The Kosovo Advisory Proceedings and the Court’s Advisory Jurisdiction as a Method of Dispute Settlement

Dr. Eric De Brabandere*

Introduction

It is generally acknowledged that the International Court of Justice has a discretionary authority to answer the question put to it under its advisory jurisdiction. Although the Court has since its inception consistently refused to exercise its discretionary authority to refuse to answer a request for and advisory opinion, the question was raised again in the Kosovo case. The fact that the question related to an actual dispute between Serbia and a non-state entity, and other States which had recognised Kosovo’s independence, and not as such to the General Assembly’s activities, is characteristic of several requests for advisory opinions. It raises questions as to whether the use of the Court’s advisory jurisdiction is an appropriate tool to settle such legal questions.

This article first discusses the International Court of Justice’s established and relatively consistent jurisprudence on the use of its discretionary authority. It then discusses the Court’s decision on the use of its discretionary authority in the Kosovo case.

The paper will argue that although the Court’s appraisal of its discretionary authority is sound from a legal perspective, and should thus be upheld, the Court’s advisory function is not the best way to settle disputes between states or states and non-state entities. As some states observed, the Kosovo Advisory Opinion is undeniably aimed to serve the interests of certain states only, and the Court’s advisory function is here clearly used as an alternative to the Court’s jurisdiction in contentious cases. This development, although not problematic in se, might however lead to a blurring of the distinction between the two types of proceedings. Indeed, while it is not the purpose here to argue that this development is dangerous, we will argue that it is nevertheless undesirable.

* Dr. Eric De Brabandere, Assistant Professor of International Law, Leiden University.
1. The Court’s Discretionary Authority under the Statute

Article 96 of the UN Charter gives the General Assembly and the Security Council the authority to request the ICJ to give an advisory opinion on any legal question. Other organs of the United Nations and specialised agencies may also request advisory opinions of the Court on legal questions, provided that they have been so authorised by the General Assembly and that these rise within the scope of their activities. Once the Court has established that it has jurisdiction to entertain the request it can thus nevertheless refuse to do so, using its discretionary authority under article 65 of the Statute.

One of the first cases in which the question of the discretion was discussed, was the *Easter Carelia* case before the Permanent Court of International Justice [hereafter ‘PCIJ’].¹ The case concerned the question whether the Court could respond to a request by the Council of the League of Nations on the question whether the Treaty of Peace between Finland and Russia, regarding the autonomy of Eastern Carelia, constitutes ‘engagements of an international character which place Russia under an obligation to Finland as to the carrying out of the provisions contained therein’. The question was raised whether the absence of Russia’s consent, which was then neither a party to the League of Nations nor party to the Statute of the PCIJ, was a bar to the exercise by the Court of its jurisdiction under the League of Nations Covenant. According to Article 17 of the Covenant, ‘in the event of a dispute between a Member of the League and a State which is not a Member of the League, the State not a Member of the League shall be invited to accept the obligations of membership in the League for the purposes of such dispute.’ Russia however refused any League of Nations intervention and thus refused to consent to the dispute being settled by the PCIJ. The Court, without engaging in an enquiry as to whether disputes could be submitted to the Court without its consent,² decided that the answer of the Court bears on an actual dispute between Finland and Russia.³ The Court thus noted that, in the absence of Russia’s consent, it ‘finds it impossible to give its opinion on a dispute of this kind’.⁴ Indeed, since Russia was not a member of the League of Nations, Russia’s acceptance would have been needed. The independence of states and the basic principle of international law that a state cannot be compelled to submit its disputes to any kind of pacific settlement indeed would bar any decision by the PCIJ in this case. The PCIJ moreover noted that there are ‘other cogent reasons’ not to answer the request. There would be a lack of evidence provided by Russia, since it essentially is a question of fact which the Court would have to answer.⁵

The circumstances of this case, and the characteristics of the PCIJ, are however particular and make the principles developed by the PCIJ not directly transposable to the ICJ. Contrary to the ICJ, the PCIJ was not an organ of the requesting authority, the League of Nations.

¹ PCIJ, Status of Eastern Carelia, Advisory Opinion of 23 July 1923, Series B – No. 5.
² Ibid., p. 28.
³ Ibid., p. 27.
⁴ Ibid., p. 28.
⁵ Ibid., p. 28.
Moreover, according to the PCIJ statute, requests for advisory opinions could also be made on ‘disputes’, and not only on ‘legal questions’, as is the case with the ICJ.\(^6\)

The International Court of Justice has since its inception been confronted with this jurisprudence and has established a relatively consistent jurisprudence on the use of its discretionary authority.\(^7\) The Court has systematically opined that, as a matter of principle, the Court will not refuse to answer a request for an advisory opinion, since the Court’s jurisdiction in advisory proceedings represents the Court’s participation in the activities of the UN, of which it is a subsidiary organ.\(^8\) The Court will only refuse to answer a request for an advisory opinion if there are ‘compelling reasons’ to do so, such as the lack of consent of an interested State, which ‘may render the giving of an advisory opinion incompatible with the Court's judicial character’.\(^9\) The Court notes that ‘when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction’.\(^10\)

The Court clarified that the question of consent is not as such relevant for the question of jurisdiction of the Court in advisory proceedings. The Court has noted several times that by becoming a Member of the UN, States accept, and give consent to the exercise by the Court of its advisory jurisdiction in accordance with the UN Charter and the ICJ Statute. In the Western Sahara case for example, the Court indicated that Spain ‘has not objected, and could not validly object, to the General Assembly's exercise of its powers to deal with the decolonization of a non-self-governing territory and to seek an opinion on questions relevant to the exercise of those powers.’\(^11\) The circumvention of consent thus only is relevant for the question whether this constitutes a ‘compelling reason’ for the Court not to answer a request for an advisory opinion as an application of its discretionary authority under Article 65 of the Statue.

Other potential ‘compelling reasons’ invoked by States concerned, for example in the Court’s decision in the Wall advisory opinion, include the fact that any decision could impede a political, negotiated solution to the conflict, the lack of adequate facts and evidence

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\(^6\) Art. 14 League of Nations Covenant.
\(^8\) See e.g.: ICJ, Western Sahara, Advisory Opinion of 16 October 1975, 1.C.J. Reports 1975, para. 23.
\(^9\) See e.g.: ICJ, Western Sahara, Advisory Opinion of 16 October 1975, 1.C.J. Reports 1975, para. 33.
\(^10\) See e.g.: ICJ, Western Sahara, Advisory Opinion of 16 October 1975, 1.C.J. Reports 1975, para. 33.
considering the absence of participation of one of the parties concerned and the lack of useful purpose. The Court however dismissed all these arguments.¹²

Since its inception, the Court has never refused to answer a request for an advisory opinion based on its discretionary authority under Article 65 of the Statue.

2. Application of these Principles to the Kosovo Advisory Opinion

In the course of the advisory proceedings before the ICJ in the Kosovo case, several states had called upon the Court to exercise its discretionary authority in order to refuse to answer the request for an advisory opinion.¹³ It is interesting to note that the issue of the possible circumvention of consent was not raised in this case. First, Serbia, one of the interested parties, was itself the main sponsor of the General Assembly Resolution requesting the advisory opinion. Secondly, since the statehood of Kosovo was the subject matter of the dispute, it would have been difficult for the Court, and States for that matter, to allege that the consent of Kosovo would have been required to answer the request for an advisory opinion. Third, although the request for an advisory opinion was also aimed at providing clarification as to whether the recognition of Kosovo as a state by other states could be seen in se as a violation of international law, only very few states actually voted against the request. The resolution was adopted by 77 votes in favour, 6 votes against and 74 abstentions.¹⁴

One of the main arguments advanced by States, however, is very much linked to the fact that the request related to an actual dispute. Indeed, the request actually did not have as its principal objective to assist the UN General Assembly in the exercise of its functions, but in effect only served the interests of one particular State, namely Serbia. The Court, in its advisory opinion, quotes a part of the statement by Serbia at the time of the adoption of the Resolution, which offers much clarification in this respect. It is interesting to reproduce this quote here:

> the Court’s advisory opinion would provide politically neutral, yet judicially authoritative, guidance to many countries still deliberating how to approach unilateral declarations of independence in line with international law. [...] Supporting this draft resolution would also serve to reaffirm a fundamental principle: the right of any Member State of the United Nations to pose a simple, basic question on a matter it considers vitally important to the Court. To vote against it would be in effect a vote to deny the right of any country to seek -now or in the future- judicial recourse through the United Nations system.” (A/63/PV.22, p. 1.)¹⁵

¹² ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004 (I), paras. 51 et s.
¹³ ICJ, Accordance with international law of the unilateral declaration of independence in respect of Kosovo, 22 July 2010, §§ 17 et s.
¹⁴ UN General Assembly, Meeting Records, Sixty-third session, 22nd plenary meeting, Wednesday, 8 October 2008, 10 a.m., UN Doc. A/63/PV.22.
¹⁵ Ibid., § 32.
This statement indeed clearly shows that the main objective of the question was not to assist the General Assembly, but rather to serve as judicial guidance for Serbia on the Kosovo question. Moreover, Serbia insists on the fact that it would be a ‘right of any country to seek judicial recourse through the United Nations system’, although the advisory function of the Court is open only to international organisations and organs of the UN, as explained above. Therefore, States have no possibility to seek the Court’s advice through this type of proceedings. Moreover, the objective of the Court’s jurisdiction in advisory proceedings is not one which could be qualified as ‘judicial recourse’. Instead, the Court then acts more as a ‘lawmaker’ than as a ‘dispute settler’, since the advice is given to the requesting body in order to clarify a point of law in order to enable it to exercise its functions.

The Court’s reply to this argument is relatively succinct, and in line with the earlier developed jurisprudence. The Court first reiterates its long-standing jurisprudence in respect of its discretionary authority which we have discussed in the previous section. The Court then noted that, indeed, the advisory jurisdiction ‘is not a form of judicial recourse for States but the means by which the General Assembly and the Security Council, as well as other organs of the United Nations and bodies […] may obtain the Court’s opinion in order to assist them in their activities. The Court’s opinion is given not to States but to the organ which has requested it’. However, the Court indicates that the motives behind a request for an advisory opinion or the motives behind the States which sponsor a resolution are of no relevance for the Court. The absence in the requesting resolution of any statement in regards of the purpose of the request is not a precondition for the Court to be able to exercise its jurisdiction.

The discussion however is very interesting and characterises many of the recent requests for advisory opinions put to the Court. Indeed, the motives behind the request are obvious and one cannot overlook the fact that the Kosovo advisory opinion indeed was meant to serve as a sort of judicial recourse by Serbia against the unilateral declaration of independence by Kosovo and the recognition of Kosovo by several UN member States. Such a question relates in actual fact to a dispute between two entities, and does not relate directly to the exercise by the General Assembly of its functions. The distinction between the Court’s function in advisory proceedings and its function in contentious cases is thus blurred.

In this specific case moreover, one could wonder whether the Court’s opinion would have given the expected results Serbia was hoping for. After the request by the General Assembly, several other states have in fact recognised Kosovo, without waiting for the Court’s opinion. Portugal recognised Kosovo the day before the adoption by the General Assembly of the Resolution requesting the opinion; Montenegro and the Former Yugoslav Republic of Macedonia recognised Kosovo the day after the adoption. Some 19 other states have done

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16 Ibid., § 33.
17 Ibid., § 33.
18 Ibid., § 34.
19 See Ministry of Foreign Affairs of Kosovo, ‘Countries that have recognized the Republic of Kosova’, at http://www.mfa-ks.net/?page=2,33 (visited 27 September 2010).
so between the request and the Court’s opinion.\textsuperscript{20} Moreover, after the Court rendered its opinion, only one state has thus far recognised Kosovo.\textsuperscript{21} One could thus say that the Court’s opinion has not been determinant for state recognition. In addition, the narrow scope of the question posed to the Court, and thus the relatively narrow scope of the opinion of the Court leaves much margin to both recognising and non-recognising states, including Serbia.

However, taking into consideration the Court’s jurisprudence in respect of its discretionary authority, this finding is not surprising, and indeed is not legally unsound. It does raise questions as to whether the use of the Court’s advisory jurisdiction is an appropriate tool to settle such legal questions.

\textsuperscript{20} \textit{Ibid.}