



The General Assembly resolution requesting the *Kosovo* opinion and the *ultra vires* issue

*Dr. Raphaël van Steenberghe**

This paper analyses the reasoning adopted by the International Court of Justice (ICJ) on its jurisdiction in the *Kosovo* case. It is submitted that this reasoning is not devoid of any ambiguity and could be interpreted as suggesting that the Court endeavoured to analyse the validity of the UN General Assembly (UNGA) resolution by which it was seized, beyond what seems formally required by the relevant UN Charter provisions. It is also noticed that, contrary to previous advisory opinions, the Court sensibly discussed whether the question should have been asked by the Security Council rather than the General Assembly not in the context of its jurisdiction but mostly in relation to its discretionary power to give the advisory opinion. Those issues are only briefly addressed here. More detailed reflections on such questions as well as on all the other questions raised by the Court's advisory opinion may be found in a forthcoming paper.¹

It is well known that, under the ICJ Statute which refers to Article 96 para. 1 of the UN Charter, the General Assembly, like the Security Council, benefits from a broad authority to request an advisory opinion from the ICJ. The only limit to this authority is that the requested opinion must concern a legal question. The legal nature of the question put before the Court was difficult to deny in this case. Yet some States contested it by arguing that the act of making a declaration of independence was a political act and could only be regulated by domestic law (which must be considered as a fact in light of international law).² According to those States, the question over the legality of the declaration of independence of Kosovo was not therefore a question pertaining to international law which could be submitted to the Court. Some States also emphasized that the question about the independence of Kosovo had

* Postdoctoral researcher, Belgian National Fund for Scientific Research (FNRS); lecturer in humanitarian law at the University of Louvain (Belgium); professor at the Royal Military School of Belgium; member of the International Law Centre at the University of Louvain [raphael.vansteenbergh@uclouvain.be].

¹ R. VAN STEENBERGHE, A. CLAEYS BOUÚAERT, « L'avis de la Cour internationale de Justice sur la déclaration d'indépendance du Kosovo. Audace et retenue de la Cour au sujet d'une question controversée », *Revue de droit international et de droit comparé*, forthcoming 2011.

² ICJ, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, 22 July 2010, para. 26-27.

strong political aspects which dominated any legal ones. The Court easily refuted those arguments by relying on its well-established jurisprudence. According to the Court, the question was formulated in such a way as to require a proper legal analysis on the basis of international law and the political dimensions of the question could not prevent the Court from ruling on its legal aspects.³

The Court could have stopped its reasoning at that point and concluded that it had jurisdiction to give an advisory opinion on the question asked in the UNGA resolution. However, it went further. Without expressly mentioning that it also had to analyse whether this resolution had not been adopted *ultra vires*, the Court actually gives the impression that it embarked on such analysis.

Although having started its reasoning on its jurisdiction by recalling that the question asked to the Court “should be one arising within the scope of the activities of the requesting organ” (Article 96 para. 2), “except in the case of the General Assembly or the Security Council” (Article 96 para. 1),⁴ the Court nonetheless asserted shortly after that “[w]hile paragraph 1 of Article 96 confers on the General Assembly the competence to request an advisory opinion on ‘any legal question’, [it] had sometimes in the past given certain indications as to the *relationship* between the question which is the subject of a request for an advisory opinion and the *activities* of the General Assembly”.⁵ This assertion is far from being clear. Firstly, the Court did not expressly state that the existence of such “relationship” is a legal condition for the valid seizure of the Court by the General Assembly. Its ambiguous statement and reasoning however leave the door open to this interpretation.⁶ Secondly and more fundamentally, the notion of “activities” used by the Court could be interpreted as meaning either the “concrete activities” undertaken by the General Assembly in relation to the question or, more generally, the “competences” of the General Assembly, in the same sense as the “activities” referred to by Article 96 para. 2 of the UN Charter.⁷ Interpreting the notion of “activities” in this latter sense is particularly tenable not only, as explained below, in light of the final purpose of the advisory jurisdiction of the Court (*cf. infra*), but also given, more concretely, the considerations upheld by the Court immediately following its ambiguous assertion. Those considerations indeed directly refer to articles 10 and 11 of the UN Charter, that is, articles concerned with the functions and powers of the General Assembly.⁸ The Court did not refer at that stage to the “concrete activities” conducted by the General Assembly in relation to the *Kosovo* situation. It (sensibly) did so, as detailed below, only in the context of its discretionary power (*cf. infra*).

³ *Ibidem*.

⁴ *Ibid.*, para. 19.

⁵ *Ibid.*, para. 21.

⁶ See, in the same way, concerning similar conclusions held by the ICJ in the *Wall* case, J.A. FROWEIN, K. OELLERS-FRAHAM, “Article 65”, in A. ZIMMERMANN, C. TOMUSCHAT, K. OELLERS-FRAHM (ed.), *The Statute of the International Court of Justice. A Commentary*, OUP, 2006, at 1407.

⁷ See *ibidem*, for such interpretation, concerning similar conclusions held by the ICJ in the *Wall* case.

⁸ ICJ, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, 22 July 2010, para. 22-23

As a result, the wording used by the Court could give rise to interpretations whereby the distinction between para. 1 and para. 2 of Article 96 fades away. More precisely, the Court left open the possibility of such interpretations. 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 Weapons* case. In this case, some States indeed claimed that the Court was not competent because, in their opinion, the “speciality requirement” provided under Article 96 para. 2 also applied to the General Assembly under Article 96 para. 1 and the question concerning the legality of the nuclear weapons was not “arising within the scope of the activities” of the General Assembly.⁹ Quite curiously, the Court did not reject the claimed interpretation of Article 96 para. 1. It expressly stated that it was not relevant to consider whether such interpretation was or was not correct, because, according to the Court, “the General Assembly [had] competence in any event to seize the Court [in this case]”.¹⁰ Then, to support its view, the Court directly referred to articles 10, 11 and 13 of the UN Charter before analysing, in the following paragraph, the concrete activities undertaken by the General Assembly in relation to nuclear weapons.

By referring to this case law, without giving any further clarifications, the Court did not dispel the ambiguity about the meaning of Article 96 para. 1 in the current case. Would it be unreasonable for the Court to determine whether the question “arises within the scope of the activities” of the General Assembly before establishing its jurisdiction? If one considers it as a legal condition for the valid seizure of the Court, it would imply the reducing of the broad authority that the General Assembly, like the Security Council, seems to enjoy to request an advisory opinion from the Court under Article 96 para. 1 of the UN Charter. However, it would be consistent with the fundamental purpose of the advisory jurisdiction of the Court,¹¹ which consists of “enable[ing] organs of the United Nations and other authorized bodies to obtain opinions from the Court which will assist them in the future exercise of their functions”.¹² Indeed, how could such purpose be achieved if the question asked does not fall within the competences of the requesting organ? Having said that, one must acknowledge that the competences of the General Assembly are so extended and extendable that it is unlikely (but not theoretically impossible) that the question could not be linked to any of such competences. In the current case, the Court could easily mention the competences to which the question was related to, mainly the maintenance of international peace and security.¹³

The Court then mentioned Article 12 para. 1 of the UN Charter and analysed whether the resolution violated this Article. Indeed, according to such provision, the General Assembly

⁹ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ. Rep.* at 233, para. 11.

¹⁰ *Ibidem.*

¹¹ See, for a similar observation, R. RIVIER, « Conséquences juridiques de l’édification d’un mur dans le territoire palestinien occupé. Cour internationale de Justice, avis consultatif du 9 juillet 2004 », *AFDI*, 2004, at 318.

¹² ICJ, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, 22 July 2010, para. 44.

¹³ *Ibid.*, para. 22.

cannot make any recommendation with regard to a dispute or situation concerning the maintenance of international peace and security as long as the Security Council is effectively exercising its responsibility with respect to that dispute or situation, unless the Council so requests. The question was particularly relevant since the situation relating to Kosovo was still on the agenda of the Security Council while the General Assembly, requesting the opinion, had not substantially dealt with this situation since 1999. In other words, the Court wondered whether the UNGA resolution had not been adopted *ultra vires*, in violation of the rule establishing the respective powers of the General Assembly and the Security Council. It had actually already done so in its opinion in the *Wall* case. In this opinion, the requirement that the UNGA 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 General Assembly.¹⁴ This requirement seems reasonable since the respect of the rule pertaining to the balance of powers between the General Assembly and the Security Council is particularly important in order to give full legitimacy to the Court's opinion. The Court quickly settled this question. As already stated in the *Wall* case, the Court asserted that Article 12 para. 1 was not applicable because the request for an advisory opinion could not be considered as a "recommendation".¹⁵ In other words, according to the Court, the General Assembly could never encroach upon the powers of the Security Council when requesting an advisory opinion from the Court.

Quite sensibly, the Court stopped its reasoning here, contrary to what it did in the *Wall* case. In the latter case, after having refused to assimilate a request for an advisory opinion to a recommendation, the Court nonetheless went further and analysed whether the adoption of the UNGA resolution did not violate Article 12 para. 1 of the UN Charter, curiously suggesting that this resolution could nevertheless be considered as a recommendation.¹⁶ The Court then developed a long analysis regarding the evolution of the respective powers of the General Assembly and the Security Council. In this context, it analysed the concrete activities undertaken by both organs in relation to the *Middle East* situation. The Court did not follow this reasoning in the current case. It explicitly asserted that this question had to be discussed exclusively in the context of its discretionary power regarding the exercise of its jurisdiction and, more particularly, in relation to the question of whether the advisory opinion had been requested by the appropriate organ.¹⁷

It is worth mentioning in this respect that the Court focussed (only) at that stage on the concrete activities conducted by the General Assembly (and the Security Council) in relation

¹⁴ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep. 2004, para. 25. See, for a similar observation, J.A. FROWEIN, K. OELLERS-FRAHAM, *supra* note 6.

¹⁵ ICJ, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, 22 July 2010, para. 24.

¹⁶ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep. 2004, para. 25.

¹⁷ ICJ, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, 22 July 2010, para. 24.

to the Kosovo situation and not on the competences of this (those) organs as it may be interpreted as having done when analysing its jurisdiction (*cf. supra*). This seems entirely justified in light of the final purpose of the advisory jurisdiction of the Court. Indeed, as already argued above, such purpose could logically never be met if the question does not “arise within the scope of the [competences]” of the requesting organ. It seems therefore logical for the Court to analyse this issue in relation to its jurisdiction and to conclude that it has no jurisdiction if the question cannot be linked to any competence of the requesting organ. However, once such a link is established, one cannot (theoretically) exclude that the advisory opinion may be useful for the (future activities of the) requesting organ, even if the concrete activities already undertaken by this organ in relation to the question put before the Court are very few or nonexistent. It is then a matter of discretion (rather than of jurisdiction) for the Court to analyse this usefulness. The jurisprudence of the Court proves in this regard that the number of relevant concrete activities conducted by the requesting organ is not decisive in denying the exercise of its jurisdiction since the Court generally considers that it cannot act as a substitute for the requesting organ in assessing the usefulness of its advisory opinion.¹⁸ In other words, it leaves this assessing task to the requesting organ. As a result, it becomes impossible for States to argue that the final purpose of the advisory jurisdiction of the Court could not be met on the basis of the (limited) activities undertaken by the requesting organ in relation to the question put before the Court.

As shown above, the reasoning adopted by the Court on its jurisdiction is not devoid of ambiguity. Although it clearly asserted that UNGA resolutions requesting an opinion cannot be seen as a recommendation in the meaning of Article 12 of the UN Charter, it did not exclude the possibility to consider that the question asked by the General Assembly has to “arise within the scope of its activities” (in the meaning of “competences”) in order for the Court to have jurisdiction, although such requirement seems to go beyond what is provided under Article 96 of the 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.

¹⁸ See *ibid.*, para. 34.