

AN INSIGHT INTO BINDING EFFECT: *OPENING THE PANDORA BOX ON ADVISORY JURISDICTION OF ICJ*

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ABSTRACT¹

ICJ located in The Hague, Netherlands commonly known as World Court founded in 1946 replacing Permanent Court of International Justice is a judicial organ of United Nations Charter by virtue of Article 92, i.e. principal judicial organ.

Judge Lachs put it, “the guardian of legality for the international community as a whole, both within and without the United Nations.

When in contentious jurisdiction of ICJ can be used while states submits to the same whether by express or implied way , it has viewed that courts compulsory jurisdiction has never widespread, the judicial pronouncement even not binding on parties could be obtained by advisory opinion making application in normal way. But there arise two problems regards this opinion that:

- a) The court has power to decide only legal questions and if dispute tends to be political in nature it falls outside jurisdiction.
- b) Discretionary power has been bestowed upon the court to answer the question.

And the paper also addresses the same issues on resolving whether the advisory jurisdiction is binding or not and the relevance of such opinion.

KEYWORDS:opinion, judicial, legality, community, court.

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INTRODUCTION

In case of contentious jurisdiction, need to see whether a legal dispute with political implications can come before court as contentious depends on existing declaration of acceptance of courts compulsory jurisdiction or willingness of the parties. But in case of contentious jurisdiction there is no limitation regards to it and legal dispute having political terms can be approachable to the court for its opinion. Instance where court refused to give the opinion was of Eastern Carelia case due to the discretionary power given to it, it was again in Peace treaties case, stated that Article 65 of the statute gives power to examine whether circumstances are of character leading to decline to give opinion.

In Cameroon vs. Nigeria (2002) ICJR, held that to decide upon the legal disputes only court can exercise jurisdiction with the consent of the state and no decision upon third states not parties to the dispute.²

Jurisdiction of ICJ is thus the resultant of sovereignty of states and state responsibility. The discretionary authority puts International court of justice itself into advisory jurisdiction which has been put into many disputes. It was only again in July 2010, the international court of justice issued its advisory opinion in Kosovo case which relates to the dispute between Serbia and a non-state entity recognising Kosovo's independence. And to further on this matter the advisory opinion that the declaration made by Kosovo for its independence is not in contravention in rules of international law.

But what was observed even after this opinion that states were not recognising its independence. The only single point before the in 2008 to United Nations General Assembly was whether the unilateral declaration of independence by Kosovo in accordance with

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international law.³It is followed that many countries even G-7 states, 22 of 27 EU members sates recognized Kosovo.⁴

Even though receiving green signal for being Kosovo as independent Serbia continues it's withhold to recognise Kosovo. Even though it was said that the opinion is not that relevant but it may results into aspirations for many separatists. The courts response in this matter has been narrow ignoring issues like secession, statehood, and self –determination.

Advisory opinion functions as crucial element in legitimacy wars fought with soft power instruments that are non-violent yet coercive⁵. While states show reluctance to increase jurisdiction of ICJ, it can be possible at same time to widen advisory jurisdiction. Article 2(4) of United Nations Charter stipulates all members to refrain in their international relations from threat or forceagainst territorial integrity or political independence of any state or any manner inconsistent with purpose of United Nations. The Helsinki Final Act does not unconditionally advocate for absolute maintenance of territorial integrity but condemns use of force. The principle of self-determination by people has to be consistent with territorial integrity.

In Kosovo the ICJ underlines the relevance of territorial integrity and interpret basis of General Assembly Resolution 2625(XXV) of 1970 entitling Declaration on Principles of International Law concerning Friendly relations and co-operation among states in accordance with the charter of the United Nations and final act of Helsinki. International law contains no prohibition of declarations of independence and territorial integrity confined only to relations between states.

The article has discussed both positive and negative aspects of having advisory opinion but what author has felt is that advisory opinions of the ICJ has played vital part in evolution of International law. The importance cannot be underestimated on ground that it was first in *Difference Relating to Immunity from Legal Process case, when court received a request*

³Richard Caplan, *The ICJ's advisory opinion on Kosovo*, United Institute of Peace, available at www.usib.org, last seen on 06/04/2014.

⁴ US Department of State, *Diplomacy in action*, <http://www.state.gov>(last accessed on 27/04/2014)

⁵South West Africa case, GA Res,2145 (XXI)(Oct 27, 1996)

under Gebral Convention on the Privileges and immunities of UN,1946 and particular interest stipulated that this opinion shall be accepted as decisive by the parties.⁶

RESULTS ON ADVISORY OPINION

BRIEF OF: KOSOVO

Article 1 of Montevideo Convention on rights and duties of states⁷contain:

- a) A permanent population.
- b) A defined territory.
- c) Government
- d) Capacity to enter into relations with the other states.

February 18, 2008: The United States has recognized Kosovo as a sovereign state

June 15, 2008 : Kosovo Constitution came into force.

Kosovo was ruled by Ottoman Empire and was incorporated in Serbia being a later part of Yugoslavia. But thence ethnic tension protrudes up when Muslim Albanians outnumbered Eastern Serbs in Kosovo which resulted into international crisis and air bombardment in Yugoslavia. Throughout the period, Kosovo was administered by UN and also separate states were resulted to Serbia and Montenegro but Serbia considered still it to be part of its territory while Kosovo developed into independent country which was followed by formal declaration also.

⁶Reparations case, ICJ Reports 1949, p.174;16 AD,p.318

⁷Signed at Montevideo, 26 December 1933

It was on 22 July 2010, the ICJ gave advisory opinion on question asked by General Assembly on the as to whether unilateral declaration of independence by Provisional Institutions of Self Government of Kosovo in accordance with International Law?

In summary 2010/2 advisory opinion, the court based its opinion majorly on addressing the jurisdiction issue which got clarified as per Article 65 of Statute, paragraph 1⁸ in accordance with United Nations Charter and as per Article 96 of the Charter⁹ providing opinion taken on by General Assembly or Security Council. While ignoring the political aspects and considering the case pertains to legal aspects thereby it assumes its jurisdiction. It can be analysed that the Court has discretion to give advisory opinion.¹⁰ This power has been made discretionary in order to protect the integrity of courts judicial nature of functions. This opinion is just a kind of assistance in the activates and not a form of judicial recourse. In various other opinions, in Legality of threat or use of Nuclear Weapon,¹¹ where it was stated that it is not for court to decide whether or not advisory opinion is required by the Assembly for performance of its functions. Again in Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory,¹² the court commented that it cannot substitute its assessment of usefulness of opinion requested for that of organ. In the present matter the Security Council had exercised its responsibility on maintain peace and security.

Even form the analysis it could be analysed that that exercise of powers by Security Council will not preclude General assembly from discussing the aspects and the only limitation

⁸The 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. And Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

⁹The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

¹⁰1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

4. The application for revision must be made at latest within six months of the discovery of the new fact.

5. No application for revision may be made after the lapse of ten years from the date of the judgment.

¹¹(ICJ Reports 1996 (I), p 237, para 16.

¹²(I.C.J. Reports 2004 (I), p.163, para 62.

follows on it is as per Article 12 of the Charter¹³ which does not allow it to engage in any discussion being before Security Council but not for all matters. Henceforth the present matter as per Article 96 of ICJ. The court mentioned as per Article 12 para1. Of UN Charter according to which General Assembly cannot make any recommendation concerning maintenance of international peace and security as long as Security Council is effective. This issue was pertinent due to the fact that Kosovo was still on agenda of Security Council and then court analysed the long analysis of respective powers of the General Assembly and Security Council and UNGA did not violate Article 12 para1 of UN Charter and this resolution cannot be considered as recommendation.

In WHO case, certain conditions were observed in order to deliver the advisory opinion, i.e. authorization and point of opinion to be legal and within scope of activities. Even though all three conditions was not fulfilled but still the constitution of WHO permitted it. This brings us to major discussion whether such kind of specialised agencies could bring in the request. Article 76 of WHO Constitution¹⁴ empowers it to seek for the advisory opinion from ICJ but limited to question which are within its competence. So even though nuclear weapons subject is in mandate of WHO, but actual request made was outside the scope of its activities. The request was majorly on legality of use of nuclear weapons rather than effects of such weapons.

The paper majorly focuses on ICJ's jurisdiction in Kosovo case, which has been seen as with ambiguities. With regard to legality of declaration of independence of Kosovo was question that can be submitted but was argued by some states that it is political question which was rejected by courts on ground that the question can be asked in UNGA resolution.

1. Court did not concerned itself over matters as whether international law contains a right to unilateral secession, deriving right to self-determination and what preconditions to be met to have recourse to such right.

¹³While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests. And The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

¹⁴Upon authorization by the General Assembly of the United Nations or upon authorization in accordance with any agreement between the Organization and the United Nations, the Organization. may request the International Court of Justice for an advisory opinion on any legal question arising within the competence of the Organization.

2. The court observed that the international law do not contain any prohibition regards to declaration of independence¹⁵ and not violate of UN Security Council Resolution 1244 and Constitutional Framework 2001 because authors of declaration were not subjected to it.
3. Still not clear whether Kosovo is an independent state or not.

DISCUSSION ON EFFECTS OF THE ADVISORY OPINION

Of equal though not great significance, states file this as part of its proceedings as a remedial secession in written and oral pleadings.

1. Kosovo has been recognised as independent state.
2. Dispelling of uncertainty making a contribution to peace in Balkan region even if Serbia and Kosovo did not settled.

Three of the five permanent members of UN Security Council i.e. USA, UK, and France recognised the independence of Kosovo while Russia and China had refused.

Some criticisms has also followed which states that court has failed to see whether declaration of independence by it was according to the rules of the use of force. Whether the court was competent on declaring the legality of the entity status and did not discuss the international rules whether they do actually possess legal personality or not. The opinion is said to be unconvincing. Courts advisory opinion is also not the best way to solve disputes between state and non-state entity and seeks that this kind of opinion is undesirable.

Now after the verdict and opinion Kosovo could get memberships in EU and UN. But an adverse effect on Serbia could be seen. Although this judgement has been controversial

¹⁵ Advisory Opinion, pp. 29-32, paras. 79-84.

questioning the advisory opinion, on other hand an opinion in *Nuclear Weapons Case*,¹⁶ it was said that that even though contentious cases bind only the parties and advisory opinion do not have binding force but Judge Mohammed Shahabuddeen in a book, Precedent in the World Court has remarked that advisory opinion is a authoritative statement of the law as same as judgement rendered.¹⁷

A. ADVISORY OPINION UNDER THE STATUTE.

Article 96 of UN Charter reads:

- i. *The General Assembly or the Security Council may request the International Court of Justice to give advisory opinion on legal question.*
- ii. *Other organs of the United Nations may also at any time be so authorized by General Assembly, may also request advisory opinion of court on legal questions arising within their scope of activities.*

Simultaneous powers have also been bestowed under Article 65 of the statute¹⁸ to refuse to give opinion.¹⁹ Such factors are: like that of the political nature of the question and absence of consent which is actually concerned of.²⁰

B. ADVISORY OPINION ON KOSOVO

Under Article 65, paragraph 1 of International Court of Justice provides that Court,²¹ 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 to make such a

¹⁶ Advisory Opinion , On the legality of the threat or use of nuclear weapons, International Court of Justice July 8, 1996, General List No. 95

¹⁷ John H. McNeill, Senior Deputy General Counsel at the United States Department of Defense, International Review of the Red Cross, No.316, <http://www.icrc.org/> (last accessed on 27-04-2014)

¹⁸Ibid.,7

¹⁹1. 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.

2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question

²⁰ Pomerance, Michla, *The Advisory Function Of The International Court In The League And U.N.* Eras, 1973 at 281 cited in Liz Heffernan, *The Nuclear Weapons Opinions: Reflections On The Advisory Procedure Of The International Court Of Justice*, Stetson Law Review, 1998. Cited in (Amit Kumar Meena 4th Year, National Law School of India University Bangalore, India

²¹Ibid.,7

request. Even by Article 96 of the Charter, General Assembly or the Security Council may request the ICJ to give an advisory opinion on any legal question.²²

In an opinion of World Health Organization on nuclear weapons use by state during Armed Conflict was held that to have court the advisory jurisdiction 3 major conditions need to be fulfilled.

1. Agency should be duly authorized under charter to request
2. Should be for the opinion on legal question.
3. Question on scope of activities of requesting agency.

The two major points urging this course the first state i.e. Serbia only was the one first to request for this opinion and secondly since statehood itself was the subject matter of opinion, consent of Kosovo was difficult to answer for opinion. Thirdly this request per se was a violation of international law because of the fact that only few states voted against the same i.e. by 77 votes, 74 abstentions and 6 votes against.²³ Arguments by states suggest that this opinion was to assist Serbia only which is a kind of judicial guidance and advisory opinion can only be sought by international organs of the UN and states do not have this power. The function in rendering the opinion is much more like a lawmaker rather to do settlement.

But these contentions rejected by following the jurisprudence by courts that to exercise its jurisdiction resolution of any statement is not required. Motives behind request are of no purpose for the courts.

Even but if one see the trend then before the judicial opinion many states had recognized Kosovo. And thus could be said that the opinion was not a determinative factor for recognition.

In the present matter Serbia has lost the battle not completely and it was also expected that it would denounce advisory opinion so that the findings will have no bearing on it. But on other

²²<http://icj-cij.org>, last seen on 16/04/2014.

²³Dr. Eric De Brabander, Assistant Professor of International Law, Leiden University, *The Kosovo Advisory Proceedings and the Court's Advisory Jurisdiction as a Method of Dispute Settlement* citing, UN General Assembly, Meeting Records, Sixty-third session, 22nd plenary meeting, Wednesday, 8 October 2008.

hand Kosovo has welcomed this opinion in the sense that the independence has now been declared.²⁴

But at the same time there is much efforts being wasted in opinion of some in obtaining such opinions which are also backed by political motives in obtain such opinions and one such example is that of Kosovo. Some consequences positive or negative are:

1. Regional stability is always at stake and concerns over self-determination.
2. Advisory opinion is treated as political approach.
3. A path where no adverse consequences as it are a respectable option to ignore the conclusions reached.
4. The states whose national policies will be colliding with legally determined outcomes will never be respected by Government.
5. It is different from contentious opinion where state parties consents to adjudication while in case of advisory opinion it may be on sensitive issues even against objections by concerned states.

In EasternCarolina case, which had been in principle that advisory opinion cannot function as indirect way of pronouncing upon states that didn't submitted to court for adjudication. But court in real practise does have responded to the requests from organs of United Nations which concerns matters involving sovereignty of states.

²⁴Richard Falk, *The KOSOVO ADVISORY OPINION: CONFLICT RESOLUTION AND PRECEDENT*, American Society of International Law, Vol.105, January 2011, pg 50-60

CONCLUSION AND SUGGESTION

SUMMARY

Even though court did not determine whether international rule allows for a secession of a part of territory of existing states.

But certain questions like whether recognition of independence of Kosovo by United Nations Member states violate obligations not to interfere in Serbia Domestic affairs and especially territorial integrity has paved conclusions like:

- a) International law did not authorise unilateral secession from state but prohibition of unilateral independence is not implicit in territorial integrity
- b) With regard to non-state entities the principle of integrity has limited scope but use of force is applicable to all.
- c) The court did not take position on effectiveness of the declaration.

International court of justice has been criticized due to its limited effectiveness, wherein only few states recognise the compulsory jurisdiction of the court whether with or without reservations. Even some states refused to comply with it. Its jurisdiction is not that of compulsory from the very fact that only when states wish then they can apply for the same.

Even need arises to ponder upon whether ICJ can extend or limit its jurisdiction, including capacity to interpret jurisdiction, eg in case of legality to use nuclear weapons. It was criticised that court cannot give opinion in this but earlier it was seen that it has given and extended its jurisdictions in case like that of Corfu channel case where a unilateral application of United Kingdom intimating acceptance of court's jurisdiction deeming it to be consent.

The ICJ opinion on legality of the use by a state of nuclear weapons in armed conflict is a fair example of differences held by different states as to the role of international organizations.

IMPLICATIONS

Regard to human rights point of view as well as political realism, the Kosovo claim is highly reasonable and it would turn to be unreasonable to insist on legal reversal of defacto independence of Kosovo had been enjoying. The self-determination for ethnic community and delimited geographic region within Serbia, being a federal component of Yugoslavia has some destabilizing potentialities. And in case on achievement of statehood, it will be case concerning self-determination to the third degree. The third degree is an ethnic/ geographic fragment of a federal unit. The case of Kosovo is an example of existing sovereign states, and hence any person living in area suffering from human rights can claim sovereign independence and statehood. The delegation by Security Council of its extensive powers was termed as valid. But it is unable to determine as one time advisory opinion is not binding while other treated its statement as binding.

SUGGESTIONS

In current scenario, it is hence suggested that opinions should not be resorted without consent of the states which may result into dismissal of international rule. But there can be confidence taken from opinions like that of Nuclear Weapons and Walls case who favoured these opinions if they even not implement them.

Even regards to advantages of such an opinion there has been criticism of the same like that advisory opinion

- a) Lacks reasoning
- b) And even-handedness

The Advisory opinion according to me is right even it has set terms for future debates and presumptions.

Regard to current and future state of development, the legitimacy of declarations of independence and legitimacy not infringing peremptory norms will depend on democratically expressed opinion of the citizens living in concerned place. Since advisory opinion has no binding force, yet the question of whether or not it should be accepted is not a legal one. Before submitting a dispute the organs should consider whether the dispute is of political importance.

1. The court having no jurisdiction whether advisory or contentious over political disputes has not been recognised.
2. Courts should pay greater attention to possibility that the question relates may be of dispute between states having political implications and simply if the dispute has been submitted by General Assembly would not make it less political.
3. Court should decline further to give opinion on political considerations or members should look upon the pronouncements as advice.

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