The Presentation of the Republic of Kosovo Before the International Court of Justice: Procedural Aspects

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Abstract

Now, one year following the declaration of independence of the Republic of Kosovo from Serbia, on February 17th, 2008, the institutions of Kosovo have before them, the great challenge of promoting ever greater recognition from international society.[1] In the near future, the independence of Kosovo will also be subject to a legal evaluation from the International Court of Justice.[2] Within the framework of a request for a consultative opinion, directed by the General Assembly based on article 96 of the Charter of the Organization of the United Nations, with Serbia's initiative, the International Court of Justice was called upon to respond to the question of whether "the unilateral declaration of the independence of Kosovo from the provisional institutions of self-governance of Kosovo is in accordance with international law?"[3]

Key words: Independence of the Republic of Kosova, Consultative Opinion, Jurisprudence of the International Court of Justice, Judges Ad Hoc of the International Court of Justice, General Assembly of the United Nations.

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[1] Based on December 2008 official statistics, the Republic of Kosovo has been recognized by 53 out of 192 total member states of the Organization of the United Nations.

[2] The International Court of Justice is a judicial organ of the Organization of the United Nations.

[3] Resolution A/RES/63/3 adopted by the General Assembly of the Organization of the United Nations on October 8th, 2008, http://daccessdds.un.org/doc/UNDOC/GEN/N08/470/98/PDF/N0847098.pdf?OpenElement, seen last on February 2th, 2009.

This paper aims to explain the context of the invitation that was made to the Republic of Kosovo to defend its cause before the International Court of Justice (I.). Without wanting the final decision of the ICJ to be prejudged, it has as its objective, to analyze the role that the consent of Kosovo plays in the exercising of the competencies of the Court (II) and the eventual possibility of the Republic of Kosovo to appoint an *ad hoc* judge within the ICJ on this issue (III).

I. The invitation made to the Republic of Kosovo to make a presentation before the International Court of Justice

Based on article 96 of the Statute of the International Court of Justice, the General Assembly and the Security Council of the Organization of the United Nations may request the opinion of the Court on every legal matter of international law. Other bodies and specialized institutions of the UN have such a right only with respect to legal issues that are raised in the context of their activities, and with the authorization of expression of the General Assembly of the UN.

We note that, unlike its function of contestation,[4] the consultative procedure of the International Court of Justice towards states is not opened in a direct manner. This is explained by the fact that the jurisdiction of the International Court of Justice is optional and not obligatory, which means that an issue may be submitted to the International Court of

[4] Through its consultative competency, the International Court of Justice is competent to review legal disputes between member states of the UN, and eventually between other states that have accepted the Court's Statute or have accepted its jurisdiction, under certain conditions designed for this purpose. The Court cannot exercise its function of contestation except in cases where the states concerned have accepted its jurisdiction in one of the following three ways: through a dispute called a compromise, connected between them in order to submit their dispute for review by the ICJ; on the basis of a compromise provision included in a treaty, through which the state parties engage to submit to the ICJ every future dispute concerning the interpretation and implementation of this treaty; on the basis of the declaration for the acceptance of the jurisdiction of the ICJ, made based on the Statute under which every state that has made such a declaration accept, as obligatory, the jurisdiction of the Court for every dispute that may occur in the future between it and another state that has made a similar declaration.

Justice for review only in cases where the two contesting parties have expressed the acceptance of its jurisdiction. Thus, the authorization of states to call upon the International Court of Justice to give a consultative opinion would be in contradiction with this principle, because in requesting such an opinion from the Court, one of the contesting parties will bring the other party before a determined fact even if the latter has not recognized the jurisdiction of the Court.

It is evident that at the origin of a request for a consultative opinion, is the proposal of a state or a group of states, members of the body which raises the request for a consultative opinion, which consequently has a resolution of the interested body, approved based on the procedure prescribed for this purpose. In the case of the Security Council of the Organization of the United Nations, a request for a consultative opinion is not considered to be an important issue which requires a two-thirds majority vote, as foreseen by article 18 of the UN Charter.[5] In the case of the Security Council, such a request is considered a substantial matter which means that its vote is subject to the veto of the permanent member states – Great Britain, France, China, Russia, and the United States of America.[6]

Thus, resolution A/Res/63/ 3 which contains the request for a consultative opinion directed to the International Court of Justice on the issue of whether the unilateral declaration of the independence of Kosovo is in accordance with international law, was approved on October 8th, 2008, based on Draft-resolution A/63/L.2 which Serbia presented to the General Assembly, on September 23rd, 2008.

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[5] Thus, called upon according to Resolution 49/75 K of 15 December 1994, which raises the issue of the legality of the threat or use of nuclear force, the ICJ did not elaborate *ex officio* on the issue of its validity, even though this resolution was not adopted by the two-thirds majority vote.

[6] In the only case where the initiative was taken to request from the ICJ, a consultative opinion with regards to legal consequences for states, of the continued presence of South Africa in Namibia, Resolution 284 (1970) was approved with 12 votes in favor and with the abstention of Poland, Great Britain and the Former Union of Soviet Socialist Republics (based on the empty seat principle, abstention is not equivalent to using a veto and therefore does not prevent the approval of a decision, for which the unanimity of the permanent member states is required).

Even though the member states of the UN were excluded from the right to directly request a consultative opinion, they do have the opportunity to present their views to the Court regarding the legal issues that are the subject of the request for a consultative opinion. On this occasion, their capacity as UN member states is a test of their legal interest to be presented at the Court and they do not need to justify the existence of a subjective interest which comes into question from the facts found at the origin of a dispute with another state.

The situation is more delicate with the consultative opinion has to do with other actors from international society such as, with other international organizations or an entity with a contested legal status. It is clear that they do not have the automatic right to present their views on the issue in question to the International Court of Justice. In practice, with respect to the principle of the equality of parties, the International Court of Justice has shown itself to be quite open, even though its conduct towards this end has not always been constant. Thus, in 1954, the Federation of International Civil Servants Associations was not called upon to provide data for the *Effects of Verdicts of the Administrative Tribunal of the United Nations* issue.[7] In 1962, for the issue on the *International status of South West Africa*, the Court had agreed to take the opinion of the International League for Human Rights with regards to legal aspects, but not with factual aspects.[8] In 1971, the Secretariat of the Court refused the participation of the Organization of African Unity on the Namibia issue[9], whereas the Court allowed Namibia to participate and defend its views.[10] In the year 2004, Palestine's right to express its views was officially recognized on all consultative procedures related to the *Legal consequences of building a wall in the occupied territory of*

[7] SAVOIE (P.-O.), « La C.I.J., l'avis consultatif et la fonction judiciaire : entre décision et consultation », http://cfcj-fcjc.org/clearinghouse/drpapers/2005-dra/savoie.pdf , pg. 41, seen last on February 2th, 2009.

[8] *Ibidem.*

[9] ICJ, Consultative opinion of June 21st, 1971, *Legal consequences for states of the continued presence of South Africa in Namibia,* Summary *16, pg. 41.*

[10] Ibidem.

Palestine.[11] In the same procedure, the Organization of the Islamic Conference and the League of Arab States won the right to take part in their request. The example of the issue of the *Legal consequences of building a wall in the occupied territory of Palestine* has thus far been the first and only case, in which an entity which is not in an international organization was called upon to present data in a consultative procedure within the ICJ. The importance of this precedent is even greater in the entity's special situation as it is not recognized as an existing state but as a state which is to be created in the future.

The chronological remembrance of all of the examples, in which other entities besides member states and UN bodies, were called upon to present their opinion in a consultative procedure within the ICJ, has as an objective to explain the importance of the invitation of the ICJ made to the Republic of Kosovo to present its views regarding the compatibility of the declaration of independence of Kosovo with international law. Even though legally, nothing obligated the ICJ to do such a thing; with its ordinance on October 17th, 2008, the Republic of Kosovo was invited to fully partake in a manner equal to that of the UN and its member states, in the consultative procedure which relates to its legal status. Thus, up until April 17th, 2009, the UN and interested member states, as well as the actors of the declaration of independence of Kosovo, have the right to put forth their views in writing, to the ICJ, commensurate with article 66 § 2 of its Statute. After which, in accordance with article 66 § 4 of the Statute of the ICJ, all of these may direct to the Court, up until July 17th, 2009, written remarks as a response to the written presentations of the other parties.

II. The consent of the Republic of Kosovo necessary for the exercising of the consultative competency of the ICJ?

Given the principle of the voluntary jurisdiction of the ICJ, the question may be asked: what would be the effect of the

[11] ICJ, Consultative opinion of July 9th, 2004, *Legal consequences of building a wall in the occupied territories of Palestine*, Summary 2004, pg. 136.

objection of the Republic of Kosovo that the ICJ review the issue of its independence since Kosovo is not a member of the UN and has not accepted the jurisdiction of the ICJ.

The response to this question is conditioned to the response to another question raised in a wider meaning: if it is a possible that a state, who does not want the ICJ to review a dispute in which it is a party or also a general theoretical issue which affects its interests, it may object because it has not accepted the jurisdiction of the Court, and, therefore, the ICJ refuse the request for a consultative opinion?

In 1923, the Permanent Court of International Justice,[12] the predecessor of the ICJ, refused to provide a consultative opinion with regard to the interpretation of peace treaties between Finland and the former USSR as it related to Eastern Karelia, with the reason being that the former USSR had refused to take part in the procedure, refusing this at the beginning and not recognizing the jurisdiction of the PCIJ. It must also be mentioned that the former USSR was not a member of the League of Nations, the judicial body of which was the PCIJ.[13]

Rather, the jurisprudence of the ICJ is not very clear in this regard. In its consultative opinion on March 30th, 1950, on the issue of the *Interpretation of peace treaties signed between Bulgaria, Hungary, Romania,* it expresses that: *The consent of states party to a dispute is the basis of the jurisdiction of the Court as it relates to contestation procedures. The work stands differently when it comes to consultative procedures when the consultative opinion has to do with a legal issue that is pending between the parties. The response of the Court only has a consultative character; as such, it does not have a binding effect. The result is that no state, member or not of the United Nations, has the capacity to prevent the acceptance of a consultative opinion, which the United Nations considered necessary, to explain their action.*[14]

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[12] The Permanent Court of International Justice (PCIJ) was the judicial body of the League of Nations (the predecessor organization to the Organization of the United Nations) and operated from 1922 up to 1946.

[13] SAVOIE (P.-O.), « La C.I.J., l'avis consultatif et la fonction judiciaire : entre décision et consultation », *op. cit.,* pg. 43.

[14] ICJ, Consultative opinion of March 31st, 1950, *Interpretation of peace treaties signed between Bulgaria, Hungary, Romania*, Summary 1950, pg. 71.

However, in the Consultative Opinion of October 16th, 1975 on the issue of the *Western Sahara*, it came into contradiction with this previous jurisprudence when it accepts to compare the situation of Spain as a member of the UN and that of the former USSR as a non-member of the League of Nations, on the issue cited earlier of *Eastern Karelia*. According to the ICJ, *the fact that the League of Nations did not have the competency to review a dispute that relates to non-member states that refuse its intervention, which was a crucial reason as to why the Permanent Court of International Justice had abstained from replying.*[15] It adds that on the issue of the *Western Sahara, Spain [was] a member of the United Nations and accepted the provisions of the Charters and the Statute; with this, it provided in a general manner its consent that the Court exercise its consultative jurisdiction[...] and not be able to oppose in a valid manner that the General Assembly exercise its right to take care for the decolonization of a non-autonomous territory and to request a consultative opinion on the issues that have to do with the exercising of this right.*[16] As it was expressed in this paragraph, the reasoning of the ICJ is to be understood as, if Spain was not a member of the UN; maybe its refusal may have motivated a refusal by the Court of the request for a consultative opinion on the *Western Sahara* issue.

One thing is certain: despite the opinion of some states, the ICJ is categorical that the consent of a state, which is the subject of the consultative opinion, is not a condition for its competency. It considers that *the consent of the concerned state retains its importance not as it relates to the competency of the Court, rather in terms of whether it is necessary to provide a consultative opinion.*[17] *Thus, the lack of consent of the concerned State may, in several circumstances make it so the declaration of a consultative opinion is inconsistent with the judicial character of the Court. Such would be the case, if the facts prove that the acceptance of the Court to respond would have as an effect a strain on the principle, according to which a state is not obligated to submit a legal settlement on a dispute without its*

[15] ICJ, Consultative opinion of October 16th, 1975, *Western Sahara*, Summary 1975, pg. 16.
[16] Ibidem.
[17]Idem., pg. 25.

consent.[18] Only in such cases, the ICJ may use its discretionary power which it has based on article 65 § 1 of its Statute and refuse to respond to the request for a consultative opinion. It must be mentioned that the ICJ has never refused a request for a consultative opinion on this basis.[19]

In this context, the case of Kosovo is very specific. Theoretically, from the standpoint of international law, a state exists from the moment that in a cumulative way, it has three existing elements: a territory, a population and an effective government. The Republic of Kosovo has all of these three elements and can be considered a state from the standpoint of international law. As such, it may object that it is not related to the competency of the ICJ due to the fact that it is not a member of the UN and that it is not associated with the Charter or with the Statute of the ICJ, nor has it accepted in another other way, the jurisdiction of the ICJ. In this registry, the case of Kosovo is similar to that of the former USSR in the case cited above concerning *Eastern Karelia* and calling upon the jurisprudence of the Permanent Court of International Justice may be alleged. However, it must not be forgotten that the stance of the ICJ in relation to this jurisprudence of the PCIJ has been in a way contradictory and it is not certain whether the ICJ is willing to use the jurisprudence of its predecessor. The tendency is even less likelier, when it is known that the object of the consultative opinion that was requested by the General Assembly, in this case, has to do with the legality of the independence of Kosovo from the viewpoint of international law, and with this comes into question also the capacity of Kosovo as a state, which has an international legal personality equal to that of other states. It is difficult to imagine that the ICJ would refuse this request for a consultative opinion, in recognizing the unique situation of Kosovo as a territory that was for years a protectorate of the UN and continues to remain under its supervision *sine die*.

[18] Idem., pg. 17.

[19] The decision to refuse the request for a consultative opinion directed by the International Health Organization as it relates to the *Legality of the use of nuclear arms in an armed conflict is based on the lack of competency and not for the reason that it regards the discretionary power of the Court* (see ICJ, Consultative opinion of July 8th, 1996, *Legality of the threat or use of nuclear arms*, Summary 1996, pg. 226.

Moreover, the painful past of Kosovo makes it so the issue of the legality of the independence of Kosovo is interpreted in a wider sense as an issue of international peace and security; this is a domain in which the UN Charter recognizes the importance competencies of the General Assembly. In this context, the jurisprudence of the ICJ in the above mentioned verdicts in the cases the *Interpretation of the peace treaties signed between Bulgaria, Hungary, and Rumania*[20] and *Western Sahara,*[21] find an uncontested application, in the sense that the ICJ has been categorical in a manner that no member or non-member state of the UN be able to attempt to prevent in a valid manner that the United Nations in general, and the General Assembly specifically, exercise their function. However, the Court is responsible for its own decisions and no hypothesis cannot be defended or rejected with absolute accuracy. Moreover when it is known that the ICJ may, at all times, use its discretionary power and refuse a request for a consultative opinion on the grounds that it does not consider it beneficial.

III. The right of the Republic of Kosovo to appoint an ad hoc judge within the ICJ

The International Court of Justice comprises of fifteen judges, selected for a nine year mandate by the General Assembly and the Security Council, if they have won the absolute majority of one and the other UN body. The composition of the Court is renewed every three years for one third of its members. They must be chosen among the personalities which have the reputation of a high morality and that fulfill the conditions in order to exercise judiciary functions or those that are known jurists in international law. The composition of the Court must represent the major forms of civilization and main legal systems of the world. Two citizens of the same state may not be permanent judges of the ICJ at the same time.

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[20] See above footnote 13.
[21] See above footnote 14.

Based on article 31 of the Statute of the Court, states that are party to an issue being presented before the Court and that do not have any citizen of theirs as a judge mandated by the Court, they have the right to appoint an *ad hoc* judge as a member of the panel of judges which will make a decision on the issue in question. Thus, commensurate with paragraph 2 of article 31 of the Statute, if one party in a contest within the Court has its own citizen as a mandated judge, every other party has the right to appoint one person of their choice to take part as a judge in that issue. This is similar even in the situation where none of the parties in the contest has a citizen of its own as a judge of the ICJ. It should be emphasized that it is not obligatory that this person have the citizenship of the state in question and in the majority of cases *ad hoc* judges are not nationals of the states that they have determined. For as long as the function is exercised, the *ad hoc* judge has the same status as the other judges and takes part, in an equal manner, in the making of all decisions regarding the issue in question.

Paragraph 1 of article 35 of the Rules of the Court requires that parties who wish to exercise the right to appoint an *ad hoc* judge should do this as soon as possible. The party must inform the Court on the name, citizenship, and short biography of the person selected as *ad hoc* judge at the latest – two months before time expires for the presentation of a written reply. If one party decides to abstain from this right with the condition that the other party does the same, it notifies the Court and the other party regarding this. If the opposing party decides to appoint an *ad hoc* judge, the Court then provides an extended term for the party that initially withdrew from this right, to appoint an *ad hoc* judge. The notification for the appointment of an *ad hoc* judge is communicated to the other party which may file a complaint in regards to this, within the time period determined by the President of the Court. If, after this time expires, the other party has not made any objection and the Court itself does not see any disadvantage in regards to this, the judge is considered as appointed and all parties are informed on this. In a case of contestation or doubt, the Court reserves the right to

make the final decision with regards to the appointment of an *ad hoc* judge.[22]

These provisions firstly are meant to be implemented in the contestation procedure, but, in accordance with article 68 of the Statute of the ICJ, the right of states was recognized to appoint an *ad hoc* judge also in the consultative procedure.

The current composition of the ICJ[23] does not comprise of citizens of Serbia. However, it is very possible that Serbia request the appointment of an *ad hoc* judge based on article 31, paragraph 2 of the Statute of the ICJ.[24]

The drafting of the provision of article 31, paragraphs 1 and 2 implies that the right to appoint an *ad hoc* judge was recognized for every state that is a party in a dispute which is the subject of a contestation or consultative procedure within the ICJ regardless of their capacity as a member of the UN. Certainly, this provision is firstly meant for member states, which have accepted the jurisprudence of the Court. However, it is logical that in rare cases when a state from those rare states which are not a member of the UN finds itself in a way as a party in a procedure within the UN, it have equal rights to the other party. Therefore, in principle, the Republic of Kosovo, whose interests may be affected by the consultative opinion that the Court will provide on the issue of the accordance of the

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[22] To illustrate, we can note that in the above mentioned case *Western Sahara*, the ICJ had refused Mauritania to appoint an *ad hoc* judge with the reason that they did not meet the conditions for such a thing since the consultative opinion which was requested did not have to do with any existing contestation between Mauritania and Spain. On the contrary, the request of Morocco to appoint an *ad hoc* judge was accepted by the Court since the consultative opinion had to do, without contestation, with a dispute between Spain and Morocco. (see ICJ Consultative opinion of October 16th, 1975, *Western Sahara vep. cit.*, pg. 8).

[23] The composition of the ICJ during 2009 is presented as the following : Hisashi Owada (Japan) - president ; Peter Tomka (Slovakia) – vice president; members : Shi Yiyong (China); Abdul G. Koroma (Sierra Leone); Awn Shawkat Al-Khasawneh (Jordan); Thomas Buergenthal (United States of America); Bruno Simma (Germany) ; Ronny Abraham (Franca); Kenneth Keith (New Zealand) ; Bernardo Sepúlveda-Amor (Mexico) ; Mohamed Bennouna (Morocco); Leonid Skotnikov (Russia) ; Antônio A. Cançado Trindade (Brazil) ; Abdulqawi Ahmed Yusuf (Somalia) ; Christopher Greenwood (The Kingdom of Great Britain and Northern Ireland).

[24] For notification, Serbia appointed Mr. Milenko Kreca as an *ad hoc* judge on the issue *Implementation of the convention for the prevention and punishment of the crime of genocide*, Croatia against Serbia, proceedings underway within the ICJ.

independence of Kosovo with international law, has the right to request the appointment of an *ad hoc* judge within the ICJ, based on article 31, paragraph 2 of the Court Statute.

Conclusion

It is worth mentioning that unlike verdicts issued within the contestation procedure, the consultative opinions of the International Court of Justice do not have a legally binding force for the parties to which they are directed. The consultative opinion is not a judicial act in the genuine meaning of the word, but only an expression of the viewpoint of the International Court of Justice on the issue which has been raised for consultation.[25] However, consultative opinions have an uncontested importance as it relates to the ascertaining of positive international law and take the same place within the framework of the jurisprudence of the International Court of Justice, as well as the verdicts which are issued in the exercising of its contestation competency. In practice, consultative opinions have a moral authority towards states, which in most cases accept to behave in accordance with it.

In the case of Kosovo, the consultative opinion of the ICJ may have a major impact on the continuing international recognition of the state of the Republic of Kosovo. Certainly, it is difficult to imagine that the states which have recognized the Republic of Kosovo withdraw the recognition they have made, in respect to an eventual consultative opinion which considers that the declaration of independence of Kosovo was made in violation of international law. At least, the Court cannot with any legal means impose states to do such a thing. The effect of such an opinion will be more expressed in terms of the position of the states which have hesitated or those who have categorically opposed the independence of Kosovo, by providing them a legal argument to not recognize the new state of Kosovo.

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[25] QUOC DINH (N.), DAILLIER (P.), PELLET (A.), *Droit International Public*, 6 ed., L.G.D.J., Paris, 1999, pg. 870.

In a different hypothesis built upon the supposition that in the legal duel of the principle of sovereignty to the right of peoples to self-determination, the ICJ will make the second triumph; the cause of Kosovo will gain undeniable legitimacy. This will not suffice to "heal" from the phobia of a precedent, states which within them have territories which aspire to separate, but in general will be favorable for the international recognition of the statehood of the Republic of Kosovo. Therefore, Kosovo should use all the procedural and substantive means possible, to convince the ICJ in this regard.

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