

## Unbolting the Central Principles in the 'Case Concerning the Unilateral Declaration of Independent Kosovo' (UDIK)

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This case comment revolves around the pristine principles of International Law involved in the case concerning 'Unilateral Declaration of Independence in Kosovo (UDIK)<sup>2</sup>. The case is considered by legal scholars as a watershed movement in International law, in a sense it brought to light the underlying principles of International law which since World War II has eluded, although the relevance of the advisory opinion is far sighted in terms of the jurisprudence evolved.

The three elementary principles dealt in the advisory opinion includes;

- a) Principle of Sovereign Equality;
- b) Principle of Territorial Equality;
- c) Principle of self-determination.

The advisory opinion sought is one of discretion. The question posed before the International Court (hereinafter referred to as 'the court') was whether the declaration of independence falls under 'legal question'. The advisory power of the court is derived from Article 65 and Article 96 of the Statute of the International Court of Justice (hereinafter referred to as 'ICJ') and United Nations Charter (hereinafter referred to as 'UN Charter') respectively. Enveloping more into the nature of advisory opinion, it is not binding on the states, it has only advisory character (refer the Peace Treaties Case) but in case of special agreement it could be eclipsed. In certain circumstances the ICJ could evade advisory opinion on following grounds: the question raises serious political issue, lacking adequate information on the issue, lacking jurisdiction, could affect the interest of parties as reflected in the Eastern Carelia Case. In order to refuse, the reason cited should be 'Compelling', in the history of the court only once the advisory opinion has been declined i.e. in the

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<sup>2</sup><http://www.icj-cij.org/docket/index.php?p1=3&p2=4&case=141&p3=4>.

advisory opinion to the W.H.O on the 'Legality of Use by a state of Nuclear Weapons in Armed Conflict'. Also, as emphasized under Article 1 of the UN Charter (Reservations Case) 28<sup>th</sup> May 1951, advisory opinion is to guide the UN in respect of its own actions.

Coming to the core issue in the UDIK, three facets have been focused at length firstly the jurisdiction, secondly the permissibility or prohibition of Unilateral Declaration of Independence and validity of Unilateral Declaration of Independence.

Another pertinent question is whether there is hierarchy in UN Charter as to the ranking amongst the organs, Article 7(1) of UN makes it amply clear that the hierarchy element is missing, as underscored in the 'Reparations Case' (UN enjoys legal personality) that it is doctrine of implied power. The structure and the hegemony of the organs of the UN was further elucidated through the General Assembly Resolution 171(II) "Need for greater use by UN and its organ by ICJ", also in paragraph 2 of the operative part of the resolution 44/23 it was vivid that only in case of compelling reasons advisory opinion must be refused by organs.

In case of Unilateral Declaration of Independence, the power of General Assembly granted by the UN Charter under Article 10 and Article 11(2) request any question in consonance with the objectives of the organization. Whether the question is in accordance with International Law, what happens when the matter is already seized by the Security Council? Article 12 ban on the General Assembly as to any recommendation when the dispute is seized by Security Council. Now talking about it is worth taking a ride into the evolution of what is 'dispute' in International Law. In the *Mavromattis Palestine Concession (Jurisdiction)* Case the term 'dispute' meant disagreement over a point of law or fact. In the *Georgia v Russia and Burkina Faso v Niger, 2013* the term dispute was based on 'objective determination test' i.e. claim by one party is positively opposed by the other. In the *El Salvador/Hondorus* case it was laid down that for a dispute to subsist, it is sufficient merely to deny. In the case of *Belgium v Senegal*, it was propounded that negotiation indicates that there is a dispute. From the above catena of cases it is ubiquitous that the jurisprudence on the term 'dispute' is evolving. The recent vogue is the test in the *India v Marshall Island* case, October 5 2016 the court in the majority opinion pondered over jus positivism

and fails to capture the normative spirit involved in problem relating to nuclear arsenal. Further the court states that the dispute is one of a substantive question and not of a procedural one, pointing toward 'Awareness Test'. The settled principle as to the definition of dispute is missing even after six decade of the existence of the International Court. Disputing the notion that the Security Council is superior organ in the context of Article 12 of the UN charter, the question of the supremacy of the organs was addressed by Judge C.G Weeramanthry in the 'Question of Interpretation and Application of the 1971 Montreal Convention Arising from Aerial Incidence (Libya v U.K)' and stated that "There can never truly be a question of opposition of one organ to another but a common subjection of all organ of the charter". Article 12 is clear in this regard as it uses both 'recommendation and request'.

Next the quandary was whether the mandate of security council to maintain peace and security under Article 24 of the UN charter could be taken over by the General Assembly under Article 10 and 11 of the UN charter under the 'Uniting for Peace Resolution' remains affair of predicament in the Kosovo case.

The court dealt extensively on the Principle of Self-Determination also called as principle of 'International Democratic Governance', jurisprudence of the right is evolving and achieved greater dictum in International Law since the instrument 'Declaration of Granting Independence to Colonial Countries and People, 1960' came into existence, since then the term itself is evolving and it is chiefly classified as in terms of timeline as; colonial regime, multinational companies and oppressive minorities. Besides, which Article 1 of International Covenant on Civil and Political Rights (hereinafter referred to as 'ICCPR') employs the term 'for all peoples', excluding minority as there is a separate provision for minority under Article 27 of ICCPR. It also creates an obligation upon the international community as 'Sacred Trust Obligation' (refer Article 73 of the UN Charter). Right to Self Determination also guarantees remedial rights to the people to separate from the existing state as a matter of remedial succession. Which is 'External Right to Self-Determination' along with the Friendly Declaration, under paragraph V authorizes the right to secede with essentials, reinforcing 'UTI POSSEDTIS JURIS'. The final piece of puzzle dealt in the

Kosovo case is on the principle of sovereign equality, which is broadly classified as Internal and External, from the dimensions of UN charter the equality is a sub-species of legal equality and actual equality as reflected in Article 2(1) of the UN charter. The evolution of the term itself could be traced back to the 'Moscow Declaration', which under Article 4 uses the phrase 'peace-loving states', besides committee 1/11 of the San Francisco Conference enshrined four elements of sovereign equality viz. legal equality, enjoy rights which are attributes of sovereign, respect personality of state, carry on good faith the obligation. Principle V of the 'Friendly Declaration' document emphasis the term International Democratic Governance, notwithstanding the differences of economic, social, or other nature.