



The Advisory Opinion of the International Court of Justice on Kosovo's Declaration of Independence

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Abstract: The question raised by Serbia at the ICJ that, “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”, is my main focus in this study. The purpose of the paper is the study and analysis of the advisory opinion of the ICJ on Kosovo's declaration of independence. In the beginning, I will make a brief chronology of the process up to the Declaration of Independence, offering historical and legal facts that this way of declaration of independence was the only option for Kosovo. Later, I will focus on contesting the declaration of independence from Serbia at the ICJ of UN. After contesting the Declaration of Independence, will analyze the review and its judgment the ICJ, whether ICJ had jurisdiction in the treatment and trial of the case, countries with their statements that were in support of Kosovo and countries which they were against it and in favor of Serbia. After review and trial at the ICJ, I would analyze the decision of the ICJ that Kosovo's declaration of independence was in accordance with International Law? In conclusion, I would summarize the whole of the paper, the process through which Kosovo went during this period. Was also an undeniable fact that the Declaration of Independence was the only remaining option for Kosovo and its people?

Keywords: Declaration; Independence; Opinion; Judgment; Right

1. Chronology of the Process until the Declaration of Independence

“Serbian annexation of Kosovo in 1912 and again in 1945” (Reka, 1996, p. 109), already, in addition to war any other alternative seemed impossible. “However, the war in Kosovo began in 1997-98” (Reka, 2003, p. 71), especially “5, 6, and 7 March, 1998 ... Epic was the largest and most glorious but also the most tragic of the KLA” (Krasniqi, 2006, p. 24). “Serbian killings in Kosovo recall the killings in Bosnia” (Clinton, 2005, p. 712). To find a solution for Kosovo, the International

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Community called Rambouillet Conference. “Europe to prove that it was able to take the lead in resolving its internal issues, like the Rambouillet Conference to be held in Europe rather than in the US” (Fischer, 2008, p. 128). “This is the most decisive event in the history of Kosovo since the Conference of Ambassadors in London 1912-1913” (Qosja, 1999, p. 16).

“On March 18, was signed unilateral agreement in Rambouillet, Paris, in center of Kleber, where the Serb side nor the Russians were present” (Fischer, 2008, p. 146). “The signing was conducted by Albanians, the United States and the European Union” (Gecaj, 2009, p. 59). “As a result of not signing by the Yugoslav Serb party will follow NATO’s intervention, on March 24, 1999” (Gashi, 2004, p. 258). Rambouillet agreement had not made solution also for the final status of Kosovo, however, the agreement was marked with this text: “Three years after the entry into force of this Agreement shall be an international meeting to determine a mechanism on the final solution for Kosovo based on the will of the people, opinions of relevant authorities, the efforts of any one party which relate to the implementation of this agreement and the Helsinki final Act” (Buja, 2007, p. 354).

Negotiations between Belgrade and Pristina started in February 2006, which led by special envoy Martti Ahtisaari. Although progress was made on technical issues, the two sides had diametrically opposite views on final status. “From the whole process of negotiations, the special envoy of talks, Martti Ahtisaari on February 2, 2007, comes with its proposal regarding the final status of Kosovo, which envisaged independence under international supervision” (Baliqi, 2013, p. 3).

Serbia, as in all processes of negotiations, did not accept the Ahtisaari’s proposal. Kosovo had no other alternative than the unilateral declaration of independence. On February 17, 2008, Parliament proclaimed independence of Kosovo. “Out of 120 deputies of the Assembly, the Declaration of Independence 109 deputies voted. Ten members of the Serb minority, as well as Gorani deputy were not present” (Kosovo, 2008). “Kosovo was recognized by a significant number of countries, where until October 2008, it was recognized by 50 states.

2. Contesting the Declaration of Independence

Serbia considers that within the UN, Russia, China and other allied states, could help to prevent the recognition of Kosovo and the announcement of the declaration

as legally invalid and internationally. For this next battle, as in diplomatic and legal terms, Serbia managed to convince a number of European Union states to review the proposal of the Kosovo case by the ICJ, through the General Assembly of the UN. Serbia via the Memorandum which was presented by its Foreign Minister Vuk Jeremic stated that “the most principled way, most reasons to overcome the potentially destabilizing consequences of the unilateral declaration of independence of Kosovo, is that the issue was transferred from political into the legal arena”¹.

“Serbian Foreign Minister Vuk Jeremic, on August 15, 2008, formally sent a request to the UN, through which he seeks ICJ opinion about the act of Independence of Kosovo”². “The General Assembly of the UN in its meeting in September 2008” (Desku, 2013, p. 47), Serbia's request was sent to the International Court of Justice for further proceedings” (Blerim Reka, Bardhok Bashota Ylber Sela, 2016, p. 202). “On October 8, 2008, the General Assembly (GA) of the United Nations adopted Resolution 63/3, pro this resolution were 77 countries in favor, 6 against, 74 abstained and 30 countries did not participate in the vote” (Kosovo at the International Court of Justice, 2010, p. 37). “Through this resolution, the GA asked the ICJ”³ (Goldstein, 2003, p. 310) advisory’s opinion on the issue the following⁴: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?” Kosovo’s case before the ICJ had consultative function (Advisory). Serbia as an internationally recognized state and a member of the

¹ Letter sent by Serbia through its representative at the United Nations, sent to the President of the Security Council S / 2008/103, dated February 17, 2008, Nr. 117 file.

² Serbia claimed that the declaration of independence violate these principles; a) the principle of respecting the territorial integrity of states, b) the principle of self-determination, c) violation of Resolution 1244 of the Security Council of the UN.

³ The ICJ is a permanent organ of the UN based in The Hague. Founded in June 1945, and its function was started in April 1946, see the official website of the International Court of Justice <http://www.icj-cij.org/court/index.php?p1=1>, Accessed: 04/03/2016. ICJ consists of 15 members for a term of 3 years, elected by the Assembly, see Joshua S. Goldstein, *International Relations*, 2003, p. 310. The ICJ has two functions: a) Take decisions in disputes when a state requests such a thing, the judicial function, and b) Give opinions when requested by organizations or UN agencies, consultative function (advisory). Besides competence consultative (advisory), the International Court of Justice has jurisdiction to review the legal disputes international between member states of the UN, as well as other states that have accepted the Statute of the Court or have recognized its jurisdiction under certain conditions provided for this purpose.

⁴ It is worth mentioning that the Resolution was approved by several countries had already recognized Kosovo as an independent and sovereign State, Iceland, Costa Rica, Liechtenstein, Montenegro, Norway, and Panama.

United Nations, based on the UN Charter the General Assembly addresses sending of Independence at the ICJ.

Invoking the UN Charter who can raise the issue at the International Court of Justice are: “General Assembly or the Security Council may request any legal issues the justice of International Court” (Charter, United Nations Article 96, Paragraph 1, 1945). “Other authorities of the United Nations, after of authorized by the General Assembly, the Court may ask opinions about legal matters related to their field of activity” (Ibid Article 96, Paragraph 2). “A state which is not a member of the United Nations, may become party to the Statute of the International Court, if it fulfills the conditions’ set of UN Assembly on the recommendation of the Security Council” (Ibid, Article 93, Paragraph 1 and 2). From these Articles of the UN Charter, even though Kosovo was not and still is not a UN member, its case on the legality of Independence can be tried in court at the request of the General Assembly. “From this we can understand that, on the basis of the UN Charter, the ICJ Statute, the norms of international law contains no specific halt on the declaration of Independence” (Zaganjori, 2011). The right to request advisory opinions have a number of international organizations¹ (Gruda, 2007, p. 512), but remain dominant opinions given on issues requested by the General Assembly and the Security Council.

3. Assay and Judgment of the ICJ Kosovo Case

Relying on Article 66, paragraph 1 of its Statute, the ICJ announced on all states to have the right to attend the judgement². Based on Article 66 paragraph 2 of the Statute, the Court determined on April 17, 2009, as the deadline for submitting written opinions from interested countries. Thoughts about the issue presented 38 countries. Republic of Venezuela although a week outside the scheduled time, on April 29, 2009, presented its written statement that the Court decided to accept. The Court decided to invite the authors of the Declaration of Independence to present written opinions and comments, as their contribution was estimated that it

¹ According to the ICJ, organs and agencies have the right to request an advisory opinion are: General Assembly, Security Council, Economic and Social Council, the Council of the Custodian, the Internal General Assembly, and eleven specialized institutions like; ILO, UNESCO, FAO, ICAO, IBRD, IMF, ITU, WHO, IMCO, WMO, IFC, IDA, IAEA. See, Zejnullah Gruda. Public International Law, 2007, p. 512.

² Presenting in court is a condition for starting the process. The process is divided into two phases: a) in writing, and b) orally.

would be worthwhile for its decision (Kosovo at the International Court of Justice, 2010).

Based on the status and its regulation, on June 8, 2009, the Court informed the UN and member states, the beginning of the session for the presentation of oral arguments will be on December 1, 2009. At this session the oral declaration, opinions and comments were presented by 29 countries. At the session attended by all judges of the ICJ (15 judges)¹, but on May 28, 2010, Judge Shi from China resigned from the Court (House, 2010, p. 2). So, in the final decision of the Court judgment were only 14 judges (Knudsen, 2013, p. 204).

4. ICJ Advisory Opinion on the Declaration of Independence

ICJ by judging the legality of Kosovo's independence, focuses only on close examination of the application. Before addressing this question, the ICJ treated two procedural question: whether it has jurisdiction to give the opinion requested by the General Assembly; secondly, if it has jurisdiction to give an opinion on this case (DOĞAN, 2013/1., p. 64)? “Citing Article 10 of the UN Charter, the ICJ had accepted that there was legitimacy to review the request for issuance of the advisory opinion on Kosovo's declaration of independence. The court was informed that during the assaying of a case on the basis of legal authority has not led and is not affected by political motives in such matters” (Accordance with international law of the unilateral declaration of Independence in respect of Kosovo, 2010). “Based on statements submitted by States, the 14 countries have been in support of the Declaration of Independence approved on February 17, 2008², and against the declaration of independence and support for Serbia have been 12 countries³.

¹ The composition of the judges at the ICJ in 2009 in the Kosovo case was as follows: Hisashi Owada (Japan) chairman; Peter Tomka (Slovakia) - Vice President; members: Yiyong Shi (China); Abdul G. Koroma (Sierra Leone); Awn Shawkat Al-Khasawneh (Jordan); Thomas Buergenthal (United States of America); Bruno Simma (Germany); Ronny Abraham (France); 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 (United Kingdom of Great Britain and Northern Ireland).

² States that defended the legality of Kosovo's independence; Albania, US, Germany, UK, France, the Netherlands, Austria, Saudi Arabia, Jordan, Norway, Denmark, Finland, Croatia, Bulgaria.

³ Countries which were in support of Serbia were; Russia, China, Spain, Brazil, Argentina, Cyprus, Romania, Bolivia, Azerbaijani, Belarus, Venezuela, Vietnam.

The claim that the Declaration of Independence is violating the principle of respecting the territorial integrity of States: ICJ in clarifying whether the “Declaration of Independence has violated the principle of territorial integrity” emphasizes the following. Under the terms of the Kumanovo protocol signed with NATO in June 1999, the Federal Republic of Yugoslavia withdrew its army, police and civil administration of Kosovo. Thus, in 1999, the Yugoslav Federal Republic lost three elements of its sovereignty, control over Kosovo's territory, population and borders. According to the ICJ, “Declaration of Independence of 18 February 2008, only stated” ex post facto “with an internal act Kosovo's secession from Serbia” (Accordance with international law of the unilateral declaration of Independence in respect of Kosovo, 2010).

The claims raised that the principle of self-determination does not apply to Kosovo: Court emphasized that this problem falls outside the margin of appreciation to the question posed by the General Assembly. According to the Court, to answer the question it is necessary to determine whether the declaration of independence violates the norms of international law or “lex specialis-in” established by Resolution 1244 (1999), the Security Council. The Court then decolonization process and the principle of territorial integrity, if as such conflicts with the right of people to self-determination, the latter is given priority. This is based on a number of international legal documents, including the International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights, 1976), the Declaration of the General Assembly of the UN on giving independence to colonial peoples. In his seventh principle, the Helsinki Final Act also allows a peaceful change of state's borders relying on self-determination expressed democratically¹. “Declaration of Independence of Kosovo was conducted in a peaceful, orderly and civilized way” (Accordance with international law of the unilateral declaration of Independence in respect of Kosovo, 2010).

Claims arising out of violation of Resolution 1244 of the UN: The Court emphasized that the object and purpose of 1244 was the creation of a separate legal regime and temporary, and as such “should be understood as an exceptional measure” (Meller, p. 853). The court in its judgment that “nor Resolution 1244 (1999), nor the Constitutional Framework do not define the time that, when applied

¹ On 1 August 1975, the United States, Soviet Union, Canada and other European countries signed the Final Act of the Helsinki Conference on Security and Cooperation in Europe (CSCE). The purpose of this Act was to reduce tensions between the Soviet Union and the United States and its allies.

to or replaced by other acts” (Accordance with international law of the unilateral declaration of Independence in respect of Kosovo, 2010). Therefore, they constitute international law applicable in Kosovo until 17 February 2008. The Court also emphasizes the practice of the Security Council, which shows that, when the Security Council has set restrictive conditions for the final status of the territory, the restrictions mentioned expressly resolution. According to the Resolution 1244 (1999), “the Security Council has not reserved itself the right to the final settlement of the situation in Kosovo, also, the issue of conditions in determining the final status of Kosovo” (Advisory opinion of the ICJ on Kosovo's Declaration of Independence, 2010). The court reaches the conclusion that Resolution 1244 (1999), “does not prevent the Declaration of Independence of 17 February 2008, because these two acts operate at various levels, unlike Resolution 1244 (1999), the Declaration of Independence is an attempt to definitely determine the status of Kosovo” (Qerimi, 2015, p. 87).

Claims for violation of the principle of political solution: The Court further elaborates the meaning of the expression “political solution” as contained in Resolution 1244 (1999), specifically paragraph 11 / c her that, “the main responsibilities of the international civil presence will be... the organization and supervision of the provisional institutions in the exercise of self-government autonomous and democratic, to achieve a political solution” (United Nations, Resolution 1244, 1999). Court clarifies that the term “political solution” of Resolution 1244 (1999), was made “in the context of arranging the responsibilities of the international civil presence, mainly to special representative of the Secretary-General in Kosovo and UNMIK and not for actors others” (Accordance with international law of the unilateral declaration of Independence in respect of Kosovo, 2010). The Court concludes that the expression “should not be interpreted to mean the prohibition of the authors of the Declaration of Independence proclaimed. Well, Resolution 1244 (1999), does not prevent the authors of the Declaration of 17 February 2008 to declare independence from Serbia” (Ibid).

They claimed that the Declaration of Independence made violation of the Constitutional Framework: The Court noted that, “The Declaration of Independence was not revealed by the provisional institutions of self-government and not an act intended to have effect within the legal order, on which operate interim institutions” (Ibid). It says “The authors of the Declaration of Independence were not connected with competencies and responsibilities of the provisional institutions of self-government” (Ibid). “They were as representatives of the people

of Kosovo outside the framework of the interim administration” (Radi, Dov Jacobs & Yannick, 2011). On this basis, “the Court concludes that the Declaration of Independence does not affect nor the Constitutional Framework”¹. The International Court of Justice on July 22, 2010, with 10 votes in favor and 4 against states that, “The approval of the Declaration of Independence on 17 February 2008, does not violate the general international law, Resolution 1244 (1999) of the Security Council, and the Constitutional Framework. Consequently, **the approval of this Statement shall not affect any applicable norm of international law**” (Accordance with international law of the unilateral declaration of Independence in respect of Kosovo, 2010).

Serbia, after the ICJ’s opinion, insisted that the issue of Kosovo's status should be re-discussed (Bytyqi, 2012, p. 363). However, if one of the countries involved do not implement it, then the other part may refer the matter to the Security Council of the UN: “If a party to a conflict do not respect the obligations arising from a decision by the Court, the other party can 'addresses the Security Council, if it deems necessary, make recommendations or take measures to ensure the effectiveness of the decision” (Charter, United Nations Article 94, Paragraph 2, 1945).

5. Conclusion

The advisory opinion of the ICJ that Kosovo's declaration of independence did not violate the general international law, is of special importance for Kosovo's state-building process and its recognition in the international arena. I presented the case of Kosovo chronologically and analytically, how it came to the declaration of independence and its defense challenge the legality of Independence at the ICJ.

If we look at historical chronology of Kosovo and its occupation of Serbia, we conclude that any option other than independence would create space for other conflicts in the Balkans. Therefore, the struggle for liberation in 1998/99, the transition period under the international protectorate, and the declaration of Independence, they were as essential processes as legal by the ICJ decision.

¹ At the end of the stage meet Court decision. The decision made by a majority (quorum 9), in cases where the votes are equal, the major share of votes the president. The court's decision but the decision of the majority and minority opinion have the right to formulate their opinion in writing and attach to the majority. After the hearings, the members of the Court and then the Court consider the matter publicly announces its decision. The decision is final and no appeal.

Kosovo's declaration of independence with the decision of the ICJ, testified that there is no provision that violates the International Law.

By decision of the ICJ confirmed legality of the declaration of independence by the people's elected representatives. Kosovo's independence was a logical consequence of the destruction of Yugoslavia and self-determination of people. According to the ICJ, the right to self-determination is based on the principle of "jus cogens", applied in the case of East Timor and has implemented not only in de-colonial cases, but is a universal right of people to self-determination. The Court also confirmed that Kosovo's independence is not an act "secessionist", but the case of international coordination for solving territorial conflict between Serbia and Kosovo. Likewise, Kosovo's independence was a logical action in relation chain Rambouillet, 1244, the Constitutional Framework, 2001, Ahtisaari Plan, until the Declaration of Independence.

Destruction of Yugoslavia and Kosovo eject as one of the equal right of self-determination. International help and especially the United States, made the independence of Kosovo is a success story of local and international. International intervention (humanitarian) of NATO and Kosovo's independence was and is the case: Sui Generis, and without rolling.

The decision of the International Court of Justice on the legality of Kosovo's independence, testifies that Kosovo-Albanians already have the legally right for an Independent and Sovereign state.

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