

## The jurisdiction and discretion challenge of International Court of Justice in Kosovo opinion

Soheyla Koosha

Department of International Law, Payame Noor University, Tehran Branch, Tehran, Iran  
s.koosha1389@yahoo.co.uk

**Abstract:** The advisory opinion of the international court of justice (here after ICJ or the court) is a legal constitute which comes from common law system. It is established to aid other bodies of united nation and specialized organizations in their activities according to their statutes. This paper is about to analyses the reasoning of the court on establishment of its jurisdiction and discretion in Kosovo opinion. In this respect, it will consider the question raised by General Assembly or (GA), the articles of charter and statute of the court in this issue, the reasoning of the court and declarations of the judges in favor or against the court reasoning, and the effect of this opinion on development of international law. It seems, this is the first time that the court does not deal with the conduct, rights and obligations of states or international organizations, but rather deals with an action of non- state entities which the legality of their action on issuing the declaration of independence according to international law must be determined.

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### Factual background

Kosovo declaration of independence was issued on February 17, 2008[1], after ten years of international community efforts for solving the conflict whit Serbia.

The first action in this respect was about concluding Rambouillet accords which provided, inter alia, for a three years interim democratic self-government in Kosovo, albeit within the Federal Republic of Yugoslavia (FRY). The accords were accepted by Kosovo (on 18 March 1999), but rejected by Serbia. After NATO's military intervention, the security council (SC) adopted resolution 1244 (1999) authorizing interim international territorial administration of Kosovo, the creation of United Nations Mission in Kosovo (UNMIK), and implementation of provisional institutions of domestic self-government [2].

Local political institutions were established in 2001 on basis of regular democratic elections. Gradually, powers and responsibilities were transferred from UNMIK to Kosovo authorities. After Kosovo's assembly election in November 2007, deputies of the assembly unanimously declared Kosovo to be an independent and sovereign state.

About seventy states recognized Kosovo's independence so far [3]. Serbia and Russia and other state's denounced it as illegal. On October 8, 2008 the UN General Assembly adopted a resolution (63/3) to request the court's advisory opinion on the issue [4].

### Jurisdiction and discretion

The international court of justice (ICJ) advisory jurisdiction is due to the text of article 96 of the UN

charter and article 65 (1) of the ICJ statute.

The debate about court's jurisdiction arose several arguments with some participant in Kosovo advisory opinion. The next problem was about the court discretion. These problems will be considered in the following sections.

### Jurisdiction in charter and statute with respect Kosovo case

For each request of advisory opinion, the court must first consider whether it has jurisdiction, and whether there is any reasons to use its discretion and decline to exercise its jurisdiction.

The power of the court to give an advisory opinion is based upon article 65, paragraph 1, of its statue, which provides that "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 United Nations (UN) to make such a request [5].

Therefore the conditions for request of an advisory opinion are: "request by an organ duly authorized to seek this opinion under the charter, requested question must be a legal one, except General Assembly or the Security Council , that question should be one arising with the scope of the activities of the requested organ [6].

It is for the court to satisfy itself that request comes from an authorized organ. The GA is authorized by article 96 of the charter, which provides that:

"1-the General Assembly or the Security Council may request the international court of justice to give an advisory opinion on any legal question" [7].

The only condition mentioned in this article is that,

the question asked by GA must be a "legal" one. Although the court sometimes in the past mentioned in its jurisprudence that there must be a relationship between the question asked and activities of GA [8]. This assertion is far from being clear. Firstly, the court didn't expressly state that the existence of such "relationship" is a legal condition for the valid seizure of the court by the GA. Its ambiguous statement and reasoning however leave the door open to this interpretation [9].

Secondly and more fundamentally, the notion of "activities" undertaken by GA in relation to the question or, more generally, the "competences" of the GA, in the same sense as the "activities" referred to by article 96 Para 1 of the UN charter [10].

Interpretation the notion of "activities" in this latter sense is practically tenable not only, as explained below, in light of the final purpose of the advisory jurisdiction of the court, but also given more concretely, the considerations upheld by the court immediately following its ambiguous assertion. Those considerations indeed directly refer to article 10 and 11 of the UN charter [11], that is, articles concerned with the functions and powers of GA [12]. The court did not refer at that stage to the "concrete activities" conducted by GA in relation to Kosovo situation. It (sensibly) did so, as detailed below, only in the context of its discretionary power. As a result, the wording used by the court could give rise to interpretations where by the distinction between Para 1 and Para. 2 of article 96 fade away.

This may be supported by the jurisprudence to which the court referred when making its ambiguous assertion, and notably by its considerations upheld in the nuclear weapon case [13]. Indeed, how could such purpose be achieved if the question asked does not fall within the "competence" of the requesting organ? Having said that, one must acknowledge that the "competences" of the GA are so extended and extendable that it is unlikely that question could not be linked to any of such competences. In the Kosovo case, the court easily mentions the competences to which the question was related to, mainly maintenance of international peace and security [14]. Because article 11, Para 2 of the charter has provided the GA with competence to discuss "any question" relating to the maintenance of international peace and security brought before it by any member of UN, and subject again to limitation of article 12 [15].

Indeed, according to such provision, the GA cannot make any recommendation with regard to a dispute or situation concerning with the maintenance of international peace and security as long as the SC is effectively exercising its responsibility with respect to that dispute or situation, unless the SC so request. In wall case, the court mentioned that the requirement of

UN GA resolution be in accordance with article 12 Para. 1 of the UN charter clearly appeared as a legal condition for a valid seizure of the court by the GA [16]. This requirement seems reasonable since the respect of the rule pertaining to the balance of powers between the GA and the SC is particularly important in order to give full legitimacy to the court's opinion. To solve this problem raised, the court by reference to its jurisprudent in wall case stated: "article 12 Para. 1 was not applicable here because the request for an advisory opinion could not be considered as a "recommendation"" [17].

In Kosovo case, the court (contrary to wall case) stopped its reasoning here, because it focused (only) at "concrete activities" conducted by GA in relation to the Kosovo situation and not the competence of this organ as may be interpreted as having done when analyzing its jurisdiction. Although such requirement seems to go beyond what is provided under article 96 of UN charter. It has been submitted that this requirement would actually be relevant in light of the final purpose of the advisory jurisdiction of the court and that such purpose would also justify that the link between the question and the activities (in the meaning of the "concrete activities") of the requesting organ be only discussed, as the court did in this case, in relation to the discretion (rather than the jurisdiction) of the court.

### Discretion

The fact that the court has jurisdiction does not mean that it is obliged to exercise it. Article 65, Para 1, provides that "the court may give an advisory opinion" [18]. The word may imply that court has a discretionary power to decline of giving its opinion even if the conditions of its jurisdiction are met [19].

The aim of discretion is protection of the integrity and the court's judicial function and its nature as the principal judicial organ of UN [20].

The court is always mindful of the fact that its answer to any request for an advisory opinion, "represent its participation in the activities of UN, which in principal should not be refused except the occasions where there is "compelling reasons" to do so [21]. Some arguments arose in Kosovo case in this respect which are as following:

"Consent of an interested state, motives behind the request, lack of useful purpose in GA resolution 63/3 and its legal effect, as Kosovo situation is very much linked to an actual dispute, the request must be asked by the sc rather than GA, and political consequences of the court opinion".

### Application of these arguments in Kosovo case

In course the Kosovo advisory proceeding, several states have called upon the court to exercise its discretionary in order to refuse to answer the GA

request in this case. In this section, I will consider their argument and the answers which in my opinion are justified.

First argument was about interested parties consent. Firstly, Serbia as a part of this opinion was itself main sponsor of the CA resolution. Secondly, since the statehood of Kosovo was the subject matter of the dispute, it would be difficult for the court, and states for that matter, to alledge that the consent of Kosovo would have been required to answer the request of advisory opinion.

Thirdly, although the request was also aimed at providing clarification as to whether the recognition of Kosovo as a independent state by others could have seen as a violation of international law, only very few states actually voted against this request [22].

Second argument concerns about the motives behind this request. This matter very much linked to the fact that the request related to an actual dispute. They believed that the request did not have as its principal objective to assist the UN GA in the exercise of its functions but in effect only served the interest of Serbia. Because Serbia in its statement at the time of adoption of resolution 63/3 by GA stated:

"It seems this opinion to be politically neutral, yet judicially authoritative, guidance to many countries still deliberating how to approach unilateral declaration of independence in line with international law" [23].

The court answer (as before) was that, "its opinion is given to the organ which has requested it. Therefore the motives of individual state which sponsor or vote in favor of GA resolution for requesting the court opinions are not relevant to the courts discretion [24].

The third argument concerns about GA resolution 63/3 and lack of the legal effects of this opinion for GA. The court answered this problem by reference to its jurisprudence and stated:

"It is not for the court itself to purport to decide whether or not an advisory opinion is needed by requesting organ of UN for the proper performance of its functions. That organ (in this case the GA) has the right to decide for it self on the usefulness of an opinion in the light of its own needs" [25].

The forth argument is about political consequences of the court opinion. The court stated in several time before that "there are no evident criteria by which it can prefer one assessment to another" [26].

The fifth and the most important argument were about respective roles of the SC and the GA in relation to the situation of Kosovo. As some participants and judge s like Tomka, Keith, Sepulveda- Amor and Bennouna believed that this request for advisory opinion must put to the court by the SC rather than GA [27]. Their reasons was that situation in Kosovo had been the subject action by the SC for a decade, in exercise of its responsibility for maintenance of

international peace and security [28]. The GA also adopted 20 resolutions on the situation of Kosovo which five of them were about human rights [29] and 15 of them concerning the financing of UNMIK [30]. At the time of issuing the unilateral declaration of independence of Kosovo (2008), the GA feels it necessary to create a new agenda item for a request of an opinion form the ICJ. This decision of the GA in those circumstances seems justified, because of the following reasons:

1. According to well- established jurisprudence of court, the only "compelling reasons" should lead the court to refuse its opinion is in response to a request falling within its jurisdiction [31].

2. Articles 10 and 11 of the charter confer upon the GA a very broad power to discuss matters within the scope of the activities of the UN, including questions relating to international peace and security [32].

3. As court made it clear in its jurisprudence, article 24 of charter [33] refers to a primary, but not necessarily exclusive competence [34].

4. The fact that the situation in Kosovo is before the SC and it has exercised its authority in chapter VII does not preclude the GA from discussing any aspect of Kosovo situation, including the unilateral declaration of independence. Because of the limits which the charter place upon the GA to protect the role of the SC are contained in article 12 of charter [35]. This article restricts the power of the GA to make recommendations following a discussion, not its power to engage in such a discussion.

More over this article does not bar all actions by the GA in respect of threats to international peace and security before the sc. The court considered this matter in detail in its jurisprudence and stated:

"there has been an increasing tendency over time for the GA and the SC to deal in parallel with the same matter concerning the maintenance of international peace and security and observed that in these occasions the SC has tended to focus on the political aspects of such matters and the GA has taken a broader view, considering also their humanitarian, legal, social and economical aspects of the same matter" [36].

5. As the court has mentioned before, GA resolution 337 A (V), ("uniting for peace") provides for the GA to make recommendations for collective measures to restore international peace and security in any case where there appears to be "a threat to the peace, breach of the peace or act of aggression and the sc is unable to act because of lark of unanimity due to veto right of the permanent members [37].

6. The purpose of the court's advisory jurisdiction is to enable organs of the UN and other authorized bodies to obtain opinions from the court which will assist them in their future exercise of their functions. The court cannot determine what steps the GA may

wish to take after receiving the advisory opinion or what effect this opinion may have in relation to those steps. So GA is entitled to discuss the unilateral declaration of independence of Kosovo without trespassing on the power of the SC.

8. The interpretation and application of a decision of one of political organs of the UN is, in the first place, the responsibility of the organ which took the decision. But the court as the principal judicial organ of the UN has also frequently been required to consider the interpretation and legal effects of such decisions.

It has done so both in the exercise of its advisory jurisdiction [38], and in the exercise of its contentious jurisdiction [39].

There is nothing incompatible with the integrity of the judicial function in the court under taking such a task. Because the court observes where, as here, the GA has a legitimate interest in the answer of the court to GA question, the fact that, this answer may turn, in part, on a decision of the SC is not sufficient to justify the court in declining to give its opinion.

The court concludes from the forgoing reasons that "there are" no compelling reasons" for it to decline to exercise its jurisdiction in respect of the GA request before it [40].

\*Corresponding author:

Email: s.koosha1389@yahoo.co.uk (Soheyla Koosha).

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- 25- Cases concerning Legality of the threat or use of nuclear weapons, Op. Cit, P. 237, Para. 16; Legal consequences of the construction of a wall in the occupied Palestinian territory, Op. Cit, P. 163, Para. 62.
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