFA, Pristina 2010

Part III, described the declaration of independence dated on 17 February 2008, the circumstances for its signing, its authors, and its content.

Part IV, addresses the legal aspects and questions contained in General Assembly resolution 63/3, the legal analyses by addressing in details the questions that has been asked to the Court. Further explanation that international law does not prohibit the issuance of declaration of independence, as well as the practice that occurred in the case of dissolution of Yugoslavia, where all other constitutive parts of this federation declared their independence, during early 90-s.

Part V, this part concluded the written contribution of Kosovo to the Court that contained a summary of key contextual elements and the legal arguments. As a conclusion of that Kosovo requested to the Court to respond to the General Assembly's resolution 63/3, to find that the Declaration of Independence of 17 February 2008, was not in contradiction with any applicable rule of the international law.⁴

4. Oral statement of Kosovo

As a head of the Kosovo representation team to the Court, the Minister of Foreign Affairs of the Republic of Kosovo HE. Skender Hyseni addressed to the Court on oral hearings that began on 1st of December 2009. He began his introduction by thanking and being grateful to the Court that enabled the Kosovo team, to present its written arguments and being present at the hearing.

Kosovo Foreign Minister before elaborating the declaration of independence made a short presentation about the position of Kosovo that just after a few months from the declaration of independence, Kosovo drafted its Constitution that came into force on 15 June 2008. The Constitution which is considered to a very modern and it contains the highest international standards of human and minority rights. Foreign Minister mentioned the municipal and general elections that were organized, which were monitored by international community, and their evaluation was that the elections were free, fair and democratic, and as a result of this recent elections the new leaders were elected and these leaders presented the will of citizens of Kosovo.

Furthermore the speech was concentrated in the diplomatic relations that Kosovo is entering with foreign countries, the diplomatic mission that were sent abroad, and a wide range of international bilateral treaties that were signed. All these mentioned fact were presented to the Court in order to show that Kosovo is functioning as an independent state and the declaration of independence provided peace and stability in the region.⁵

After the speech of the Kosovo Foreign Minister, the presentation continued with Kosovo's head of legal team Sir Michael Wood, where he made a summary of legal arguments and factual backgrounds. The legal arguments were presented in summary of five prepositions.

⁴ Archive of Ministry of Foreign Affairs of Republic of Kosovo

⁵ Introduction to ICJ by Kosovo Minister of Foreign Affairs, HE. Skender Hyseni, Archive of MFA, "Kosovo in ICJ", 2010 Pristina

The first point is that the Court needs to consider the propriety of answering the question, which was addressed by the UN General Assembly.

Second the question was related to the declaration of independence that was issued in 17 February 2008, and it did not concern a question of recognitions or membership in international organizations.

Third was that the general international law does not contain the rules by which the legality of declaration of independence of 17 February 2008 may be assessed.

Fourth nothing in the UN Security Council resolution 1244 of 1999 prohibited the issuance of the Declaration of Independence in 2008.

And the fifth point is that some of the states, in their written pleadings have focused on the principle of self-determination. Regarding self-determination principle, Kosovo shared its view with the states like Albania Switzerland and others, that were referring to that the Kosovo citizens were entitled to exercise the right of self-determination.⁶

5. Oral statement of Albania and the States which supported the Declaration of Independence of Kosovo

The Albania was represented to the Court by its Ambassador in the Kingdom of Netherlands H.E. Gazmend Barbullushi and his respective team. Albania presented its arguments in favor of the Declaration of Independence and the declaration as such was in full compliance with international law. The arguments that were presented started by Yugoslav Constitution of 1974, were all entities of this federation were entitled in the right of self-determination. Furthermore the arguments were the campaign of ethnic cleansing of the war of 1998-1999, were 1.5 million Kosovars, were forcibly expelled from their homes and Albania hosted more than 700.000 hundred Kosovars. Albania expressed its commitment to support the people of Kosovo and their efforts toward peace progress and prosperity for all its citizens⁷

Like the Republic of Albania, also many other states that took part at the Court oral hearings were in favor that the Kosovo's Declaration of Independence was in compliance with international law. For the reference of this essay the states that were in favor were: the United States of America, Federal Republic of Germany, the Kingdom of Saudi Arabia, the Republic of Austria, the Republic of Bulgaria, the Republic of Burundi, the Republic of Croatia, the Kingdom of Denmark, the French Republic, the Hashemite Kingdom of Jordan, the Kingdom of Norway, the Kingdom of Netherlands, the Kingdom of Great Britain and Northern Ireland, and the Republic of Finland.⁸

⁶ Introduction to ICJ by Kosovo head of legal team Sir Michael Wood

⁷ Summary of Albania's oral statement at the ICJ

⁸ ICJ official site - www.icj-cij.org

6. The States which opposed the Declaration of Independence of Kosovo

There were 12 States which opposed the Declaration of Independence of Kosovo, expressing their arguments by assertion that this act is against International Law. The representatives of these States used the argument that declaration is against also with the resolution 1244 of the Security Council of United Nation, and other reasons according to them was in contradiction with the International Law and the Right to Self-determination.

The states are as follows:

Russia, China, Spain, Brazil, Argentina, Cyprus, Romania, Bolivia, Azerbaijan, Belarus, Venezuela and Vietnam⁹.

7. The ICJ Advisory Opinion

After the oral proceedings of all states that participated at the Court hearing, on 22 July 2010, the Court delivered its Advisory Opinion on the United Nation General Assembly question, “*Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?*”¹⁰

The ICJ Advisory Opinion was divided into five parts: The first part included the jurisdiction and the discretion of the Court; the second was the scope and meaning of the question; the third was the factual background; the fourth the question whether the declaration of independence is in accordance with international law; and the fifth and the last one was general conclusion.

I. As far as the jurisdiction is concerned the Court has the mandate to give an advisory opinion, based on article 65, paragraph 1 of its statute, which provides “*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.*”¹¹

The Court notes that the General Assembly is authorized to request an advisory opinion by Article 96 of the Charter, which states that “the General Assembly or the Security

⁹ The States which opposed the Declaration of Independence of Kosovo, MFA-Kosovo “Kosovo in ICJ”, 22 July , 2010 Pristine

¹⁰ MFA-Kosovo “Kosovo in ICJ” , 22 July , 2010 Pristine

¹¹ The Statute of the Court, Archive of MFA, 2010 Pristina

Council may request the International Court of Justice to give an advisory opinion on any legal question.”

II. Regarding the scope and the meaning of the question the Court observed that the question addressed by the UN General Assembly was clearly formulated. The question is narrow and specific, and asks for the Court’s opinion, on whether or not the declaration of independence was in accordance with international law. It notes that the question does not ask about the legal consequences of that declaration. In particular, it 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 recognized it, as an independent State.

III. Regarding the factual background, the Court briefly described the relevant characteristics of the framework that was put in place by the UN Security Council, to ensure the interim international administration of Kosovo, with UN Security Council resolution 1244 (1999), and the regulations promulgated by the United Nations Mission in Kosovo (UNMIK). It then gives an account of the developments relating to the so-called “final status process” in the years preceding the adoption of the declaration of independence, before turning to the events of 17 February 2008.

IV. On the question whether the declaration of independence was in accordance with international law, the Court considered that it is not necessary, in the present case, to resolve the question whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing state a right to separate from that state, or whether international law provides for a right of “remedial secession” and, if so, in what circumstances. That issue was beyond the scope of the question posed by the UN General Assembly. To answer that question, the Court needed only to determine whether the declaration of independence violated either general international law or the *lex specialis*, created by UNSC Resolution 1244 (1999).

Accordingly, it concludes that the declaration of independence of February 17, 2008 did not violate the general international law. The Court finds that Security Council Resolution 1244 (1999) did not bar the authors of the declaration of February 17, 2008, from issuing a declaration of independence. Therefore the declaration of independence did not violate the UNSC Resolution 1244 (1999).

Concerning to the question whether the declaration of independence of February 17, 2008, has violated the Constitutional Framework established by UNMIK, the Court noted that it has already held that the declaration of independence of February 17, 2008, was not issued by the Provisional Institutions of Self-Government, nor was it an act intended to take effect, or actually taking effect, within the legal order in which those Provisional Institutions operated. It follows that the authors of the declaration of independence were not bound by the framework of powers and responsibilities established to govern the conduct of the Provisional Institutions of Self-Government. Accordingly, the Court finds that the declaration of independence did not violate the Constitutional Framework.

V. As a general conclusion of this advisory opinion the Court concluded that “the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework” so y the adoption of that declaration did not violate any applicable rule of international law.”¹²

By 9 votes in favor with 5 against, the advisory Opinion was delivered on 22 July 2010, and announced by the President of the Court Hisashi Owada at a public hearing inside the Peace Palace in Hague.

After the announcement of the Court ruling, the Minister of Foreign Affairs of the Republic of Kosovo, addressed to the crowd of journalist that were waiting in front of the Court. He stated that the Opinion was explicit and clear and leaves no room for doubt; he further stated that we now look forward to further recognitions of Kosovo. He called the states that hesitated to recognize the Republic of Kosovo, pending the opinion to move forward towards recognition.¹³

8. Conclusion

The ICJ’s Advisory Opinion was clear and left no doubt, that the Declaration of Independence by Kosovo Institutions was in compliance with international law, even though that many analysts and lawyers, expected that the opinion with have a dual meaning, and therefore can be interpreted by both parties, that the opinion was on their side. The legitimacy of the independence of Kosovo is clear now and this case can be compared with some other countries that as a result of their succession from another territory have earned their independence; the case with East Timor, which was annexed by Indonesia in 1975, against the will of Portugal as an external sovereign state, than Singapore is another case, where this country was succeed from Malaysia on 1965, the case of Namibia succeeding from South Africa and getting their independence in 1991.

According to the international law Kosovo fulfils all the criteria’s to be an independent country as set forth by the Montevideo Convention (1933), where the article 1 states that: that the state as subject of international law should have it’s a) permanent population, b)defined territory, c)government, and the ability to get into the relationship with other states.

Kosovo fulfils all the criteria’s of being an independent and sovereign country, if it comes to the territory the UN has 34 states with less territory than Kosovo; if it comes to the population, UN has 58 states with less number of population than Kosovo. Another fact that proves the international subjectivity of Kosovo is the recognition by 96 UN member states. From the Court Advisory Opinion, Kosovo is recognized by 26 more countries, with an intention of new coming recognitions. The recognitions are done by respecting the Kosovo’s territorial integrity and sovereignty.

¹² Summary of the ICJ Advisory Opinion, MFA-Kosovo “Kosovo in ICJ” , 22 July , 2010 Pristina

¹³ The statement of Minister of Foreign Affairs of the Republic of Kosovo, 22 July 2010

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