MISPLACED BOLDNESS: THE AVOIDANCE OF SUBSTANCE IN THE INTERNATIONAL COURT OF JUSTICE'S *KOSOVO* OPINION

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The International Court of Justice's Kosovo Advisory Opinion *is a masterpiece of avoidance. The Court has lived to run another day, and one can only admire the judges' skill in arriving at the vacant place between difficult and clashing conclusions of substance. Still, in the wake of the Opinion, questions inevitably arise: Of what use is this document? Has it advanced a project of justice, or of law? The Opinion has done something, though not, perhaps, what it purports to do. To understand it, we must engage this cautious, crimped document in its full context—or rather, we must understand the ways in which the Opinion itself comprehensively avoids any engagement with context. Its caution and its crimped nature are themselves features illuminating the self-image, role, and limited value of the Court.*

This Article argues that in the Kosovo *Opinion, the International Court of Justice assiduously asserted its own jurisdictional, interpretative, and institutional prerogatives, at the cost of avoiding the momentous questions about secession and self-determination with which the Court was so clearly confronted. These two outcomes are related: The avoidance of substance and the assertion of prerogative were achieved by the selfsame maneuvers of definition and interpretation. Faced with a choice between emphasizing its own authority and actually engaging the question, the Court chose to invest in itself—but it did not, in turn, use that investment to any substantive end. The Opinion exhibits a misplaced boldness, advancing its procedural agenda but saying—almost literally—nothing in the process.*

This Article also considers what a bolder Opinion might have looked like, by comparing the Opinion to the Canadian Supreme Court's seminal

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Reference re Secession of Quebec. *This comparative exercise helps us to understand why questions of self-determination are easier to avoid than to decide—why it is hard even to talk about them in coherent and productive terms, and thus why one must feel sympathy for the seemingly impossible task facing the ICJ—but also to see that another, bolder language is in fact possible.*

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INTRODUCTION: THE NEED TO SAY SOMETHING

> The manager of a fruit-and-vegetable shop places in his window, among the onions and carrots, the slogan: "Workers of the world, unite!" Why does he do it? . . .
>
> . . . He put them all into the window simply because it has been done that way for years, because everyone does it, and because that is the way it has to be. If he were to refuse, there could be trouble. . . .

> . . .
>
> Let us now imagine that one day something in our greengrocer snaps and he stops putting up the slogans merely to ingratiate himself. . . . He rejects the ritual and breaks the rules of the game. He discovers once more his suppressed identity and dignity. He gives his freedom a concrete significance. His revolt is an attempt to *live within the truth*.
>
> The bill is not long in coming. . . .
>
> —Václav Havel[1]

Let us begin, as we shall also end, by acknowledging the great trepidation the judges of the International Court of Justice must have felt on hearing the news that their opinion on Kosovo's independence would be sought.[2] A momentous issue, but also a complex and fraught question, so consequentially implicated in the sweep of grave and violent events: How could one look away from the risks incumbent in such an undertaking? How could one possibly reach a just, considered, and efficacious view in the wake of all that had so recently happened in Kosovo, and knowing what a decision—if taken seriously—might yet bring to pass? Really, what could one say?

Easy answers to the legal question before the Court seemed tantalizingly available to those partisan enough to grasp after them. But those ready outcomes were as impervious to reflection as they were rehearsed; the adamantine preferences of the contesting parties—Serbia and its allies, Kosovo and its—would not simply bend to the inclinations of robed men and women in The Hague. Armies had clashed and killed over this question and this land; they would not move, no matter what was decided. Worse, they *might*, in bloody contradiction of the Court's writ.

And still, for all that, an opinion would be sought, and something must be said. There would be no shying away from that. Or . . . .

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1. VÁCLAV HAVEL ET AL., THE POWER OF THE POWERLESS: CITIZENS AGAINST THE STATE IN CENTRAL-EASTERN EUROPE 27, 39 (John Keane ed., 1985).

2. *See, e.g.*, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Dissenting Opinion of Judge Bennouna, 2010 I.C.J. 500, ¶ 1 (July 22), *available at* http://www.icj-cij.org/docket/files/141/15999.pdf [hereinafter Bennouna Dissent] ("Before turning to the reasons which have prevented me from concurring with the Opinion of the Court, I should first like to consider the propriety of the Court embarking on an exercise that is so hazardous for it, as the principal judicial organ of the United Nations, by responding to the request for an advisory opinion. . . ."); Marc Weller, *Modesty can be a Virtue: Judicial Economy in the ICJ* Kosovo *Opinion?*, 24 LEIDEN J. INT'L L. 127, 130 (2011) [hereinafter Weller, *Modesty*] (referring to "the high stakes in this case"). On the name "Kosovo," see *infra* note 13.

* * *

The International Court of Justice's (ICJ, the Court) *Kosovo Advisory Opinion*[3] is a masterpiece of avoidance. The Court has lived to run another day, and one can only admire the judges' skill in arriving at the vacant place between difficult and clashing conclusions of substance—as well as wonder at what Serbia was thinking when it put the precise question it did. Still, in the wake of the Opinion, questions inevitably arise: Of what use is this document? Has it advanced a project of justice, or of law? How does one make something bold out of such timidity?

In considering the Opinion's value, there are obvious technical objections—the narrow precision of the terms of reference, the stupefying formalism of the judges' approach, the merely advisory nature of the Opinion—that might explain its timid quality. We will consider these factors, but of course the Opinion is hardly the first anodyne, non-binding document issued on a question of international law, and some of them have achieved quite a bit.[4] We must look elsewhere to see why this document is so *thoroughly* inconsequential. The Opinion has done something—though not what it purports to do—but to see what, we must engage this cautious, crimped document in its full jurisprudential and political context. We must understand the ways in which the Opinion itself comprehensively and consciously avoids any engagement with context: its caution and its crimped nature are themselves features illuminating the self-image, role, and limited value of the Court.

In the Kosovo Opinion, the ICJ has assiduously asserted its own jurisdictional, interpretative, and institutional prerogatives, at the cost of avoiding the momentous questions about secession and self-determination that so clearly confronted it. These two moves are related: the assertion of prerogative and the avoidance of substance were achieved by the selfsame

3. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22), *available at* http://www.icj-cij.org/docket/files/141/15987.pdf [hereinafter Opinion].

4. The Universal Declaration of Human Rights is the paradigmatic example—a non-binding document that has, by general consent, attained the status of customary international law. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/RES/217(III) (Dec. 10, 1948). A recent example is the Paris Principles regulating child soldiers: *see* MARK A. DRUMBL, *REIMAGINING CHILD SOLDIERS* IN *INTERNATIONAL LAW AND POLICY* (2012). Another example, which we will consider at length at the end of this Article, is the non-binding Reference re Secession of Quebec (*Quebec Reference*), [1998] 2 S.C.R. 217 (Can.). Outside of law, of course, philosophers and public intellectuals regularly make arguments of great consequence, even though they are not generally perceived as having any formal authority.

maneuvers of definition and interpretation.

Faced with a choice between emphasizing its own authority and actually engaging the issue before it, the Court chose to invest in itself, but it did not, in turn, use that investment to any substantive end—at least, not that we can yet see. The Court exhibited a misplaced boldness, advancing a procedurally ambitious agenda but saying—almost literally—nothing in the process.

All of this we may discern this from a close reading of the Opinion's text, undertaken in the following way: After first identifying the context in which the Court deliberated, the Article examines the nature and implications of the question the United Nations General Assembly posed to the Court. We will see that the question implicated highly indeterminate bodies of law but was, in fact, clear enough for the Court to engage with, had it wished to. Then, the Article dissects the Court's approach to the question, showing how its densely procedural technique selectively frames the question in ways that assert the Court's authority while simultaneously stripping all substance from the analysis.

This Article examines a particular case in its own context, but clearly it relates to a more general question about the nature of the Court's jurisprudence. The Court itself locates the Opinion within its own jurisprudence, allowing us to see how the procedural assertiveness and substantive vacancy that the Court produces is not *sui generis*, but patterned. But this Article is not a longitudinal accounting of how the ICJ balances institutional and substantive concerns in its general jurisprudence; rather, it closely reads a single case that itself reveals a great deal about the contemporary Court.

Finally, the Article includes a comparative exercise, considering what a bolder Court might have done by comparing the Opinion to the Canadian Supreme Court's seminal *Reference re Secession of Quebec*.[5] This comparative and counterfactual exercise is necessary not only to understand why questions of self-determination are easier to avoid than to decide—why it is hard even to talk about them in coherent and productive terms, and thus why one must feel sympathy for the seemingly impossible task facing the Court—but also to see that another language is in fact possible.

This approach—combining a comparative study with a close reading of the least exciting parts of the document—should give us a foundation to evaluate the Opinion: sympathy for the judges who faced a difficult task; admiration for their skill in avoiding the profoundest questions; and a

5. *Quebec Reference*, [1998] 2 S.C.R. 217.

critical assessment of what the *Kosovo* Opinion tells us about the Court that chose to issue such a document.

I. A TERRITORY IN DISPUTE: THE CONTEXT OF THE OPINION

In considering the Opinion as an institutional artifact—in order to appreciate the conundrum that confronted the judges in October 2008—we must have in mind the key contextual elements that surrounded their deliberations:[6] the de facto independence of Kosovo, under a NATO security umbrella, after almost a decade of indeterminate status under a U.N. administration, with an ethnic Albanian majority absolutely determined to defend that independence, counterpoised against the adamantine opposition of Serbia, all playing out against the preferences of states with decided views about Kosovo's independence and the propriety of self-determination and secession. These conflicting factors produced a conundrum for the ICJ. For this was no mere border delimitation or dispute over rocks unable to sustain human habitation—the kinds of cases for which states had often turned to the Court, about which the Court is reasonably able to produce clear answers, and after which states might actually be inclined to acquiesce in the judgment[7]—but a dispute about the formation of states. In these circumstances, the Court's well-known "culture of deference to sovereignty"[8]—itself not merely metaphysical but keenly appreciative of the effective power that generally accompanies sovereignty—was of little use; here, the sovereign was no longer exercising any power, but to recognize a new sovereign would deeply offend the sensibilities and interests of *other* states, still in full control of their own frontiers yet worried about secession. Simple deference to sovereignty would not yield a legal answer consistent with the lines and dictates of power.

6. The Court itself reviews what it considers the relevant factual background, beginning with Security Council Resolution 1244 (1999), Opinion, *supra* note 3, ¶¶ 57-76.

7. *See infra* Part I.C.

8. Thomas M. Franck & Peter Prows, *The Role of Presumptions in International Tribunals*, 4 LAW & PRAC. INT'L CTS. & TRIBUNALS 197, 242-43 (2005) (discussing *Indonesia/Malaysia*, and noting that "Precisely because of their similar backgrounds in the service of government, judges at the ICJ share a common perception of the limits of their craft, which they tend to impose on themselves, and share, also, an excessive deference to the traditional notions of sacrosanct sovereignty" and referring to "the powerful common culture of the judiciary: a culture of deference to sovereignty and a reluctance to be seen to make any more law then absolutely necessary.").

A. History of the Territory and Dispute to 1999[9]

The territory whose declaration of independence was at issue before the Court had long been populated by a variety of communities, the largest of which are Albanians and Serbs. The Serbs are overwhelmingly Orthodox Christian and Slavic-speaking, while Albanians are predominantly Sunni Muslim and speak an Indo-European language not closely related to any other in the region. The demographic balance is one of the sources of controversy between partisans of the two communities, but it is clear that at least from the early twentieth century, Albanians formed a majority of the territory's population; by the time Yugoslavia collapsed, they were an overwhelming majority, nearly 90%.[10] Though complex, intercommunal relations between Serbs and Albanians have historically been more distant than those between ethnic groups in other parts of the former Yugoslavia.[11] Certainly, by the time the Court was asked for the Opinion, relations were extremely hostile.[12]

Throughout most of its history, the area known as Kosovo[13] has not

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9. On the history, ethnography, languages, demography and politics of Kosovo, see generally NOEL MALCOLM, KOSOVO: A SHORT HISTORY (1998); MIRANDA VICKERS, BETWEEN SERB AND ALBANIAN: A HISTORY OF KOSOVO (1998); JULIE A. MERTUS, KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR (1999). SABRINA RAMET, NATIONALISM AND FEDERALISM IN YUGOSLAVIA, 1962-1991 (1992).

10. *See* SUSAN L. WOODWARD, BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR 34-35 (1995) (citing to "Preventing War in Kosovo" [Lund, Sweden: Transnational Foundation for Peace and Future Research, 9 July 1992, at 14]). The last official census in Yugoslavia, in 1991, showed Albanians and Serbs as 82.2 and 9.9 percent of the population, respectively. *See* TIM JUDAH, KOSOVO: WAR AND REVENGE 313 (2000) (citing data from Statistički godišnjak Jugoslavije za 1992, [*sic*] godinu at 62-63, *in* Milan Vučković and Goran Nikolić, Stanovništvo Kosova u razdoblju od 1918. do 1991. godine (Munich, 1996), at 108-09). These figures have been contested by partisans on both sides. *See* YU-WEN CHEN, TRANSITIONAL COOPERATION OF ETHNOPOLITICAL MOBILIZATION: A SURVEY ANALYSIS OF EUROPEAN ETHNOPOLITICAL GROUPS 161 (2009) (referring to the dispute between Serbs and Albanians over the actual percentage of the Albanian population in Kosovo at the time of the census).

11. *See, e.g.*, TIM JUDAH, KOSOVO: WAR AND REVENGE 1-32 (2000) (reviewing the history of Serb-Albanian relations in Kosovo); Paul R. Williams, *Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status*, 31 DENV. J. INT'L L. & POL'Y 387, 390 (2003) ("The history of the territory of Kosovo is marked by near perpetual competition for sovereign control between Kosovar Albanians and Serbs. Throughout the history of the competition, sovereignty has ebbed and flowed from Kosovar Albanians to the Serbs and back again."); Stephen Kinzer, *Ethnic Conflict is Threatening in Yet Another Region of Yugoslavia: Kosovo*, N.Y. TIMES, Nov. 9, 1992, http://www.nytimes.com/1992/11/09/world/ethnic-conflict-is-threatening-in-yet-another-region-of-yugoslavia-kosovo.html?scp=9&sq=ethnic%20hostility%20in%20kosovo&st=cse ("For the Serbs who rule them, they [Kosovar Albanians] feel only resentment and hostility.").

12. *See, e.g.*, *Kosovo's Independence*, INT'L CRISIS GROUP (Feb. 2009), http://www.crisisgroup.org/en/publication-type/key-issues/country/kosovos-independence.aspx; Dan Bilefsky, *Kosovo Declared Its Independence from Serbia*, N.Y. TIMES, Feb. 18, 2008, http://www.nytimes.com/2008/02/18/world/europe/18kosovo.html.

13. The area is known as "Kosova" in Albanian, and as "Kosovo i Metohija," or more commonly,

had a separate political identity. Once a part of the medieval kingdom of Serbia, then long a part of the Ottoman Empire, it was briefly incorporated into the Kingdom of Serbia before the First World War—and afterward into the new Royal Yugoslavia. Under the reconstituted post-war socialist Yugoslavia, Kosovo became an autonomous province within Serbia, with the borders it now possesses.[14]

In the early years of the new Yugoslav state, this formal autonomy meant relatively little, and indeed, Kosovo was the site of considerable repression into the 1960s. The 1974 federal Constitution introduced thorough-going political decentralization.[15] Though still not de jure a republic, Kosovo became an effectively separate unit from Serbia with its own representation in the federal government.[16] Albanian—the language of the great majority of the population—also became the principal language of governance, and Albanians increasingly dominated social and political life. In 1981, Albanian demands for republican status were put down with federal intervention.[17]

Some Serbs, both within the province and in Serbia proper, expressed dissatisfaction with the circumstances of Serbs in Kosovo and the threat to Serbia's formal sovereignty over the autonomous province; from the mid-1980s, with increasing political drift and economic crisis in Yugoslavia and the reappearance of nationalist discourse, Kosovo became a rallying point for Serbian opinion.[18] Slobodan Milošević, an important official in the

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"Kosovo," in Serbian. This article follows the ICJ's and common English-language practice of referring to "Kosovo," but—as also appears to be true for the Court—no bias is intended by this.

14. *See* ARTA ANTE, STATE BUILDING AND DEVELOPMENT: TWO SIDES OF THE SAME COIN? EXPLORING THE CASE OF KOSOVO 139-43 (2010).

15. Constitution of the Socialist Federal Republic of Yugoslavia, Official Gazette of the SFRY, Vol. 30/9, Feb. 21 1974. *See* WOODWARD, *supra* note 10, at 29-41 (1995).

16. Yugoslavia consisted of six republics—Slovenia, Croatia, Serbia, Bosnia and Herzegovina, Montenegro and Macedonia—and two autonomous provinces within Serbia—Kosovo and Metohija, and Vojvodina. Kosovo's greater autonomy included effective veto power over federal legislation and a seat on the collective presidency that governed after Tito's death in 1980. Constitution of the Socialist Federal Republic of Yugoslavia, Official Gazette of the SFRY, Vol. 30/9, Feb. 21, 1974. *See* WOODWARD, *supra* note 10, at 29-41; Gordana Božić, The Communist Ideological Legacy and Serb-Albanian Relations in Kosovo, 37 NATIONALITIES PAPERS 33 (2009); SABRINA RAMET, NATIONALISM AND FEDERALISM IN YUGOSLAVIA, 1962-1991 (1992).

17. FLORIAN BIEBER & ŽIDAS DASKALOVSKI, UNDERSTANDING THE WAR IN KOSOVO 33 (2003) ("The 1981 Albanian demonstrations and the harsh government reaction only radicalized the Albanian population."); Joseph Marko, *Independence without Standards: Kosovo's Interethnic Relations Since 1999*, 5 EUR. Y.B. MINORITY ISSUES 219, 220 (2005-2006) (discussing the violent suppression of the Kosovo Albanian population after the 1981 protests).

18. Momčilo Pavlović, *Kosovo under Autonomy, 1974-1990*, *in* CONFRONTING THE YUGOSLAV CONTROVERSIES: A SCHOLARS' INITIATIVE 66-67 (Charles Ingrao & Thomas A. Emmert, eds., 2009) ("The political change [referring to increased federal intervention in Kosovo's affairs] raised the expectations of Kosovo Serbs that the authorities would fully address their concerns. Soon, however,

Communist Party of Serbia, rose rapidly to a position of dominance with Serbian politics in significant part by attaching himself to a Serbian nationalist agenda in defense of Serbs in Kosovo. In 1989, Milošević engineered the effective revocation of Kosovo's autonomy and its resubordination to Belgrade.[19]

Under Belgrade's direct rule, Serbs reasserted control. Albanians were excluded from government and employment, and the Albanian language was demoted; although less than 10% of the population, Serbs dominated the government, cultural institutions, and economy of the province.[20]

In response, a nonviolent Albanian resistance movement developed, organizing parallel health and educational institutions for Albanians and seeking diplomatic support for independence or restored autonomy. Kosovo's parallel Albanian leadership first declared the province a republic and then declared its independence in 1991, and organized a referendum that was overwhelmingly supported by ethnic Albanians but almost entirely ignored by other states.[21] Serbia's control continued without external challenge.

In 1991 and 1992, the crisis of the Yugoslav state became general, with several republics seceding and protracted wars breaking out in Croatia and Bosnia. The Socialist Federal Republic of Yugoslavia effectively dissolved; Kosovo, reabsorbed into Serbia, became part of the new federal union of Montenegro and Serbia known as the Federal Republic of Yugoslavia (FRY).

From about 1996, armed resistance groups began operating in Kosovo. The Kosovo Liberation Army (KLA) took the lead in challenging Serbian security forces, which responded with violent crackdowns and reprisals. By early 1998, the KLA was fielding a significant guerrilla force, and Serbian police and military forces were fully engaged in the province.[22] By the end

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many from the community felt that the new policy did not begin to address all of their concerns, and emigration continued.").

19. Jure Vidmar, *International Legal Responses to Kosovo's Declaration of Independence*, 42 VAND. J. TRANSNAT'L L. 779, 787 (2009).

20. Michael W. Manulak, *Canada and the Kosovo Crisis*, 64 INT'L J. 565, 566 (2009) ("In 1989, Milošević coerced the Kosovo assembly into amending its constitution, repealing the educational and linguistic autonomy of the Kosovar Albanians. . . .").

21. Vidmar, *supra* note 19, at 789-90 ("Following the referendum, the underground parliament declared independence on October 19, 1991. Only Albania recognized Kosovo's independence.").

22. The military forces were the federal *Vojska Jugoslavije*—the Army of Yugoslavia—and therefore not strictly Serbian. However, Milošević's control over the other federal unit, Montenegro, had considerably weakened during the 1990s, and military operations in Kosovo were largely the domain of Milošević and elements of the Serbian government. While the precise identity of the armed forces operating in Kosovo during the war is an issue of considerable importance for the cases before the International Criminal Tribunal for the Former Yugoslavia, it is not particularly important for the

of the year, 350,000 Albanians had been internally displaced or had fled across the frontiers into Albania and Macedonia.[23]

The North Atlantic Treaty Organization (NATO) increasingly pressed Serbia for a negotiated solution to the situation in Kosovo; following a brief and ineffectual ceasefire and a failed peace conference, NATO began aerial bombardment of Serbia in March 1999. The operation was not authorized by the Security Council, and gave rise to considerable debate about the conditions under which military or humanitarian intervention could occur.[24]

Within a few days of the outbreak of hostilities, Serbian forces radically increased their attacks on Albanians and expelled over 800,000, or almost half the population, from the province.[25] The KLA continued fighting during this time, and NATO continued bombing, not only in Kosovo but throughout Serbia. After seventy-eight days, in early June, the FRY and NATO signed the Kumanovo Agreement, which provided for the withdrawal of Serb police and military forces from Kosovo and the entry of NATO forces, known as the Kosovo Protection Force (KFOR).[26] Serbian power in Kosovo was definitively broken, replaced with a restored Kosovar Albanian majority backed by NATO. Serbs retained effective control of areas north of the Ibar River to the border with Serbia proper, in an area in which they had been numerically predominant before the war.[27]

Opinion. *See, e.g.*, Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević & Lukić, Case No. IT-05-87-T, Judgment, ¶ 245 (Feb. 26, 2009) (discussing terminology for armed forces in relation to Serbia and the FRY and noting that "no Serbian army existed during the relevant Indictment period. Rather the Yugoslav Army ('VJ') was the only official armed force, representing the FRY as a whole.").

23. Paul R. Williams, *Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status*, 31 DENV. J. INT'L L. & POL'Y 387, 397 (2003) ("The results of the new campaign of Serbian ethnic aggression [in 1998] were that over 350,000 civilians were displaced and over 18,000 homes were deliberately destroyed, and almost half of the population centers were subject to siege.").

24. *See, e.g.*, David Wippmann, *Kosovo and the Limits of International Law*, 25 FORDHAM INT'L L. J. 129 (2001); MICHAEL J. GLENNON, LIMITS OF LAW PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO (2001); INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (2000) [hereinafter "KOSOVO REPORT"].

25. KOSOVO REPORT, *supra* note 24, at 304; UNHCR, *Refugees and IDPs from Kosovo* (2000), http://www.unhcr.org/3ae6bafe4.html; *Milutinović*, Case No. IT-05-87-T, Judgment (Feb. 26, 2009);.OFFICE FOR DEMOCRATIC INSTS. & HUMAN RIGHTS, ORG. FOR SEC. & CO-OPERATION IN EUR., KOSOVO/KOSOVA: AS SEEN, AS TOLD: AN ANALYSIS OF THE HUMAN RIGHTS FINDINGS OF THE OSCE KOSOVO VERIFICATION MISSION, OCTOBER 1998 TO JUNE 1999 ch. 14 (1999), *available at* http://www.osce.org/odihr/17772?download=true.

26. Military Technical Agreement between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, June 9, 2009, http://www.nato.int/kosovo/docu/a990609a.htm.

27. A large number of Serbs left the province, but the majority of those who remained stayed in small enclaves throughout the southern, Albanian-dominated parts of Kosovo. By far the single largest

B. The Territory and Dispute after 1999 until the Request for the Advisory Opinion[28]

The United Nations had not authorized the NATO engagement, but shortly after the termination of the conflict, the Security Council passed Resolution 1244, effectively approving the NATO presence and establishing the United Nations Administration in Kosovo (UNMIK). The provisions that were to be of greatest interest to the Court a few years later concerned both the process for determining Kosovo's final status and the nature of the governance institutions established in the meantime.

Resolution 1244 included several ambiguous provisions on the status of Kosovo and the means for determining a final resolution. The Resolution reaffirmed the FRY's sovereignty,[29] but also encroached on that sovereignty in systematic ways and indicated that a changed political status would result, since the new international civil presence established by the Resolution was charged with:

> *(a)* Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo . . .;
>
> *(c)* Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;[30]

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group of Serbs, however—a third or more of the total—reside in the north, where the Pristina government's authority is minimal. Even in the southern enclaves, Belgrade continues to wield considerable authority and funds much of the local infrastructure and civil service. Balkan Investigative Reporting Network, *Kosovo Serbs Denounce Integration and 'Traitors,'* BALKAN INSIGHT, Jan. 31, 2013, http://www.balkaninsight.com/en/article/kosovo-serbs-rally-against-their-integration-into-kosovo.

28. On this period, see MARC WELLER, THE CRISIS IN KOSOVO 1989-1999: FROM THE DISSOLUTION OF YUGOSLAVIA TO RAMBOUILLET AND THE OUTBREAK OF HOSTILITIES (1999). This is also the period that the Opinion's own historical overview covers. Opinion, *supra* note 3, ¶¶ 57-76. The Opinion does not deal with events prior to 1999, though it mentions some of them by reference, for example through discussion of the provisions of Resolution 1244, which itself mentions earlier events.

29. S.C. Res. 1244, Preamble, U.N. Doc. S/RES/1244 (June 10, 1999) ("Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region."). Serbia is not actually mentioned—a point which tempted some observers to argue that, with the replacement of the FRY by the State Union of Serbia and Montenegro in 2003, and the subsequent division of that state in 2006, Serbia itself had no claim to Kosovo. *See, e.g.*, Written Statement by the United States of America, Sec. IV, Advisory Opinion, 2009 I.C.J. 1 (Apr. 17), *available at* http://www.icj-cij.org/docket/files/141/15640.pdf. This reading found little traction, however: the law of succession does not easily support it; as a matter of protocol, a Security Council resolution would be addressed to the FRY (and therefore would not necessarily prejudice the rights of sub-state entities); and, perhaps, there was a pragmatic recognition that Serbia was in fact the relevant party. *See, e.g.*, Andreas Zimmermann & Carsten Stahn, *Yugoslav Territory, United Nations Trusteeship Over Sovereign State- Reflections on the Current and Future Legal Status of Kosovo* 70 NORDIC. J. INT'L L. 423, 427 (2001) (referring to Kosovo as being within Yugoslavia's territory but also to Serbia's rejection of S.C. Res. 1244).

30. S.C. Res. 1244, *supra* note 29, ¶ 11(d) (The international civil presence was also supposed to "[t]ransfer[ ], as these institutions are established, its administrative responsibilities while overseeing

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> *(e)* Facilitating a political process designed to determine Kosovo's future status . . .;
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> *(f)* In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement . . . .[31]

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The Resolution also authorized the creation of governance institutions, which were later established by the Secretary General,[32] and rolled back any legal provisions enacted since March 1989—that is, since the revocation of Kosovo's autonomy.[33]

The KLA was formally disbanded, but its forces constituted the bulk of the new security forces, and its leadership became prominent in the new

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and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities.").

31. *Id.* ¶ 11 (noting that for subparagraph (a) this should be done "taking full account of annex 2 and of the Rambouillet accords (S/1999/648)" and, for subparagraph (e), "taking into account the Rambouillet accords (S/1999/648)"). Annex 2 refers to "[a] political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the [FRY] and the other countries of the region, and the demilitarization of [the KLA]. Negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions." *Id*. annex 2, ¶ 8. The Rambouillet Accords describe governance structures for Kosovo. Rambouillet Agreement: Interim Agreement for Peace and Self-Government in Kosovo, U.S. Dep't State, *available at* http://www.state.gov/www/regions/eur/ksvo_rambouillet_text.html.

32. S.C. Res. 1244, *supra* note 29, ¶ 10; U.N. Secretary-General, *Report Of The Secretary-General On The United Nations Interim Administration Mission In Kosovo*, ¶¶ 110-16, U.N. Doc. S/1999/779 (July 12, 1999); U.N. Secretary-General, *Report Of The Secretary-General On The United Nations Interim Administration Mission In Kosovo*, U.N. Doc. S/1999/987 (Sept. 16, 1999), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/267/07/IMG/N9926707.pdf?OpenElement (describing many of the structures and early regulations).

33. UNMIK regulations originally provided for the continuity of the legal regime in effect prior to 24 March 1999—therefore excluding wartime provisions but leaving the post-autonomy legal regime in place—but in December 1999, the Special Representative of the Secretary General promulgated a new regulation providing that the law governing Kosovo would consist of laws under the Constitutional Framework (that is, UNMIK and SRSG regulation) and "[t]he law in force in Kosovo on 22 March 1989[.]" *See* Opinion, *supra* note 3, ¶ 61 (citing UNMIK Regulation 1999/25, UNMIK/REG/1999/24 (Dec. 12, 1999)).

civilian administration.[34] Neither UNMIK nor the new Kosovar provisional governance entities wielded effective authority in the Serb north—nor do they today.[35]

As contemplated in Resolution 1244, and after elections in May 2001, UNMIK established a Constitutional Framework for the Provisional Self-Government of Kosovo, leading to the creation of the "Provisional Institutions of Self-Governance" (PISG).[36] These included an executive and a parliament, operating under the aegis of the international civil presence and the Special Representative of the Secretary General, who had broad authority to supervise and veto acts of the provisional institutions.

UNMIK began a process, termed "Standards before Status," to establish a stable administration before attempting a political settlement.[37] Following violent riots in 2004, however, the Secretary General appointed Martti Ahtisaari, the former President of Finland, to negotiate a final status agreement for Kosovo. When, to no one's surprise, negotiations failed, Ahtisaari crafted his own set of proposals for radical decentralization and extensive minority protections within an independent Kosovo.[38] It was on

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34. *See* Bureau of Eur. & Eurasian Aff., *Background Note: Kosovo*, U.S. DEPARTMENT OF STATE: DIPLOMACY IN ACTION (Apr. 11, 2011), http://www.state.gov/outofdate/bgn/kosovo/177369.htm ("Under UNMIK's guidance, Kosovo established new institutions (both at the municipal and central levels), held free elections, and established a multi-ethnic Kosovo Police Service (KPS). The KLA was demobilized, with many of its members incorporated into the Kosovo Protection Corps (KPC), a civilian emergency services organization. UNMIK gradually turned over more governing competencies to local authorities.").

35. *See*, *e.g.*, Bojana Barlovac & Fatmir Aliu, *Northern Serbs Vote 'No' to Kosovo*, BALKAN INSIGHT, Feb. 16, 2012, http://www.balkaninsight.com/en/article/99-74-kosovo-serbs-say-no-to-pristina (reporting on an unofficial referendum held in Serb areas, with overwhelming vote against Kosovo institutions); Balkan Investigative Reporting Network, *supra* note 27 (discussing continued resistance and protests in the north and noting that "[t]he northern segment of Kosovo is beyond the remit of the Pristina government").

36. UNMIK, Regulation 2001/19, U.N. Doc. UNMIK/REG/2001/19 (May 15, 2001) (subsequently amended by UNMIK Regulations 2002/9 of May 3, 2002, and 2007/29 of October 4, 2007), *cited in* Written Statement by the United States of America, Sec. IV, Advisory Opinion, 2009 I.C.J. 1 (Apr. 17), *available at* http://www.icj-cij.org/docket/files/141/15640.pdf.

37. *See, e.g.*, Joseph Marko, *Independence without Standards: Kosovo's Interethnic Relations since 1999*, 5 EUR. Y.B. MINORITY ISSUES 219 (2005-2006). *But cf.* Paul R. Williams, *Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status*, 31 DENV. J. INT'L L. & POL'Y 387, 394 (2003) ("At its essence, the standards before status approach simply suspends the political discussion over final status and sets in motion the construction of Kosovar institutions which will likely ensure an independent Kosovo.").

38. Vidmar, *supra* note 19, at 801 ("After more than a year of unproductive negotiations and occasional outbursts of ethnic violence, the U.N. Secretary-General addressed a document to the President of the Security Council on March 26, 2007, entitled 'Report of the Special Envoy of the Secretary-General on Kosovo's Future Status' (the Ahtisaari Plan), in which he recommended independence supervised by the international community."). *See also* David Wippmann, *Building the Rule of Law in Kosovo*, 104 ASIL PROC. 366 (2010) (discussing the governance of Kosovo).

the basis of the Ahtisaari Plan that, on February 17, 2008, members of Kosovo's parliament and its President—though not necessarily those institutions as such, since in the Opinion's analysis the difference is not semantic, as we shall see—declared the independence of Kosovo.

Thus at the time the Court heard and considered the request for an opinion, most of Kosovo was already in fact independent of Serbia, a situation unlikely to be changed by Court's deliberations, just as Serbia's continued resistance was equally given. Poised between these two unyielding and determined views—and caught between the unreconciled positions of its masters on the Security Council—UNMIK took no formal view on the territory's final status, and continued to operate.

To this we must add the rapid recognition of Kosovo by a sizable number of states, including the United States and many of the most important actors in the European architecture[39]—here too, however, counterpoised against non-recognition by the majority of the world's states, including a small number of EU members and several major global powers.[40] It strains the imagination to suppose that any of the states publicly committed on either side would have altered their position in response to any opinion issued by the Court. Indeed, the continued operation of UNMIK was itself a result of this stand-off, since Serbia's allies effectively forbade the U.N. to dissolve its operation or concede ultimate authority to the new state.

C. The International Court of Justice as a Venue for Continuing the Conflict

Finally, to this historical and political context we may add the existence of the ICJ itself, a jurisdiction available to the parties as a

39. In total, sixty-nine states had recognized Kosovo before the General Assembly approved Serbia's request to the ICJ, including a clear majority of EU states. Andrew Solomon, *The Road Ahead for Kosovo's Independence*, THE BROOKINGS INSTITUTION UP FRONT BLOG (July 23, 2010), http://www.brookings.edu/opinions/2010/0723_kosovo_solomon.aspx. *See also* International Recognition of Kosovo, WIKIPEDIA, http://en.wikipedia.org/wiki/International_recognition_of_Kosovo (last visited Jan. 28, 2013) (giving the date on which each state formally recognized Kosovo's sovereignty, and links to embassy websites confirming each state's recognition).

40. These included Russia, China and India. Within the EU, Spain, Greece, Slovakia, Cyprus and Romania have not recognized Kosovo. Just prior to the declaration of independence, the European Union inserted a new administrative apparatus, EULEX, which was intended to provide governance support without taking a position on Kosovo's status. Vidmar, *supra* note 19, at 804-05 ("On February 16, 2008 (one day prior to the declaration of independence), the EU Council launched the European Union Rule of Law Mission (EULEX) in Kosovo, which aimed 'to support the Kosovo authorities in their efforts to build a sustainable and functional Rule of Law system.'" The new mission's goals expressly noted that "the United Nations Mission in Kosovo (UNMIK) will continue to exercise its executive authority under U.N. Security Council Resolution 1244. EULEX Kosovo will not replace UNMIK but rather support, mentor, monitor and advise the local authorities").

strategic alternative for advancing their goals. The Court is the principal judicial organ for the U.N. system, intended to provide judgments and, as here, advisory opinions on important issues affecting the international legal order.[41]

The ICJ Statute expressly permits the Court to issue advisory opinions on questions submitted by bodies authorized by the U.N. Charter;[42] the Charter, in turn, indicates that the General Assembly may request them.[43] So long as the matter refers to "any legal question," the Court's jurisdiction is textually amenable. The Court has been asked for advisory opinions twenty-six times,[44] and the resulting opinions have "sometimes been useful in obtaining authoritative answers to legal questions of general institutional concern."[45] But the question posed in this case was the opposite of that—it was a particular, political contestation. The Kosovo inquiry was a rare case of a highly divisive question, very specific in form, that deeply concerned a very large number of states.[46]

The ICJ has considered a number of disputes involving sovereignty and territory, as this one did: maritime delimitations,[47] including fisheries

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41. Statute of the International Court of Justice arts. 1, 36, 65-68, June 26, 1945, 3 Bevans 1179; 59 Stat. 1031; T.S. 933; 39 AJIL Supp. 215 (1945),, *available at* http://www.icj-cij.org//documents/index.php?pl=4&p2=2&p3=0 [hereinafter ICJ Statute].

42. *Id*. art. 65(1).

43. U.N. Charter art. 96, para. a. ("1. The General Assembly or the Security Council may request the [ICJ] to give an advisory opinion on any legal question."). The Court cites this, Opinion, *supra* note 3, ¶ 20, and further notes that it does not need to inquire as to if the matter is in the "scope of the activities" of the GA (as it does do for some other organs). *See also* Opinion, *supra* note 3, ¶ 19 (citing Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, 1982 I.C.J. 1, at 333-334, ¶ 21).

44. *See List of Advisory Proceedings Referred to the Court Since 1946 by Date of Introduction*, INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/docket/index.php?p1=3&p2=4 (last visited Jan. 13, 2013). Twenty-four of these preceded the Kosovo Advisory Opinion, while one has been issued since. *Id*. *See also* Press Release, I.C.J., The General Assembly of the United Nations Requests an Advisory Opinion from the Court on the Unilateral Declaration of Independence of Kosovo, I.C.J. Press Release No. 2008/34 (Oct. 10, 2008), *available at* http://www.icj-cij.org/docket/files/141/14797.pdf.

45. SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 106 (1989).

46. *See* Thomas Burri, *Kosovo Opinion and Secession: The Sounds of Silence and Missing Links*, 11 GERMAN L.J. 881, 881 (2010) (noting that "it is a *rare* occurrence that such a situation comes to the Court. The regular case, if there is such a thing, before the Court has tended to be a relatively low-profile interstate dispute. The Kosovo incidence [*sic*] had only come to the Court in the first place—like the case of the Wall on the West Bank, the other recent high-profile exception—because the detour via the United Nations General Assembly had been open."). *See also* Pieter H.F. Bekker, *The World Court's Ruling Regarding Israel's West Bank Barrier and the Primacy of International Law: An Insider's Perspective*, 38 CORNELL INT'L L.J. 553, 559 (2005) (noting Judge Burgenthal's lone dissent against the Court's acceptance of the Wall advisory question).

47. A recent example is *Maritime Delimitation in the Black Sea (Rom. v. Ukr.)*, Judgment, 2009 I.C.J. 61 (Feb. 3).

jurisdictions and title to uninhabitable rocks; continental shelf cases; and frontier disputes. The Court appears to have ruled more often in favor of the current possessor, though this tells us nothing certain about the Court's relationship to power, as a possessor may have the better legal claim.[48] Equally, there are cases in which the Court has reached conclusions at variance with the lines of control.[49] Here, too, it is very hard to say for sure what this means, since the broader political framework—as in, say, the *Southwest Africa* cases—might have meant the present possessor was diplomatically isolated.

The Court has never put the matter in these terms, instead resting its decisions on analyses of title and past *effectivités* that might have created title. The very concept of *effectivités*—describing a state's perfection of title through concrete acts expressing sovereignty—can tend to bring analysis of title into conformity with the reality of factual control.[50] But the Court has been clear that *effectivités* provide evidence of perfected title, not that they give grounds to substitute for existing title.[51] The continental shelf cases presented claims that were, in significant part, novel, since they involved areas previously within the high seas commonage. In these cases, the Court has generally evinced a greater scope to devise novel solutions unencumbered by the fact of possession, and focused instead on equitable principles also commonly used in maritime disputes.[52]

The related question of compliance is complex. On the one hand, the record of compliance is reasonably good and getting better, with far fewer states openly defying or failing to appear. On the other, this may reflect self-selection, as many of the contentious cases are in fact brought to the Court by special agreement between the parties.[53] Clearly such cases are

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48. *See, e.g.*, Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.), Judgment, 2008 I.C.J. 12 (May 23); Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), Judgment, 2002 I.C.J. 625 (Dec. 17) (both reaching territorial awards generally consistent with the existing control of territory).

49. *See, e.g.*, Land and Maritime Boundary Between Cameroon and Nigeria ["Bakassi Peninsula"] (Cameroon v. Nigeria; Eq. Guinea Intervening), 2002 I.C.J. 303 (Oct. 10); Western Sahara Advisory Opinion, 1975 I.C.J. 12 (Oct. 16).

50. *Cf.* The Island of Palmas Case (U.S. v. Neth.), 2 R. Int'l Arb. Awards 829 (Perm. Ct. Arb. 1928).

51. *See, e.g.*, Nsongurua J. Udombana, *The Ghost of Berlin Still Haunts Africa! The ICJ Judgment on the Land and Maritime Boundary Dispute Between Cameroon and Nigeria*, 10 AFR. Y.B. INT'L L. 13, 30 (2002) (discussing the Court's reasoning on this in *Bakassi Peninsula*).

52. *See, e.g.*, P. Mweti Munya, *The International Court of Justice and Peaceful Settlement of African Disputes: Problems, Challenges and Prospects*, 7 J. INT'L L. & PRAC. 159, 201-02 (1998) (describing how, in *Continental Shelf (Tunisia v. Libya)*, the Court rejected both Tunisia's and Libya's preferred approaches and devised its own delimitation method).

53. See CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 407 (2004) (showing the large number of territorial disputes submitted by agreement).

only imperfectly analogous to the situation here: no one could characterize Serbia and Kosovo as in any way willing to mutually accept whatever decision the Court might have rendered.[54] When the Court has been presented with truly contentious cases—in which one party has resisted the Court's jurisdiction or which are highly politicized—its record on ruling against power and on compliance is weaker.[55]

Literal compliance is not the only way to measure the Court's effectiveness—after all, in an advisory opinion, there is rarely any question of literal compliance—nor is a clear, consistent record of boldly ruling directly against the interests of the powerful necessary. The Court's judgments may shape or confirm a general opinion, or give aid to actors otherwise uncertain about their position, or promote the legitimacy of a particular view.[56] One could read the *Southwest Africa* cases in this way, for example: no immediate effect on South African rule, but contributing to a deepening isolation and delegitimization of the regime's control. Any analysis of the Court's effect in general must deal with several complicating factors: the Court's changing composition and the greatly varying legal and political contexts, both for individual cases and for the general environment in which the Court operates.[57]

There were other avenues for pursuing a diplomatic strategy to isolate and undermine the new state, but Serbia—apparently worried that the number of recognitions might reach a tipping point,[58] and perhaps seeing an

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54. Indeed, advisory opinions in general can involve disputes that are more fraught than in actual contentious cases. *See* Richard Falk, *The* Kosovo *Advisory Opinion: Conflict Resolution and Precedent*, 105 AM. J. INT'L L. 50, 53 (2011) ("[U]nlike a contentious case in which states have either directly or indirectly expressed their consent to adjudication, and implicitly their willingness to comply with the outcome reached, an advisory proceeding enables an international law question on very sensitive issues to be put to the ICJ in the face of the strenuous objections of concerned states, even leading states." (footnotes omitted)).

55. *See* SCHULTE, *supra* note 53, at 410-13.

56. *See* Falk, *The* Kosovo *Advisory Opinion*, *supra* note 54, at 54 (noting that advisory opinions such as *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8), were sought by civil society actors, and that in such a context "an advisory opinion functions as a crucial element in 'legitimacy wars' fought with soft-power instruments that are nonviolent yet intend to be coercive").

57. On compliance with ICJ decisions generally, see SCHULTE, *supra* note 53 (but expressly not considering advisory opinions); Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT'L L. 815 (2007). For a view that the ICJ has become increasingly activist, but also noting that the dominant view sees a clear distinction between a legal realm in which the Court speaks and a political realm it does or must avoid, see THOMAS J. BODIE, POLITICS AND THE EMERGENCE OF AN ACTIVIST INTERNATIONAL COURT OF JUSTICE (1995).

58. If a majority of the world's states recognized Kosovo, they could also incorporate Kosovo into those parts of global institutional architecture that are not subject to Security Council veto or do not require unanimity for membership. *See* U.N. Charter arts. 3-6. *See, e.g.*, Press Release, Int'l Monetary Fund, Statement on Membership of the Republic of Kosovo in the IMF, Int'l Monetary Fund Press

opportunity to actually reverse, rather than merely freeze, Kosovo's progress towards full independence[59]—settled upon an approach that converted political confrontation into a more refined legal challenge.

It was in this context that Serbia advanced the idea of seeking the ICJ's view about the legality of Kosovo's independence. A divided General Assembly formally requested an advisory opinion on October 8, 2008.[60] At the time, this was seen as a considerable tactical victory for Serbia and a defeat for Kosovo and the United States.[61] And the short-term defensive aim of Serbia's move may have been successful—some more countries recognized Kosovo's independence, but the rate of recognition slowed—although the causality is speculative.[62]

The ICJ itself had encountered the wars of the Yugoslav dissolution, and the Kosovo conflict in particular, including in a suite of cases filed by the FRY against the NATO powers.[63] Merely one year before the *Kosovo* Opinion was requested, the ICJ had issued its decision in *Bosnian*

Release No. 08/179 (July 15, 2008) (referring to the possibility of the IMF's accepting Kosovo's application to be a member).

59. *See, e.g.*, Veton Surroi, *The ICJ Advisory Opinion on Kosovo: The Beginning of a New Road*, EUROPEAN UNION INST. FOR SEC. STUDIES (Sept. 2010), http://www.iss.europa.eu/uploads/media/The_ICJ_advisory_opinion_on_kosovo__the_beginning_of_a_new_road_01.pdf.

60. GA Res. A/RES/63/3, U.N. Doc. A/RES/63/3 (Oct. 8 2008); *see* ROSENNE, *supra* note 45, at 106 (1989) (discussing Cold War opinions, and noting that the practice of requesting advisory opinions by majority vote, rather than unanimity "may be one of the factors which has prevented the Court's advisory work from becoming a decisive element in the political evolution of a given issue."). *See also General Assembly refers Kosovo situation to ICJ*, THE HAGUE JUSTICE PORTAL (Oct. 8, 2008), http://www.haguejusticeportal.net/eCache/DEF/9/853.html (77 states voted in favor, 74 abstained, and six voted against Serbia's proposal).

61. Dan Bilefsky, *Gates, in Kosovo, Highlights U.S Balancing Act on Russia*, N.Y. TIMES, Oct. 7, 2008,http://www.nytimes.com/2008/10/08/world/europe/08gates.html?scp=1&sq=october%208,%202008%20serbia%20request%20icj&st=cse (referring to the United States' emphatic opposition to partitioning Kosovo and the blow Kosovo would suffer if Serbia won the U.N. vote an advisory opinion.).

62. Twenty-one states recognized Kosovo's independence during the 21 months between the time the General Assembly requested the advisory opinion and the day the Opinion was delivered. Two of these, Montenegro and Macedonia, recognized Kosovo the day after an opinion was requested, By comparison, 47 states had recognized Kosovo during the eight months between the UDI and the General Assembly's request. Since the Opinion was issued, 12 more states have accepted Kosovo's independence. *International Recognition of Kosovo*, WIKIPEDIA, http://en.wikipedia.org/wiki/International_recognition_of_Kosovo (last visited Jan. 28, 2013); *General Assembly refers Kosovo situation to ICJ*, THE HAGUE JUSTICE PORTAL (Oct. 8, 2008), http://www.haguejusticeportal.net/eCache/DEF/9/853.html.

63. *See, e.g.*, Legality of Use of Force (Yugoslavia v. Belg.), Application, (Apr. 29, 1999), *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=d6&case=105&code=ybe&p3=0; Legality of Use of Force (Yugoslavia v. Fr.), Application, 1999 I.C.J. (Apr. 29, 1999), *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=d6&p3=0&case=107. *See also* Report of the International Court of Justice, Aug. 1, 2003- July 31, 2004, G.A. Res. A/59/4, U.N. GAOR, 59th Sess., Supp. No. 4, U.N. Doc. A/54/4, ¶¶ 7-14 (Sept. 2, 2004).

Genocide, which came under considerable criticism.[64] The Court thus had direct, intimate knowledge of the forces aligned on various sides of the issue that now, in a new form, came before it.

II. THE PERIL OF SUBSTANCE: THE QUESTION ASKED

To say the General Assembly requested an opinion is to say Serbia succeeded in persuading a sufficient number of states to agree to a particular question. The question actually asked is the same that Serbia initially proposed—it was not altered in the course of the debate[65]—but it is entirely possible that Serbia's draft question was itself the subject of prior informal negotiation, or at least that actors within Serbia took other states' likely reactions into account in devising the original formulation.[66] Then again, perhaps they did not, and simply wrote the question for reasons that made sense internally—or perhaps they did not give it sufficient thought.

The General Assembly's Resolution asked the Court to issue an advisory opinion on this question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"[67]

This question is amazingly short,[68] though the textual apparatus

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64. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43 (Feb. 26), *available at* http://www.icj-cij.org/docket/files/91/13685.pdf. For criticism of the Court's decision, especially its failure to consider evidence from Serbia's military documents, see, for example, Marko Milanović, *State Responsibility for Genocide: A Follow-Up*, 18 EUR. J. INT'L L. 669 (2007); Susana SáCouto, *Reflections on the Judgment of the International Court of Justice in Bosnia's Genocide Case Against Serbia and Montenegro*, 15 HUM. RTS. BRIEF 2 (2007). *But see* C. F. Amerasinghe, *The Bosnia Genocide Case*, 21 LEIDEN J. INT'L L. 411, 428 (2008) (describing the case as a significant and positive contribution). On the Court's standard of proof for genocide, see, for example, Berglind Halldórsdóttir Birkland, *Reining in Non-State Actors: State Responsibility and Attribution in Cases of Genocide*, 84 N.Y.U. L. REV. 1623, 1641-42 (2009) ("[S]tate responsibility under the Genocide Convention . . . is civil, not criminal, in nature . . . [The Court's] onerous standard—when combined with a strict attribution test and a refusal to consider circumstantial evidence of intent—raised the threshold high enough effectively to shut the door on most complaints under the Genocide Convention."); Theodor Meron, *Breaking Developments in International Law: A Conversation on the ICJ's Opinion in* Bosnia *and* Herzegovina v. Serbia and Montenegro, 101 AM. SOC'Y INT'L L. PROC. 215 (2007).

65. U.N. GAOR, 63rd Sess., 22d plen. mtg., U.N. Doc. A/63/PV.22 (Oct. 8, 2008).

66. It is possible the politics of the question's formulation affected the Court's deliberations, but it is not necessary to assume this, since the positions of various states were quite clear and would have been known to the Court even if it were unaware of what exactly was being negotiated within the General Assembly. In any event, the history of the question's formulation is a factual question, amenable to archival investigation, but I have not done this, nor am I aware of others who have.

67. G.A. Res. 63/3, U.N. Doc. A/RES/63/3 (Oct. 8, 2008).

68. Compare the heavily qualified and referential question underlying another recent, even more controversial Advisory Opinion:

> What are the legal consequences arising from the construction of the wall being built by

surrounding it is large[69] and became larger still in the course of proceedings, as an unusual number of states piled on written comments.[70]

> Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly Resolutions?

G.A. Res. A/ES-10/L.16, at 1, U.N. Doc. A/ES-10/L.16 (Dec. 3, 2003), *available at* http://www.icj-cij.org/docket/files/131/1497.pdf (accompanied by a file of 1067 pages).

69. The question came embedded in a resolution with preambular text, which the Court cited in full:

> *The General Assembly*,
> *Mindful* of the purposes and principles of the United Nations,
> *Bearing in mind* its functions and powers under the Charter of the United Nations,
> *Recalling* that on 17 February 2008 the Provisional Institutions of Self-Government of Kosovo declared independence from Serbia,
> *Aware* that this act has been received with varied reactions by the Members of the United Nations as to its compatibility with the existing international legal order,
> *Decides*, in accordance with Article 96 of the Charter of the United Nations to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following question:
> "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"

Opinion, *supra* note 3, ¶ 1. Attached to this was a large set of materials from the GA debates and the U.N. administration of Kosovo. *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Request for Advisory Opinion, 2008 I.C.J. 1, (Oct. 10, 2008), *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=0.

70. Thirty-six states filed written statements, and Kosovo's PISG, identifying itself as the Republic of Kosovo, filed a written contribution; most then filed a second set of written comments, amplifying the first statement and reacting to the statements of others. *See* Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Written Statements, I.C.J., http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos &p3=1 (follow Written Proceedings). This was one of the highest levels of participations for any case at the ICJ. *See* MAHASEN M. ALJAGHOUB, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT OF JUSTICE, 1946-2005, at 135-36 (2006)(listing number of states contributing written or oral statements in various advisory opinion hearings, with the previous largest involved the *Nuclear Weapons* and *Wall* cases). It was also the first time that China ever took part in an ICJ hearing, and the first in which all five permanent members took part. James Ker-Lindsay, *Not Such a 'Sui Generis' Case After All: Assessing the ICJ Opinion on Kosovo*, 39 NATIONALITIES PAPERS 1, 4 (2011).

In many ways the written statements of the states are more interesting and consequential than the Opinion itself, because they can plausibly be construed as evidence of the practice and opinions of states on a consequential question—they can be used to make claims about customary international law—while the Opinion, for the same reasons we shall examine below, is actually less useful for that purpose. In practice, though, the Opinion will likely be used more, such is the tendency of people to look to the most official-looking thing lying about. On custom, see generally DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW (2010). *See also* Dinah Shelton, *Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon*, 105 AM. J. INT'L L. 60, 80 (2011) (discussing in particular African and American states' submissions).

But short as it is—in part because it is so short—the question was, or could have been, enormously consequential.

An important preliminary matter concerns what has been called "the question question"[71] and which we might phrase this way: "What on earth was Serbia thinking?" Criticism of the question Serbia posed has centered on how much the question conceded, how it mushily failed to frame an unavoidable choice—what the Greeks and rhetoricians call stasis—and instead left spacious and ill-considered discretion to the Court.[72] We will come to the Court's artful, awkward solution and what it does (and does not do) to the question—that is the heart of this Article—but even before that, someone considering the question in the context of international law and politics could note some concerns about what it does and does not say.

The question, on its own terms, only speaks about a "declaration of independence"—not actually about the secession of Kosovo from Serbia, which in naïve (that is to say, substantive) terms is what many people would have understood had happened when Kosovo declared independence. The question, in other words, focused on the declarative act, rather than the effective consequence.

At first blush, at least to a lawyer, this may seem a wise strategy, since secession (outside the colonial context) is traditionally understood as a political question not expressly regulated by international law.[73] This, indeed, is likely why Serbia and its supporters were nervous about any

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71. Marko Milanović, Univ. of Nottingham Law Sch., Panel Remarks, What the Kosovo Advisory Opinion Means for the Rest of the World at the Annual Meeting of the American Society of International Law (Mar. 25, 2011); Marko Milanović, *Kosovo Advisory Opinion Preview*, EJIL: TALK! (July 14, 2010), http://www.ejiltalk.org/kosovo-advisory-opinion-preview/ (last visited Jan. 10, 2013).

72. *See, e.g.*, Milanović, *Kosovo Advisory Opinion Preview*, *supra* note 71; Kushtrim Istrefi, *Limitations of the ICJ Opinion on Kosovo*, JURIST LEGAL NEWS & RESEARCH (Aug. 12, 2010), http://jurist.org/forum/2010/08/limitations-of-the-icj-opinion-on-kosovo.php ("Due to the formulation of the question, the states— either in support of Serbia or Kosovo—presented their arguments outside the scope of the question."); Christian Tams, *The Kosovo Opinion*, EJIL: TALK! (Aug. 6, 2010), http://www.ejiltalk.org/the-kosovo-opinion/ (stating that "the Court was perfectly justified to answer narrowly, as it was asked a narrow question").

73. *See* MARCELO G. KOHEN, SECESSION: INTERNATIONAL LAW PERSPECTIVES (2006); *see also* Susanna Mancini, *Rethinking the Boundaries of Democratic Secession: Liberalism, Nationalism, and the Right of Minorities to Self-Determination*, 6 INT'L J. OF CON. L. 553 (2008); Clifton Van Der Linden, *Secession: Final Frontier for International Law or Site of Realpolitik Revival*, 5 J. INT'L L. & INT'L REL. 1, 4-6 (2009); *see also* Ilana Bet-El, *When is a State Not a State? A No to South Ossetia but a Yes to Kosovo—The Georgia Conflict Showed Up International Law's Confusion over Breakaway States*, THE GUARDIAN, Oct. 6, 2009, http://www.ceiig.ch/Report.html (*"*[S]elf-determination is not recognised in international law as a basis for the unilateral creation of a new state 'outside the colonial context and apartheid', and that much of international state practice 'and the explicit views of major powers such as Russia in the Kosovo case stand against it." (quoting INDEP. INT'L FACT-FINDING MISSION ON THE CONFLICT IN GEOR., 1 REPORT 17 (2009), *available at* http://www.ceiig.ch/Report.html)).

question that focused too expressly on secession: while traditional doctrine would indicate that there is no *right* to secede, it would also suggest that there is no *prohibition* either.[74] Therefore Serbia would not want to frame this issue as a matter of secession, tempting the Court to declare the whole question purely political, subject to a *non liquet*.[75]

Yet although traditional doctrine affects a Pilatean indifference to secession, in fact international law and relations have long been understood to be much more hostile to secession in practice.[76] This is in part because of two related doctrines: territorial integrity and self-determination.

The territorial integrity of states is a foundational principle of the postwar order, referred to in the U.N. Charter and *ad nauseam* in U.N. and other documents on almost any subject.[77] Logically, if a state has a near-

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74. *See* Thomas Burri, *The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links*, 11 GERMAN L.J. 881, 884, 889 (2010). The other reason is more practically political: many powerful states with their own concerns about secessionist movements would not have liked such a question. *See* Hurst Hannum, *The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?*, 24 LEIDEN J. INT'L L. 155, 158-59 (2011) [hereinafter Hannum, *The Advisory Opinion on Kosovo*].

75. *"[N]on liquet* . . . [Latin "it is not clear"] . . . A tribunal's nondecision resulting from the unclarity of the law applicable to the dispute at hand. In modern usage, the phrase appears almost always in passages stating what a court must not do: tribunals are routinely disallowed from declaring a *non liquet*." BLACK'S LAW DICTIONARY (9th ed. 2009). *See generally* Alfredo Mordechai Rabell, *Non Liquet: From Modern Law to Roman Law,* 10 ANN. SURV. INT'L & COMP. L. 1, 10-11 (2004); W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 569-75 (1971); Jason A. Beckett, *Interim Legality: A Mistake Assumption?—An Analysis of Depleted Uranium Munitions under Contemporary International Humanitarian Law*, 3 CHINESE J. INT'L L. 43 (2004); Thomas Burri, *The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links*, 11 GERMAN L.J. 881 (2010).

Whether or not Serbia was cautious in phrasing the question, it invoked the specter of secession in its lobbying efforts. *See, e.g.*, *Serbia Urges UN to Prevent Secessionist Moves*, ASSOCIATED PRESS (July 30, 2010), http://www.hindustantimes.com/Serbia-urges-UN-to-prevent-secessionist-moves/Article1-579763.aspx (noting that Serbia invoked the possibility that a ruling favorable to Kosovo could encourage secessionist movements elsewhere, and that Kosovo denied this possibility).

76. *See, e.g.*, Lee Seshagiri, *Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law*, 51 HARV. INT'L L.J. 553, 555 (2010) (arguing "there should be no 'right' to unilateral secession at all"); *see generally* Dinah Shelton, *Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon*, 105 AM. J. INT'L L. 60 (2011) (discussing current and historical secessionist movements); Ronald Thomas, *The Distinct Cases of Kosovo and South Ossetia: Deciding the Question of independence on the Merits and International Law*, 32 FORDHAM INT'L L.J. 1990 (2009) (discussing post-WWII political borders and ethnic groups' struggle for independence).

77. U.N. Charter art. 2, para. 4; *see, e.g.*, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. DAOR, 20th Sess., U.N. Doc. A/RES/2625 (Oct. 24, 1970). *See also* U.N. Secretary-General, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission; Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, ¶ 15, U.N. Doc. E/CN.4/1320 (Dec. 1, 1978) [hereinafter *Further Promotion*]; Treaty of Friendship, Co-Operation and

absolute right to territorial integrity, it should also enjoy a near-absolute protection against threats to that integrity, including threats from disaffected internal elements.[78] And, indeed, it traditionally does. The U.N. Charter framework both entrenches this protection and defines some limits to it, such as the power of the Security Council to order military intervention and the right of states to defend themselves.[79] Recent developments have eroded the original pristine doctrine of territorial integrity: the developing notion of a responsibility to protect, for example, indicates conditions under which other states might be authorized to intervene in a state that fails to meet certain standards of conduct, such as protecting its own citizens from harm.[80] But, in the main, the concept of territorial integrity remains quite solid, especially when it concerns the permanent alteration of political sovereignty over a given territory instead of emergency interventions.[81] Indeed, the international administration and

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Mutual Assistance, July 6, 1961, N. Kor.-U.S.S.R., 420 U.N.T.S. 6045; United Nations Commission on Human Rights, *Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities: Comments Received from Governments Pursuant to Commission Resolution 14 A (XXXIV)*, U.N. Doc. E/CN.4/1298 (Dec. 6,1978) [hereinafter *Rights of Minorities*]; Complaint by the Revolutionary Government of Cuba Regarding the Various Plans of Aggression and Acts of Intervention Being Executed by the Government of the United States of America Against the Republic of Cuba, G.A. Res. 1616 (XV), U.N. Doc. A/RES/1616 (Apr. 21, 1961); Promotion of Stability of International Relations in the Far East, G.A. Res. 291 (IV), U.N. Doc. A/RES/291 (Dec. 8, 1949).

78. This view was advanced by certain states in the proceedings. *See* Opinion, *supra* note 3, ¶ 80. For a discussion of the territorial integrity issue, see generally Olivier Corten, *Territorial Integrity Narrowly Interpreted: Reasserting the Classical Inter-State Paradigm of International Law*, 24 LEIDEN J. INT'L L. 87 (2011).

79. U.N. Charter arts. 42, 51.

80. *See* INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT xii-xiii (2001) (listing conditions for military intervention to protect human life); *see also* 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-39, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (acknowledging a responsibility to protect); S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (reaffirming the Responsibility to Protect); U.N. Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (Jan. 12, 2009). The Security Council's recent authorization of intervention in Libya invoked a version of this doctrine. *See* S.C. Res. 1973, ¶4, U.N. Doc. S/RES/1973 (Mar. 17, 2011). Development of this document was spurred, in significant part, by the NATO intervention in Kosovo. *See* Srdjan Cvijic, *Self-Determination as a Challenge to the Legitimacy of Humanitarian Interventions: The Case of Kosovo*, 8 GERMAN L.J. 57, 69 (2007); Robert Muharremi, *Kosovo's Declaration of Independence: Self-Determination and Sovereignty Revisited*, 33 REV. CENT. & E. EUR. L. 401, 434 (2008) (placing the Kosovo intervention in the context of the emerging "responsibility to protect" doctrine).

81. For review of arguments critical of the responsibility to protect doctrine, see Jutta Brunnée & Stephen J. Toope, *The Responsibility to Protect and the Use of Force: Building Legality?*, 2 GLOBAL RESP. TO PROTECT 191, 199-200 (2010) ("Several states, including some Arab states, Cuba, Iran, Pakistan, Venezuela, and Vietnam, rejected the responsibility to protect as an unacceptable intrusion into state sovereignty. . . . The Non-Aligned Movement (NAM) of states expressed 'its rejection of the so-called "right" of humanitarian intervention, which has no basis either in the UN Charter or in international law,' observed 'the similarities between the new expression "responsibility to protect" and "humanitarian intervention,"['] and wished 'to carefully study and consider further the expression

independence of Kosovo has provided the principal challenge to that persistent orthodoxy—which is to say, it is an exception to a rule.[82]

The second doctrine, self-determination—likewise endlessly and reflexively invoked in U.N. documents[83]—has rendered the post-colonial world even more hostile to the idea of secession. Although often associated with its earlier Wilsonian version, which sought to redesign borders to fit political communities, postwar self-determination as a legal doctrine is exceptionally conservative of existing territorial units. Colonies have the right to independence (also known as "external self-determination"[84]), but independent states are largely protected against sub-division. As self-determination is the collective right of a "people"—and a "people" conventionally means the population of an *existing* political unit—the idea

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"responsibility to protect" and its implications on the basis of the principles of non-interference and non-intervention as well as the respect for territorial integrity and national sovereignty of States.'"); Hurst Hannum, *The Responsibility to Protect: Paradigm or Pastiche?*, 60 N. IR. LEGAL Q. 135, 135 (2009) ("The vagueness, hyperbole and neo-colonial undertones of R2P may have the unwelcome consequence of making it more, not less, difficult to reach consensus on criteria for humanitarian intervention in the future. . . . [I]t may make it even more difficult to promote and protect human rights, properly understood, if a clear distinction is not maintained between the moral-political aspirations of the responsibility to protect and the legally binding norms of international human rights law."); Edward C. Luck, *Sovereignty, Choice, and the Responsibility to Protect*, 1 GLOBAL RESP. TO PROTECT 10, 11 (2009) (arguing that developed and developing nations have sovereignty concerns regarding R2P); Matthew Kalkman, *Responsibility to Protect: A Bow Without an Arrow*, 5 CAMBRIDGE STUDENT L. REV. 75, 75 (2009) ("[T]his legal duty does not include the right, responsibility, or duty to use force. Ultimately, the duty is a bow without an arrow, placing hollow obligations to protect on those with international legal personality."); Anne Orford, *Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect*, 30 MICH. J. INT'L L. 981, 1003 (2009) ("Many States were concerned at the potential expansion of international authority that might flow from the endorsement of the responsibility to protect concept, and sought to limit the scope of international protective authority with a narrow definition of the triggers to international jurisdiction.").

82. As we shall see, this is largely the tack adopted by Kosovo, the United States and their allies in this debate: that the changed status of Kosovo was *sui generis*, with no precedential effects that might make secession more possible in general.

83. *E.g.*, U.N. Charter art. 1, para. 2; *see also* Treaty of Friendship, Co-operation and Mutual Assistance, *supra* note 77, art. 4 (declaring a commitment to territorial integrity); *Further Promotion*, *supra* note 77, ¶ 15 (listing representatives' desire to give more attention to issues of territorial sovereignty); *Rights of Minorities*, *supra* note 77; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., U.N. Doc. A/8082 (Oct. 24, 1970); G.A. Res. 1616, *supra* note 77; G.A. Res. 291, *supra* note 77 (calling upon all States to respect China's territorial and political integrity); Conference on Security and Co-operation in Europe, Final Act, *supra* note 77, art. IV.

84. *See* Milena Sterio, *On the Right to External Self-Determination: "Selfistans," Secession, and the Great Powers' Rule*, 19 MINN. J. INT'L L. 137, 137-38 (2010) (describing the evolution of the doctrine that oppressed peoples have a right to remedial secession, a doctrine that began to be associated with colonial groups in the 1960s); *see also* Vita Gudelevičiūtė, *Does the Principle of Self-Determination Prevail Over the Principle of Territorial Integrity?*, 2 INT'L J. BALTIC L. 48, 49 (2005) (including the right to secede in the doctrine of external self-determination).

that any group of human beings other than the total population of a state has the right to self-determination is almost definitionally unavailable.[85]

Taking these two doctrines together, it seems secession is doctrinally constructed as a political act that does not concern international law. Of course, a state's right to territorial integrity and self-determination does not apply against itself, so a state is free to divide itself according to its own internally legitimated processes.[86] Because of the overweening respect and deference traditionally still accorded to states in their internal affairsinternational law treats secession as simply the kind of internal process outsiders can neither involve themselves in nor understand.[87]

But it is one thing to leave a state's internal processes to itself, quite another to choose which internal processes to acknowledge or support. International law is full of prohibitions against states' interfering in each other's territorial integrity and sovereignty.[88] Such interference can take many forms, from military intervention to support for rebel groups. Many of the actions taken by Kosovo's supporters since 1999 would surely qualify as interference, and therefore require some separation justification. Of particular importance in relation to the UDI were the many acts of recognition of independent Kosovo. The law governing recognition is quite thin—this too is largely a political matter[89]—but if there are any limits, they would appear where recognition can be construed as interference with another state's territorial integrity. Secession may be political, but the question of what support states can give to secessionist entities is considerably harder.

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85. *See* Jan Klabbers, *The Right to be Taken Seriously: Self-Determination in International Law*, 28 HUM. RTS. Q. 186, 197 (2006) (describing the Supreme Court of Canada's opinion that Quebec could not secede because self-determination must be exercised in the context of existing sovereign states).

86. *See* Timothy William Waters, *The Blessing of Departure: Acceptable and Unacceptable State Support for Demographic Transformation: The Lieberman Plan to Exchange Populated Territories in Cisjordan*, 2 LAW & ETHICS HUM. RTS. 221, 263-75 (2008) (discussing the logic of state division justified by internal political processes).

87. On the complexities accompanying the conversion of internal boundaries into international frontiers, see generally Steven R. Ratner, *Drawing a Better Line:* Uti Possidetis *and the Borders of New States*, 90 AM. J. INT'L. L. 590 (1996).

88. *See, e.g.*, U.N. Charter art. 2, para. 4; *see also* Protocol on the Establishment of Diplomatic Relations, Braz.-Turkm., Apr. 3, 1996, 1930 U.N.T.S. 105 (citing territorial integrity as an inspiration for the treaty); Charter of the Commonwealth of Independent States art. 3, Jan. 22, 1993, 1819 U.N.T.S. 37 (recognizing certain principles underlying the Charter, including territorial integrity and self-determination);Treaty on the Establishment of the Central American Parliament and Other Political Organs pmbl.*, concluded* Oct. 2, 1987, 1994 U.N.T.S. 172 (entered into force May 1, 1990) (citing the importance of sovereignty and territorial integrity of States).

89. *See, e.g.*, European Community, Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union," 31 I.L.M. 1486 (1992).

As a consequence, whatever the ambiguity of a doctrine that neither commands nor prohibits secession, actually successful secessions outside the colonial context are relatively rare,[90] and almost all instances of states' recognizing a secessionist entity have had plausible doctrinal cover in that the division of the state was not unilateral but was voluntary or otherwise accepted by the metropolitan state.[91] This cover was entirely unavailable in *Kosovo*, because Serbia has consistently declared Kosovo to be its sovereign territory.[92]

These considerations influenced the kinds of questions Serbia could ask and the risks it ran, and there have been criticisms of Serbia's choice. For if the question had been, say, "Does Kosovo have the right to secede?" "Do the Provisional Institutions of Self-Government have the right to

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90. *See, e.g.*, Christopher J. Borgen, *The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 CHI. J. INT'L L. 1, 9, 10 n.28 (2009) ("Instances of secession outside of the colonial context since the Second World War include: Senegal (1960); Singapore (1965); Bangladesh (1971); Latvia, Lithuania, and Estonia (1991); the eleven successor states of the USSR (1991); the five successor states of Yugoslavia (1990s); the Czech Republic and Slovakia (1993); and Eritrea (1993). . . . However, [James] Crawford notes that in the cases of Senegal, Singapore, the Czech Republic, and Slovakia, each was separated pursuant to separation agreements or operations of their domestic constitutions. Moreover, the USSR capitulated on the secession of the Baltic States . . . [and] no longer contested their departure. The successor states of the USSR and those of Yugoslavia were formed due to dissolution of the preexisting states, not secession." (citing JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 392-402 (2d ed. 2006))).

91. *See, e.g.*, Donald L. Horowitz, *The Cracked Foundations of the Right to Secede*, 14 J. DEMOCRACY 5, 13 (2003) (noting that the cases of Eritrea and the Baltic states involved mutual consent, while Bangladesh "was best viewed not as an exemplar of a recognized right to secede but 'rather as a *fait accompli* achieved as a result of foreign military assistance in special circumstances.'" (quoting James Crawford, *State Practice and International Law in Relation to Secession*, 1998 BRITISH Y.B. INT'L L. 85, 115 (1999)); Timothy George McLellan, *Kosovo, Abkhazia, and the Consequences of State Recognition*, 5 CAMBRIDGE STUDENT L. REV. 1, 11-12 (2009) ("The failure of Bangladesh to obtain UN membership prior to receiving Pakistani consent for secession sheds some doubt on whether or not its secession should be considered to be unilateral. . . . Croatia's secession, like Bangladesh's, satisfied all of the hypothetical criteria for remedial secession. Nonetheless, the circumstances assimilating Croatia with these criteria were purely incidental to its successful secession."); Benjamin Perrin, *Terrorism, Secession & Multinational Constitutions: The Challenge of Sri Lanka*, 16 SRI LANKA J. INT'L L. 175, 197-98 (2004) (discussing the history of the Eritrean secession and the constitutional changes Ethiopia enacted in relation to that); Johan D. van der Vyver, *Self-Determination of the Peoples of Quebec Under International Law*, 10 J. TRANSNAT'L L. & POL'Y 1, 8-9 (2000) ("[T]he Canadian Constitution does not authorize the unilateral secession of any constituent region of the federation as did, for example, the constitutions of the Soviet Union, Czechoslovakia and the former Republic of Yugoslavia."). *Cf. China's Anti-secession Law and Developments Across the Taiwan Strait: Hearing before the Subcomm. on Asia & the Pacific of the H.R. Comm. On Int'l Relations,* 109th Cong. 7-8 (2005) (discussing the "One China, two systems" model in the context of relations between Taiwan and China and expressing concern that Taiwan "is claimed as a sovereign territory by the People's Republic of China. . . . And this neighbor now threatens to annex Taiwan by force.").

92. *See* Hannum, *The Advisory Opinion on Kosovo*, *supra* note 74, at 159 (analyzing the limited scope of the ICJ's Advisory Opinion on Kosovo given Serbia's objections to Kosovar independence).

secede?" "Is there an affirmative right to secede in international law?" or even—turning from the action to the reaction—"May states recognize the independence of a secessionist territory that the sovereign has not itself recognized?" the Court would have been confronted with a more crisply defined question, one to which, under traditional readings of doctrine, there should be reasonably clear answers.[93] Serbia would certainly have posed a more consequential—and politically sensitive—question to ask if other states were violating Serbia's territorial integrity by recognizing Kosovo. However, the actual question did not ask anything about other states' action, nor even if the secession or independence of Kosovo as such violated international law. The Court ultimately exploited this ambiguity.

Still, I must admit that in 2008, I did not think the question was so bad—I was more impressed with Serbia's diplomatic skill in getting the question onto the General Assembly's agenda and seemingly freezing a catalytic shift towards recognition. This view was fairly general, and at the time the mere fact of the referral was seen as a tactical victory for Serbia.[94]

Whatever criticism we might lay on Serbia for asking such a defective question must be limited by two considerations. First, the question was not created in a vacuum of pure juridical. It had to be a question that the majority of the General Assembly would approve, and therefore was subject to a kind of anticipatory negotiation in which Serbia guessed at what formulation combined the highest likelihood of a positive final outcome and the highest likelihood of being approved in the first place.[95] Evidently, many states were willing to support the question that was framed, but they might not have agreed to a question that would have put the norms of territorial integrity and self-determination starkly on the line out of concern that the answer might erode sovereignty norms. After all, Kosovo was in fact independent and—whatever one thinks about the doctrinal framework or formulations that might have better favored

93. *Cf. id.* at 158 ("To avoid any ambiguity, the question that the General Assembly should have put to the Court was: 'Does the recognition by states of the juridical independence of Kosovo violate their obligations under international law not to interfere with the territorial integrity and political independence of Serbia?'").

94. *See* "Diplomatic Victory for Serbia," B92.NET (Sept. 18, 2008, 8:48 AM), http://www.b92.net/eng/news/politics-article.php?yyyy=2008&mm==09&dd=18&nav_id=53558 (quoting Foreign Minister Vuk Jeremić, who characterized the opinion as an important component of Kosovo's progress toward independence); *Serbian Media Hail Victory at the UN*, TAIPEI TIMES, Oct. 10, 2008, at 6, *available at* http://www.taipeitimes.com/News/world/archives/2008/10/10/2003425523 (similarly characterizing the decision). There does not appear to have been any criticism of the question's particular phrasing as such at the General Assembly at the time it was adopted.

95. *Cf.* MICHLA POMERANCE, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT IN THE LEAGUE AND U.N. ERAS 172-73, 221-76 (1971) [hereinafter POMERANCE, ADVISORY FUNCTION] (surveying "stillborn" attempts to put questions to the ICJ).

Serbia—the Court is rarely in the business of ruling against power.[96]

Second, considering the Court's extraordinary acrobatics—to which we will shortly turn—we might wonder if there is *any* question Serbia could have put that would not have been vulnerable to selective re-reading. The Court, like any judicial body, answers the question it wants to answer, not the one it is asked.[97] Serbia was making a strategic attempt to steer between risks—between Scylla and a doctrinal swamp—but, as we shall see, the Court's ultimate posture made all the steering seem pointless and misguided. Milanović's question-question, therefore, is not really about the infelicity of the phrasing but the indeterminacy of the frame it presented the Court, and is therefore properly a question about what the Court chose to do with it.[98]

What made most observers believe that the question was clear enough, despite its open wording, was that it appeared to present two substantive issues to the Court: self-determination or secession as a general matter, and the particular, quasi-constitutional arrangements in place in Kosovo. Put another way, the question was understood as asking if international law had anything to say about Kosovo's independence. The question may have given the Court an opportunity to escape substance, but it also gave the Court the opportunity to engage substantively if it wished. As we shall see, the Court did not address either of the substantive questions; instead, its answer gave us the answer to a different question about the value of the Court itself.

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96. *Cf.* Hannum, *The Advisory Opinion on Kosovo*, *supra* note 74, at 157-58 ("Judge Yusuf is correct when he observes that the restriction of the scope of the question . . . to whether international law prohibited the declaration of independence as such voids it of much of its substance.' Nonetheless, it should come as no surprise that the Court decided not to take a stand on an issue that is both divisive and unclear, with major powers on each side." (quoting Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Separate Opinion of Judge Yusuf, 2010 I.C.J. 500, ¶ 2 (July 22), *available at* http://www.icj-cij.org/docket/files/141/16005.pdf [hereinafter Yusuf Separate Opinion])).

97. *Cf.* ALJAGHOUB, *supra* note 70, at 57 ("The Court's consistent practice illustrates that it has always been able to answer questions placed before it, even if there were intermixed with political and factual issues or even if the drafting of the request was unclear.").

98. *Cf.* Milanović, *Kosovo Advisory Opinion Preview*, *supra* note 71 (discussing the likely outcome and "disput[ing] the conventional wisdom that the Court will render a Solomonic opinion that will be equally (un)satisfactory for both sides. The formulation of the question and the consequent array of arguments appear to exclude such an option." As it happened, the option Milanovic considered least likely (apart from outright dismissal) was closest to the Court's chosen outcome: "Narrow reading: The Court can read the question very narrowly, in which case its answer will be very narrow as well, confined to the formal examination of the UDI as a purely verbal act adopted by a non-state actor on a given day. Whatever the Court's decision, it will legally be neither here nor there with respect to the broader issues at play.").

III. STRUCTURING THE OPINION: THE USES OF JURISDICTION

But to arrive at that conclusion, we must first be clear on the structure of the Opinion, not simply to orient ourselves in some general fashion, but because the Opinion's much-observed lack of substance is a function of its assiduous attention to and cultivation of procedural matters and institutional interests. The dense procedurality of the text is not merely lawyerly habit, but part of the Court's strategy to achieve something else altogether: the entrenchment and expansion of its own authority.

The Opinion opens, and continues at length, with a procedural review—nothing unusual in this, and indeed, anything else would have been[99]—and at just under a quarter of the way through the forty-five-page Opinion, we arrive at the question of jurisdiction.[100] Jurisdiction is a procedural and sometimes dry matter, though often consequential, as it was here, in part because those who were wishing to make the question go away (at this stage, Kosovo and its allies) had reason to hope the Court might simply decline to take up the matter at all. A new section begins, but the layman or lawyer could well be forgiven for perceiving it as a continuation of the procedural history. Again, this is nothing unusual: a court, as an institution guided by rules (and gaining its legitimacy precisely because it follows those rules), must satisfy itself and its audience that it is competent to involve itself in a given matter.[101]

Sometimes jurisdiction is a hard question, but not here, and it does not delay the Court too long. As we have seen, the Court's power to issue advisory opinions on "any legal question" at the request of the General Assembly is clear[102]—those parties hoping the Court at this stage would

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99. Thus we have a helpful recitation of how the request first came to the Court's attention, how it decided to structure the proceedings, what states submitted comments, how the Court distributed these to other states that did or didn't submit comments, how it made the comments public, and who was heard for each party (including a long list of attorneys, some of whom are truly prominent and impressive figures). Opinion, *supra* note 3, ¶¶ 1-16.

100. *Id.* ¶¶ 17-48.

101. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992) ("[T]he Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."); *see also* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794-95 (2005) ("It will therefore prove helpful to distinguish between the *substantive* legal legitimacy of judicial rulings, which reflects their correctness or reasonableness as a matter of law, and their *authoritative* legitimacy or legally binding character, which may depend on standards that allow a larger margin for judicial error."); *see generally* John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775 (2001) (discussing the Supreme Court's legitimacy in relation to *Bush v Gore*).

102. ICJ Statute, *supra* note 41, art. 65(1).

find that it had no jurisdiction were predictably disappointed.[103] Yet here we encounter the first moment in the Opinion that combines confusion and recognition: the Court notes that it "has 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."[104]

What is happening soon becomes clear. "[I]t was suggested," the Court notes, that the Security Council's involvement in the Kosovo matter, as an issue of international peace and security under Chapter VII, effectively prevented the General Assembly from taking up the question, and thus also from referring it to the Court.[105] The Court pushes past this, artfully parsing the textual limitation that the Assembly shall make no "recommendation" while the Security Council is seized of a matter and concluding that an advisory opinion is not a recommendation.[106] The immediate effect is to allow the Court to continue to deal with the General Assembly's request. More broadly, of course, the Court has asserted its

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103. *See* Opinion, *supra* note 3, ¶ 48 ("Accordingly, the Court considers that there are no compelling reasons for it to decline to exercise its jurisdiction in respect of the present request.").

104. *Id.* ¶ 21 (citing Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion (First Phase), 1950 I.C.J. 65, 70 (Mar. 30); Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 11-12 (July 8); Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 16-17 (July 9)).

105. *Id.* ¶ 24. The suggestion comes from the written contributions and comments of some of the intervening parties—those favoring the Kosovar position. *See, e.g.*, Accordance with International Law of Unilateral Declaration of Independence by Provisional Institutions of Self-Government of Kosovo, Written Statement by the French Republic, ¶¶ 1.6, 1.28-1.42, (Apr. 17, 2009), *available at* http://www.icj-cij.org/docket/files/141/15607.pdf; Accordance with International Law of Unilateral Declaration of Independence by Provisional Institutions of Self-Government of Kosovo, Written Statement by the Republic of Kosovo, 130-36, (Apr. 17, 2009), *available at* http://www.icj-cij.org/docket/files/141/15678.pdf; Accordance with International Law of Unilateral Declaration of Independence by Provisional Institutions of Self-Government of Kosovo, Written Statement by the United States of America, 41-45, (Apr. 17, 2009), *available at* http://www.icj-cij.org/docket/files/141/15640.pdf. The argument largely rests on the preemption of the General Assembly by the Security Council. *See* U.N. Charter art. 12, para. 1 ("While 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."). *See also* Opinion, *supra* note 3, ¶¶ 22-23. The Security Council never made any such request to the Assembly—with Russia and China wielding vetoes, it would have been surprising if it had.

106. Opinion, *supra* note 3, ¶ 25 ("As the Court has stated on an earlier occasion, however, "[a] request for an advisory opinion is not in itself a 'recommendation' by the General Assembly 'with regard to [a] dispute or situation'" (citing Legal Consequences of Construction of Wall in Occupied Palestinian Territory, 2004 I.C.J., ¶ 25). In its next section, the Court also invokes the General Assembly's 1950 "Uniting for Peace" Resolution, 377A (V), which allows the General Assembly to propose measures relating to international peace and security in situations in which the Security Council fails to act. *See id.* ¶ 42. The "non-recommendation" logic and the logic of Uniting for Peace are probably incompatible, at least when the Security Council has taken some action on a matter.

authority to interpret its own jurisdiction and the questions that come before it.

Similarly, the Court resists moves to characterize the question as political in nature, and therefore something the Court should not deal with. This claim, again advanced by supporters of Kosovo, was made principally on the grounds that because secession—or at least a declaration of independence—is a political act, it is governed by municipal, not international, law.[107] The Court's rejection of this view is decisive and uncompromising, particularly in its assertion of judicial power and of the Court's decisional and institutional autonomy:

> Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, an assessment of an act by reference to international law. The Court has also made clear that, in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have[.][108]

Having established its jurisdictional capacity, the Court addresses its discretion in similarly assertive terms. Here, a second opportunity arose for those hoping the Court would say nothing at all, a hope briefly encouraged by the seemingly unpromising words that open the Court's analysis: "The fact that the Court has jurisdiction does not mean, however, that it is obliged to exercise it . . . ."[109] The Court may give advisory opinions, or it may not.

Discretion allows a court to avoid hard and awkward questions. This may be true here, but even that sort of discretion serves an institutional purpose which is, potentially, bolder, and the Court says as much: "The discretion whether or not to respond to a request for an advisory opinion exists so as to protect the integrity of the Court's judicial function and its nature as the principal judicial organ of the United Nations . . . ."[110] In other

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107. *See id.* ¶¶ 25-26 (framing the issue and the political objection).

108. *Id.* ¶ 27 (citing U.N. Charter art. 4; Conditions of Admission of State to Membership in United Nations, Advisory Opinion, 1948 I.C.J. 57, 61 (May 28); Legality of Threat or Use of Nuclear Weapons, 1996 I.C.J. 234, ¶ 13 (July 8)).

109. *Id.* ¶ 29.

110. *Id.* ¶ 29 (citing Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5, at 29 (July 23); Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, 1973 I.C.J. 166, ¶ 24 (July 12); Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, 1982 I.C.J. 325, ¶ 22 (July 20); Legal Consequences of Construction of Wall in Occupied Palestinian Territory, 2004 I.C.J., ¶¶ 44-45).

words, discretion is not just judicial cowardice; it is also a device for protecting judicial prerogatives, for protecting the authority and autonomy of the Court—any court—as an institution.[111]

In any event, the Court does not make a habit of refusing Advisory Opinions. Indeed, it almost never has[112] and it does not here. The Court's own jurisprudence recommends that it should do so only if there are "compelling reasons[.]"[113] Here, it does not find any, rejecting the possible reasons proffered by some of the states: the motives of the sponsoring state (Serbia),[114] the lack of a clear purpose or "any useful legal effect[,]"[115] or even the possibility that an opinion might produce "adverse political consequences."[116] In an analysis that exhibits the kind of strategic restraint best known from and most effectively deployed in *Marbury v. Madison*,[117] the ICJ shows how—precisely because it should not presume to substitute its political judgment for the General Assembly's—it is and implicitly must be free to give its legal opinion, come what may.[118] The logic would be identical for a binding judgment.[119]

The *Eastern Carelia* opinion is from the ICJ's predecessor court, the Permanent Court of International Justice, with whose jurisprudence that of the ICJ forms continuity. ICJ Statute, *supra* note 41,arts. 36(5), 37 (providing in Article 36(5) that acceptance of the PCIJ's jurisdiction are deemed to give compulsory jurisdiction to the ICJ, and providing in Article 37 that treaties referring issues to the PCIJ shall be referred to the ICJ).

111. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 127-33 (1962) (describing American courts' incentives and strategies for using jurisdictional discretion to avoid conflict with the political branches).

112. The Court has never exercised its own discretion to refuse a question or declared that the question posed was not legal in nature, although it refused one case, *WHO Legality*, on grounds that it lacked jurisdiction as the question put was *ultra vires*—a doctrinal distinction that, in itself, tells us little given that it was the Court itself that determined the matter. *See* ALJAGHOUB, *supra* note 70, at 52-56, 66, 97.

113. Opinion, *supra* note 3, ¶ 30 (citing Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*,* Advisory Opinion, 1956 I.C.J. 30, at 86 (Oct. 23) ("[T]here would appear to be no compelling reason why the Court should not lend its assistance in the solution of a problem confronting a specialized agency of the United Nations authorized to ask for an Advisory Opinion[.]")); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,* Advisory Opinion*,* 2004 I.C.J. 156 ¶ 44 (July 4) ("In accordance with its consistent jurisprudence, only 'compelling reasons' should lead the Court to refuse its opinion.").

114. Opinion, *supra* note 3, ¶¶ 32-33.

115. *Id.* ¶ 34.

116. *Id.* ¶ 35.

117. Marbury v. Madison, 5 U.S. 137 (1803); MARK TUSHNET, I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES 1-15 (2008).

118. *See* Opinion, *supra* note 3, ¶ 35 (noting that "[a]s the Court stated in [*Nuclear Weapons*], in response to a submission that a reply from the Court might adversely affect disarmament negotiations, faced with contrary positions on this issue 'there are no evident criteria by which it can prefer one assessment to another'" and citing Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 227, ¶ 17).

119. Although it has never refused an advisory opinion request, the Court has declined or found it

One particular objection prompts extended discussion: the fact that the General Assembly and not the Security Council sent the request.[120] For the states that raised this objection, this is, of course, simply a second bite at the jurisdictional apple: even if the General Assembly had the right to ask the question (because it was not technically a "recommendation"), the Court need not and should not answer it because doing so abets an intrusion on the prerogatives of the Security Council.[121] Given where the Opinion is heading—the second substantive issue addresses whether the UDI violated the quasi-constitutional regime enacted by the Security Council—the extensive discussion by which the Court dismisses this objection principally serves to expansively define the Court's own authority.

The Security Council had been intensively involved in Kosovo for a decade, beginning with Resolution 1160 in March 1998,[122] most prominently in Resolution 1244 creating (or approving) KFOR, UNMIK

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did not have jurisdiction over contentious cases, especially where third party interests were at issue (*Monetary Gold*, *East Timor*) or where its own prerogatives and independence were threatened (*Gulf of Maine*). *See, e.g.*, Bart M.J. Szewczyk, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation). Preliminary Objections.*, 105 AM. J. INT'L L. 747, 752 n.19 (2011) [hereinafter Szewczyk, *Application of CERD*] (quoting W. Michael Reisman, *The Enforcement of International Judgments*, 63 AM. J. INT'L L. 1, 3 & n.7 (1969), as discussing "'not infrequent[]' cases when 'the Court anticipated that a state was likely to impugn a judgment . . . [and] disseised itself of jurisdiction'"), On cases involving third party interests, *see* Antonio F. Perez, *The Passive Virtues and the World Court: Pro-Dialogic Abstention by the International Court of Justice*, 18 MICH. J. INT'L L. 399, 419-22 (1997); on the Court's institutional interests, *see* P. Mweti Munya, *The International Court of Justice and Peaceful Settlement of African Disputes: Problems, Challenges and Prospects*, 7 J. INT'L L. & PRAC. 159, 182 (1998) (discussing the dissents by Judges Morovozov and El-Khani concerning the Court's eventual acceptance, in *Gulf of Maine*, of Canada and the United States' proposed special agreement effectively stipulating the composition of the chamber). Even without explicitly declining jurisdiction, the Court can deploy various interpretative maneuvers to the same effect. *See, e.g.*, Perez, *supra*, 410-15 (noting that "the ICJ has, in exercising its powers of review without invoking a distinct political question doctrine, abstained in ways that perform the same function," and discussing, at 410-15, forms of abstention in *Southwest Africa* and *East Timor*); Thomas M. Franck & Peter Prows, *The Role of Presumptions in International Tribunals*, 4 LAW & PRAC. INT'L CTS. & TRIBUNALS 197 (2005).

120. *Id.* ¶¶ 36-48.

121. Written Statement by the French Republic, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22), ¶¶ 1.6, 1.28-1.42 (Apr. 17, 2009), *available at* http://www.icj-cij.org/docket/files/141/15607.pdf; Written Statement of the United States of America, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22), 41-45 (Apr. 17, 2009), *available at* http://www.icj-cij.org/docket/files/141/15640.pdf; Written Contribution of the Republic of Kosovo, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22), 130-36 (Apr. 17, 2009), *available at* http://www.icj-cij.org/docket/files/141/15678.pdf; Written Statement of the Government of the Republic of Albania, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22), ¶55 (Apr. 14, 2009), *available at* http://www.icj-cij.org/docket/files/141/15618.pdf.

122. S.C. Res. 1160, U.N. Doc. S/RES/1160 (Mar. 31, 1998).

and the PISG after the war in 1999,[123] as well as in many other actions through 2008. The Council also discussed the UDI, though it took no action concerning it.[124] The General Assembly itself had taken many actions in relation to Kosovo, although at the time of the UDI, Kosovo was not an active agenda item;[125] in fact, prior to the debate over the request for an opinion itself, only the Security Council had discussed the UDI.[126] To objectors, this meant that the Security Council, not the General Assembly, was the proper U.N. organ to ask the question, and letting the General Assembly ask it—which inevitably required the Court to interpret Resolution 1244—meant the Assembly would, through the agency of the Court, be interfering with the Council's authority.[127]

The Court disagrees: First, repeating its view that the General Assembly has an interest in the matter alongside the Security Council, it interprets this joint interest to mean that there is no compelling reason for the Court to refuse the Assembly's request.[128] As for the concern that answering the Assembly's question meant interpreting Resolution 1244, the Court simply notes that this is true and that it does this sort of thing all the time.[129]

With that, the Court establishes that there are no legal objections to issuing an opinion, nor any compelling reason not to do so.[130] And more than this: in arriving at these conclusions—in describing its own "jurisdiction and discretion"[131]—the Court has identified and reaffirmed its own considerable latitude to substantively frame the issues before it—to grasp the nettle presented to it, another of its choosing, or none at all. It will immediately go further.

IV. AVOIDING SUBSTANTIVE QUESTIONS. . .

Having considered jurisdiction, the Court now turns to the question

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123. S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999). The resolution served as the mandate for the Kosovo Force (KFOR), the United Nations Interim Administration Mission in Kosovo (UNMIK) and the Provisional Institutions of Self-Government (PISG). For further information on KFOR and UNMIK see Opinion, *supra* note 3, ¶ 37.

124. The Opinion discusses these and other Security Council actions at paragraph 37. *Id.* ¶ 37.

125. *Id.* ¶ 38.

126. *Id.* ¶ 44; *but see id.* ¶ 45 (noting that the Assembly had discussed related issues).

127. *See id.* ¶ 39 (summarizing these concerns).

128. *See id.* ¶¶ 42-44.

129. *Id.* ¶¶ 46-47 (citing both advisory opinions and judgments in contentious cases in which the Court interpreted one U.N. organ's actions in a matter raised by another).

130. A minority of judges—Bennouna, Keith, Koroma, Skotnikov, and Tomka—voted against exercising the Court's jurisdiction.

131. This is the heading for this section of the Opinion. *Id.* ¶¶ 17-48 (title at p. 13, immediately preceding ¶ 17).

itself, although its discussion remains both markedly procedural and strongly assertive of the Court's prerogatives to read and answer the question as it wishes. In the section entitled "Scope and Meaning of the Question," the Court

> recalls that in some previous cases it has departed from the language of the question put to it where the question was not adequately formulated . . . or where the Court determined, on the basis of its examination of the background to the request, that the request did not reflect the "legal questions really in issue" . . . .[132]

In such cases, "the Court has clarified the question before giving its opinion."[133] This, arguably, is exactly what a court is supposed to do, perhaps especially in an advisory opinion.[134]

Having asserted its power to read (and re-read) questions, the Court finds this question "clearly formulated" and "sees no reason to reformulate the scope of the question,"[135] but then immediately does exactly that, identifying "two aspects of the question which require comment."[136] The first concerns the role and identity of the actors who made the UDI, and their relationship to the provisional administration created by the Security Council;[137] the second concerns a proposed analogy between Kosovo and another case, in another court, dealing with self-determination—the

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132. *Id.* ¶ 50 (citations omitted) (quoting Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 89, ¶ 35). *See also* ALJAGHOUB, *supra* note 70, at 57 ("The Court observed that throughout its jurisprudence there had been cases where the wording of a request for an advisory opinion did not correspond to the 'true legal question' under consideration, or that 'the question put to the Court was, on the face of it, at once infelicitously expressed and vague.'") (quoting Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 89, ¶¶ 34-36; and *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal* Case, 1982 I.C.J., ¶ 46, respectively).

133. Opinion, *supra* note 3, ¶ 50. The Opinion notes it has done this "where the question asked was unclear or vague" and where "the request did not reflect the 'legal questions really in issue[.]'" *Id.* (citing Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, 1982 I.C.J., ¶ 46). *See* ALJAGHOUB, *supra* note 70, at 57 (discussing the *Admissibility of Hearings of Petitioners by the Committee on South West Africa* Case, 1956 I.C.J., 25; and the *Expenses Case*, 1962 I.C.J., 162, and noting that the Court itself has said that "it had often been required to broaden, interpret and even reformulate questions put to it.").

134. *See* ALJAGHOUB, *supra* note 70, at 60 ("The fact that the Court has a duty to clarify the law is paramount and should supersede other considerations. . . . Therefore, it can reformulate questions put to it in order to highlight the legal points contained with the question.").

135. Opinion, *supra* note 3, ¶ 51 ("In the present case, the question posed by the General Assembly is clearly formulated. The question is narrow and specific . . . .").

136. *Id.* ¶ 52.

137. *Id.* ¶¶ 52-53.

Quebec Reference.[138] Although the ICJ denies that it is doing anything other than glossing the question as it is, both of these "aspects" in fact present the Court with an opportunity to substantively redefine the question—an opportunity the Court denies it will take, and then does.[139]

A. Deciding Not to Identify the Authors

The first and, as it will turn out, key aspect is the Court's reading of who exactly declared independence, and its analysis is framed—really, predetermined—by the procedural ground it has staked out for itself earlier in the Opinion. The Assembly's question refers to a declaration made "by the Provisional Institutions of Self-Government of Kosovo" with a similar reference in the preamble.[140] This implicitly asserts a fact that one might contest—the identity of the declaration's authors; indeed, several states favoring Kosovo's position raised this very issue.[141]

This is a substantive question—the identity of the authors could affect the outcome of the question[142]—but the Court embeds the matter in a claim about its institutional and interpretive prerogatives: "It would be incompatible with the proper exercise of the judicial function for the Court to treat that matter as having been determined by the General Assembly"[143] and is something on which, the Court asserts, "the General Assembly [did not] intend[] to restrict the Court's freedom to determine this issue for itself."[144] This will prove decisive for the analysis of the relationship between the UDI and the administration established in Resolution 1244.

Yet even before it turns to its own substantive evaluation of the

138. *Id.* ¶¶ 55-56.

139. *Cf.* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Dissenting Opinion of Judge Koroma, 2010 I.C.J. 467, ¶ 3 (July 22), *available at* http://www.icj-cij.org/docket/files/141/15991.pdf [hereinafter Koroma Dissent] ("Although the Court in exercising its advisory jurisdiction is entitled to reformulate or interpret a question put to it, it is not free to replace the question asked of it with its own question and then proceed to answer that question, which is what the Court has done in this case, even though it states that it sees no reason to reformulate the question.").

140. Opinion, *supra* note 3, ¶ 1; Request for Advisory Opinion, Introductory Note, (Oct. 10, 2008), *available at* http://www.icj-cij.org/docket/files/141/15022.pdf.

141. *See, e.g.*, Written Statement by the French Republic, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22), ¶¶ 1.11, 1.12 (Apr. 17, 2009), http://www.icj-cij.org/docket/files/141/15607.pdf; Written Statement of the United States of America, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22), n.231 and accompanying text (Apr. 17, 2009), http://www.icj-cij.org/docket/files/141/15640.pdf.

142. Opinion, *supra* note 3, ¶¶ 52, 102-09.

143. *Id.* ¶ 52.

144. *Id.* ¶ 53 (developing an argument about the Assembly's intent based on the absence any reference to the authors in the agenda item or in the title of the resolution that contained the question).

authors' identity—in the run-up to issuing the Opinion—the Court also executed a procedural maneuver *passim* that both indicated and structured the Opinion's ultimate conclusions: the Court decided to invite "the authors of the above declaration" to submit comments.[145] In the event, however, comments were submitted by the Republic of Kosovo, whose own recitation of the Court's offer can certainly be read—as it was likely written—with an ironic smile,[146] given what, in the end, the Court concluded about the identity of the UDI authors. For this early procedural move is the only point at which the Court equates the authors with the state, and that is curious, however one understands their relationship: either "the authors" are not a subject of international law and therefore cannot speak—a view that is canonical[147]—or they actually or in effect are a state, in which case it would be strange to pretend the Opinion has nothing to do with secession or Kosovo's status. The best one can do is be open and transparent about the effect of identifying the authors in this way, and *that* the Court is not.

B. Declining to Expand the Question

Second, the Court notes and swiftly dismisses another proposal—this time from the supporters of Serbia—to frame its analysis in broader terms similar to those used in the *Quebec* Reference, decided by the Supreme Court of Canada.[148] We will return to this case, here noting only that in response to the question originally put to it, the *Quebec* Court adopted a

145. *Id.* ¶ 3.

146. "The Republic of Kosovo is grateful to the Court for this invitation, which enables it to participate in the proceedings on an equal footing." Written Contribution of the Republic of Kosovo, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22), ¶ 1.05 (Apr. 17, 2009), http://www.icj-cij.org/docket/files/141/15678.pdf.

147. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, Part II Persons in International Law, Introductory Note (1987) ("The principal persons under international law are states. . . . States have capacity to make international law, largely by practice that forms customary law and by international agreement. . . . States have legal personality and rights and duties under international law.").

148. Opinion, *supra* note 3, ¶ 55. *See also* Written Contribution by the Republic of Kosovo, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22), 130-36 (Apr. 17, 2009), http://www.icj-cij.org/docket/files/141/15678.pdf (discussing the power of the Court to respond to the question and the need to take the context of the declaration of independence into account); Statement of the Government of Ireland, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22), ¶¶ 21-22 (Apr. 17, 2009), http://www.icj-cij.org/docket/files/141/15662.pdf; Written Statement of the People's Republic of China, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22), ¶ II(c) (Apr. 17, 2009), http://www.icj-cij.org/docket/files/141/15611.pdf (discussing courts reaffirming the principle of respect for state sovereignty and territorial integrity).

more general formulation, similar to some of those which might have been more probative of the substantive issues than the actual question Serbia posed.[149] The Court correctly notes that the Kosovo question is, on its own terms, narrower, "does not ask about the legal consequences of [the UDI] . . . [nor] whether or not Kosovo has achieved statehood,"[150] and does not expressly mention secession,[151] and so:

> [t]he Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act—such as a unilateral declaration of independence—not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.[152]

Having so recently noted its power to revise questions (and having already commented on two aspects of the question), the Court energetically declines to do so, the effect of which we shall now consider.

V. . . . AND MAKING SUBSTANTIVE MOVES, LIKE AFTERTHOUGHTS

Having adopted almost as leisurely a pace as this Article, the Opinion is nearly half done—21 of its 45 pages, 56 of its 123 paragraphs—by the time it reaches what are usually, and here perhaps generously, known as "the merits of the case."[153] As is often the case in legal proceedings, by this point, the answer is all but assured.

The Court identifies two major concerns: one "concerning the lawfulness of declarations of independence under general international law, against the background of which . . . Security Council resolution 1244 (1999) is to be understood and applied" and another about "the legal

149. *See supra* discussion accompanying note 30.

150. *Opinion*, *supra* note 3, ¶ 51 ("Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State.").

151. *Id.* ¶ 56 ("The question put to the Supreme Court of Canada inquired whether there was a right to 'effect secession', and whether there was a rule of international law which conferred a positive entitlement on any of the organs named. By contrast, the General Assembly has asked whether the declaration of independence was 'in accordance with' international law.").

152. *Id.* ¶ 56.

153. Actually, the Court itself identifies the moment of substance as arriving even later, at paragraph 78, since the intervening paragraphs are a summary of the factual background of the UNMIK administration period and the events surrounding the UDI. *Id.* ¶¶ 57-77.

relevance of . . . 1244 . . . [and] whether the resolution creates special rules . . . applicable to the issues raised by the . . . declaration."[154] The first question asks if general international law says anything about declarations of independence; the other asks if the specific rules created for Kosovo affect the outcome. As we shall see, the Court's analysis quickly disposes of these questions, and where it lingers, it is to a very different purpose—to ensure the question is further, fully emptied of content and of any potential to offend the Security Council or threaten the institutional position of the Court.

A. General International Law—Reaching an Inevitable Conclusion, Quickly

We have already seen that the rules of general international law relating to secession are formally indeterminate—almost agnostic—even though in practice the field is actually more dogmatically inclined. The Court does not actually address secession, since it has already announced that is not a question it has been asked; rather, it notes, quite accurately, that there is no prohibition against declarations of independence as such:

> In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence.[155]

And that is about it—one can almost see the analysis grinding to a halt—since, really, what more is there going to be to say, if that is the question?

There are few mopping-up operations, mostly further limiting the inquiry's scope: some states had objected that territorial integrity implies a prohibition on secession or declarations of independence—or at least prohibited their having any effect—while others objected that territorial

154. *Id.* ¶ 78.

155. *Id.* ¶ 79 (further noting that state practice under postwar self-determination and decolonization likewise "does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence. . . ."). The Court's view that in the absence of prohibition the UDI is not "in violation of" and therefore "in accordance with" international law is an implicit restatement of the freedom principle from *Lotus*—something commentators have observed but which, interestingly, the Court itself does not mention. *See e.g.,* Anne Peters, *Does Kosovo Lie in the* Lotus-*Land of Freedom?*, 24 LEIDEN J. INT'L L. 95 (2011) [hereinafter Peters, Lotus-*Land*]; *see also* Hannum, *The Advisory Opinion on Kosovo*, *supra* note 74, at 155-56. *See also* SS Lotus Case (France v. Turkey), 1927 P.C.I.J. (ser.A) No. 10, at 18-19.

norms prevented other states from recognizing such actions.[156] Addressing these objections together, the Court holds that "the scope of the principle of territorial integrity is confined to the sphere of relations between States."[157] In other words, the question of a declaration of independence's effect, or the legality of other states' recognizing a secessionist entity on another state's territory, are very much issues—but not ones this Court will be addressing.[158]

Self-determination likewise is declared outside the scope of inquiry. Several states had advanced a secondary claim that Kosovo had a right to self-determination on a remedial theory (that is, in response to the depredations of Serbia in the 1980s and 1990s),[159] but the Court "considers

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156. *Opinion*, *supra* note 3, ¶ 80. *Compare* Written Statement of the Republic of Argentina ¶ 74, Advisory Opinion, 2009 I.C.J. (April 17), http://www.icj-cij.org/docket/files/141/15666.pdf ("It emerges from State practice that three main elements constitute the core of the notion of territorial integrity: *first*, the notion of *plenitude*. . . . *Second*, the notion of *inviolability*. . . . *Third*, the guarantee against any dismemberment of the territory. That explains, for instance, that the support of secessionist movements is considered a violation of the territorial integrity of the State concerned."), *and* Written Statement by Brazil, Advisory Opinion, 2009 I.C.J. (April 17), at 2, http://www.icj-cij.org/docket/files/141/15660.pdf ("the Unilateral Declaration of Independence contradicts relevant provisions of the international law, in particular the principle of territorial integrity of sovereign and independent States"), *and* Written Statement of the People's Republic of China to the International Court of Justice on the Issue of Kosovo, Advisory Opinion, 2009 I.C.J.(April 17), at III(c), http://www.icj-cij.org/docket/files/141/15611.pdf ("In the exercise of the right to self-determination, the territorial integrity of a sovereign State should be respected rather than undermined.") and Written Statement submitted by the Republic of Cyprus, Advisory Opinion, 2009 I.C.J. (April 17), ¶87 http://www.icj-cij.org/docket/files/141/15609.pdf ("States are now under a positive legal obligation not to recognize States created by, or territorial title gained by, the use of force,"); *with* Written Statement by the Bolivarian Republic of Venezuela, Advisory Opinion, 2009 I.C.J. (April 17), ¶4, http://www.icj-cij.org/docket/files/141/15676.pdf ("The recognition of Kosovo contravenes the rules of the International Law, set forth in General Assembly Resolution 2625 (XXV), since such action threatens the principle of not breaching or undervaluing the territorial integrity of the sovereign States").

157. *Opinion*, *supra* note 3, ¶ 80; *see also id*., ¶¶ 80-1 (discussing several specific Security Council resolutions condemning particular declarations of independence but finding that they are specific to their circumstances and do not contribute to a general norm); Tarcisio Gazzini, *The Kosovo Advisory Opinion from the Standpoint of General International Law*, THE HAGUE JUSTICE PORTAL, http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Gazzini_Kosovo_Note_EN.pdf.

158. A number of states directly argued that territorial integrity as a principle also binds non-state actors. Anne Peters, comments during panel at American Society for International Law annual conference, March 2011. *See also* Written Statement of the Government of the Republic of Serbia, Advisory Opinion, 2009 I.C.J.(April 17), ¶ 431, http://www.icj-cij.org/docket/files/141/15642.pdf; Written Comments of the Argentine Republic, Advisory Opinion, 2009 I.C.J. (July 17), ¶¶ 38-41 , http://www3.icj-cij.org/docket/files/141/15688.pdf. Why exactly states were concerned about the responsibility of non-state actors—and why the Court was concerned to avoid it—we shall shortly see.

159. Written Statement by the Republic of Albania, Advisory Opinion, 38-54 (Apr. 17, 2009), http://www.icj-cij.org/docket/files/141/15618.pdf; Written Statement by the Republic of Latvia, Advisory Opinion, ¶1-4 (Apr. 17, 2009), http://www.icj-cij.org/docket/files/141/15656.pdf; Written Statement by the Republic of Poland, Advisory Opinion, ¶¶ 6.1-6.6 (Apr. 17, 2009), http://www.icj-cij.org/docket/files/141/15632.pdf.

that it is not necessary to resolve these questions in the present case."[160] As we have seen, the key turn the Court made was to cast the General Assembly's question as a specific one, an evaluation of this declaration in its circumstances, rather than as a general issue of law of the kind considered in *Quebec*. Yet, although the Court's framing indeed narrows the issue, its effect is the opposite of a detailed analysis—it strips out the specific details of this series of events. The Court chooses to analyze the literal act of declaring independence—not its effect, nor the reactions of other states, nor the causes that might have justified the act—in splendid procedural isolation.[161] The purpose is clear: to avoid answering any of the questions that—in the views of the participating actors—really mattered.

B. The Specific Law for Kosovo: Removing the Last Element of Substance

The general international law analysis is over almost before it started; indeed, given the way the Court had framed the question, it effectively was. Analysis of specific international obligations concerning the regime put in place by the Security Council under Resolution 1244 carries on considerably longer, but still shows a similarly clear purpose to avoid. Indeed, the Court's crowning achievement—by which it simultaneously avoided offense to the Security Council and vacated the original question of all substance—only appears through its artful analysis of Kosovo's internal institutions and the identity of the UDI's authors.

As the Court had already noted, the identity of the UDI's authors was consequential, and it was politically sensitive. The problem, which the Court accurately perceived, was the possibility that even if there was no general prohibition on declaring independence, the particular authors of the UDI might have been specially disabled from doing so. The General Assembly's question, recall, identified the authors of the UDI as the Provisional Institutions of Self-Government (PISG), formed under the authority of Resolution 1244; if any part of the PISG, such as the Assembly of Kosovo, had issued the UDI, that might have been an *ultra vires*

160. *Opinion*, *supra* note 3, ¶ 83. The Court notes that "almost all" participants agreed that remedial self-determination was "beyond the scope of the question posed by the General Assembly[,]"; *id.* ¶ 83, although "[a] number of participants" had advanced the argument, *id.* ¶ 82.

161. *Cf.* Qerim Qerimi, University of Prishtina and Harvard Law School, What the Kosovo Opinion Means for the Rest of the World, Panel Discussion at American Society for International Law annual conference (Mar. 2011) (noting that a search for justice, broadly defined, would imply looking at other Charter provisions regarding humanitarian goals, self-determination and human rights). Where the Court avoids the question of territorial integrity by reserving that to the behavior of states, Koroma would have found that "international law upholds the territorial integrity of a State," Koroma Dissent, *supra* note 139, ¶ 21, and expressly gave priority to sovereignty and territorial integrity over claims of self-determination, *id.* ¶ 22, a question the majority avoided.

action—illegal, not because of any general prohibition, but because of specific limits on the PISG's power. The Security Council would have been very displeased to discover that institutions it created for the specific purpose of temporarily governing a territory while the Security Council looked for a permanent solution were empowered to effect their own solution.

The question was clearly sensitive, yet—on its face—the Court seemed boldly prepared to address it. Acknowledging that the 1244 regime and Constitutional Framework "form part of the international law which is to be considered in replying to the question,"[162] the Court asserts that it can "analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions."[163] In other words, the Court has considerable latitude to define its own inquiry. This reiterates what the Court has said about its freedom to interpret the General Assembly's question even if that touches actions of the Security Council; procedural assertions continue to pile up, even as the Opinion nears its end. But the use to which this interpretive boldness is put is striking for how it combines assertiveness with avoidance.

The Court's analysis of the UDI's accordance with the *lex specialis*—the special legal regime established for Kosovo by the Security Council—adopts two lines of inquiry: first, what the authors' real identity is, and second, if the textual frame of 1244 prohibits them from issuing a declaration. As the Court opens this final substantive question, it immediately recalls its own procedural agnosticism about who the authors were. For, although it might be a problem if a juridical creature of the Security Council declared independence, it might not be if, as the Court helpfully and anticipatorily suggests, "those who adopted the declaration were acting in a different capacity."[164]

And so, as it turns out, they were: the UDI was not an "Act of the Assembly of Kosovo"; rather, it was the product of private citizens who also happened to be members of the Assembly (and other parts of PISG):

> [T]aking all factors together, the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional

162. *Opinion*, *supra* note 3, ¶ 93; *see also id.* ¶ 91; *see generally*, *id.* ¶¶ 85-93 (laying out the reasons why the 1244 regimes and Constitutional Framework were still in force and constituted part of international law for the question's purposes).

163. *Id.* ¶ 94.

164. *Id.* ¶ 102.

> Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.[165]

Now, the claim that these officials were acting in a parallel personal capacity struck many observers and intervening parties (and dissenting judges)[166] as attenuated; they considered it obvious that these were PISG institutions acting, a conclusion that for most logically meant the UDI was *ultra vires*.[167] But the textual record of the UDI's passage is complex and ambiguous,[168] and the Court's interpretation of the 1244 regime and final

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165. *Id.* ¶ 109; *see also id.* ¶ 105 ("The declaration of independence, therefore, was not intended by those who adopted it to take effect within the legal order created for the interim phase, nor was it capable of doing so. On the contrary, the Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order but, rather, set out to adopt a measure the significance and effects of which would lie outside that order."). The Court also specifically addresses the relationship of the UDI to the Constitutional Framework: "It follows that the authors of the declaration of independence were not bound by the framework of powers and responsibilities established to govern the conduct of the Provisional Institutions of Self-Government. Accordingly, the Court finds that the declaration of independence did not violate the Constitutional Framework." *Id.* ¶ 120.

166. *See, e.g.*, Opinion, Declaration of Vice-President Tomka, 2010 I.C.J. 454 (July 22) ¶¶ 11-12 [hereinafter Tomka Declaration] (criticizing the majority's view, at paragraph 109 of the Opinion, that the UDI was issued by private actors: "This conclusion has no sound basis in the facts relating to the adoption of the declaration, and is nothing more than a *post hoc* intellectual construct. The majority's conclusion implies that all relevant actors did not know correctly who adopted the declaration on 17 February 2008 in Pristina: Serbia, when it proposed the question; other States which were present in the General Assembly when it adopted resolution 63/3; the Secretary-General of the United Nations and his Special Representative; and, most importantly, the Prime Minister of Kosovo when he introduced the text of declaration at the special session of the Assembly of Kosovo!").

167. For an example of a different conclusion, see Bart M.J. Szewczyk, *Lawfulness of Kosovo's Declaration of Independence*, 14 ASIL INSIGHTS (Aug. 17, 2010), http://www.asil.org/files/insight100817pdf.pdf [hereinafter Szewczyk, *Lawfulness*] (arguing the Court could have acknowledged the PISG's authorship of the UDI but still found that consistent with the PISG's role under 1244).

168. The UDI was signed by 109 members of the 120-member Assembly of Kosovo, as well as the President of Kosovo. *Id.* ¶¶ 76, 107. (The Serb and Gorani members did not sign.) The UDI declares that its authors had "[*c*]*onvened* in an extraordinary meeting on February 17, 2008, in Pristina, the capital of Kosovo[,]" but did not actually identify what, if any, institution was convening. UDI, first preambular paragraph, *in id.* ¶ 74. In its operative part, the UDI says "We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state." (UDI ¶ 1 (operative part), *in id.* ¶ 75). In opening the meeting at which the UDI was approved, the President and Prime Minister made reference to the Assembly of Kosovo as the body acting, *id.* ¶ 104, but

> [n]owhere in the original Albanian text of the declaration (which is the sole authentic text) is any reference made to the declaration being the work of the Assembly of Kosovo. . . . The language used in the declaration differs from that employed in acts of the Assembly of Kosovo in that the first paragraph commences with the phrase "We, the democratically-elected leaders of our people . . .", whereas acts of the Assembly of Kosovo employ the third person singular.

The procedure for adopting the UDI also differed from the Assembly's usual practice, including being signed by the President. *Id.* ¶ 107. *But see* Tomka Declaration, *supra* note 166, ¶ 20 (noting that the

status process, while discretionary and extremely formalistic, is plausible: It seems quite clear that the 1244 framework was intended to be open, flexible and agnostic about the final status.[169] Moreover, it is a view that indirectly brings the Court's analysis as close as it will come to a substantively consequential question.

The problem lies not with the chosen interpretation but with the way the Court uses its interpretation to terminate the analysis at the precise point that, really, one would have expected it to begin. The Court's seemingly decisive conclusion—that these individuals were not acting in their official capacity—is bludgeoningly trite: the very point of secession is to alter the existing political order, and it inheres in the concept of *unilateral* secession that those seceding neither act within nor feel constrained by that order.[170] Even more, it means that when a unilateral secession occurs, the logical and necessary response is a substantive analysis of its correctness as a general matter, or of its correctness in the

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signatories were "'invite[d]' to sign [the UDI] in his/her capacity of either 'the member of Kosovo Assembly' or 'the member of Chairmanship' of the Assembly" (quoting Transcript of the Special Plenary Session of the Assembly of Kosovo on the Declaration of Independence (Feb. 17, 2008), *reprinted in* Written Contribution of the Republic of Kosovo annex 2, at 239-45 (Apr. 17, 2009))). In Szewczyk, *Lawfulness*, *supra* note 167, n.23, the author notes that "[t]he authentic Albanian text of the [UDI] reads 'Deputetët e Kuvendit të Kosovës,' meaning 'Deputies of the Kosovo Assembly.'"

169. The Court notes divergent views on this question: States supporting Serbia argued that the framework put in place by the Security Council was intended as the only one available until the Council (and perhaps also the parties to the dispute) approved a different arrangement; On this reading, secession and the establishment of a new state, regardless of who created it, would contravene that framework. *Id.* ¶ 111. Kosovo's supporters argued that the UDI was consistent with a permanent solution, in part because the Security Council had not expressly precluded independence and had indirectly incorporated into 1244 a reference in the Rambouillet Accords to a final settlement being based on "the will of the people." *Id.* ¶ 112. The Court favors the latter view—it notes that the "specific contours, let alone the outcome, of the final status process were left open by . . .1244." *Opinion*, *supra* note 3, ¶ 104—and adduces further evidence from a resolution on Cyprus, passed just 19 days after 1244, that expressly provides for final settlement to include a unified state, while, "[b]y contrast, under the terms of resolution 1244 (1999) the Security Council did not reserve for itself the final determination of the situation in Kosovo and remained silent on the conditions for the final status of Kosovo. Resolution 1244 (1999) thus does not preclude the issuance of the declaration of independence." *Id.* ¶ 114.

170. On the Court's logic, only secessionists who act *within* a political order would be subject to it. Some states do allow secession of identified sub-units. Christopher J. Borgen, *Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 CHI. J. INT'L L. 10, n.28 (2009) (citing JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (2006) ("[I]n the cases of Senegal, Singapore, the Czech Republic, and Slovakia, each was separated pursuant to separation agreements or operations of their domestic constitutions."). In such cases, it is possible to analyze secession as a function of the existing legal order—but *unilateral* secession, by definition, only occurs when there is no accepted provision for it. This was clearly the case here—Serbia adamantly opposed secession and considered it a violation both of international law and of its own municipal legal order; the UDI's authors—who after all called their declaration "unilateral"—knew this.

particular circumstances, or of its relevance to other actors' responses. Instead, the Court uses the fact that the authors are necessarily acting outside or violating the existing legal order as a reason to conclude there is nothing further to analyze.

For, having identified the authors as private citizens not subject to a specific textual prohibition, the Court finally administers the *coup de grâce*. The general and specific international law applied in Kosovo says nothing about what *individuals* choose to do in the name of the nation.[171] Here the reasons for the Court's early insistence that the issue before it involves states, not non-state actors, becomes clear: Perhaps an organ of the U.N. could not declare independence, perhaps other states could not recognize such a declaration, but these are not at issue. Perhaps, too, the Security Council could have expressly precluded private actors from declaring independence, but it did not, and nothing more than mere private action had happened here—at least, the Court would not discuss anything more.

The narrowness of the finding is totalizing: we cannot even speak of

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171. *Opinion*, *supra* note 3, ¶ 121 ("The Court has already held, however . . . that the declaration of independence of 17 February 2008 was not issued by the Provisional Institutions of Self-Government, nor was it an act intended to take effect, or actually taking effect, within the legal order in which those Provisional Institutions operated. It follows that the authors of the declaration of independence were not bound by the framework of powers and responsibilities established to govern the conduct of the Provisional Institutions of Self-Government. Accordingly, the Court finds that the declaration of independence did not violate the Constitutional Framework."). The Court has already noted that there "is no indication, in the text of [1244], that the Security Council intended to impose . . . a specific obligation to act or a prohibition from acting, addressed to such other [non-official] actors." *Id.* ¶ 115 (and contrasting, at paragraph 116, Resolution 1244's silence with earlier resolutions that had expressly directed themselves to non-official actors, including "the leadership of the Kosovar Albanian community" mentioned in Security Council Resolution 1160 (1998), ¶ 4). The issue, therefore, as the Court considers it, concerns not only the authors' official capacity, but also the permissive governing framework the Court identifies. *See supra* Part V.A. From this context—which includes the patent failure of efforts to determine a final status—the Court concludes that the authors did not act in their formal capacities as members of the PISG, and did not intend the UDI to have effect within that legal order, but outside of it. *Id.* ¶¶ 102-06.

One might argue that the absence of references to local leaders in 1244, when previously they had been mentioned, was due to the Security Council's assumption that the "leadership" would now be represented by the PISG, and therefore silence was not permission but presumptive exclusion. But this is an interpretative choice, and while we might criticize the Court for not acknowledging the ambiguity of its evidence, we cannot do more than simply agree or disagree with its conclusion. One thing, though, we might say: Such references in early resolutions show that there *was* a leadership—which might make us wonder less about the Court's interpretation of whom the Security Council resolutions was addressing, and more about its own failure to ask what consequential authority those representatives had, or ought to have, in international law, beyond a *Lotus*-like vacuity of bare permissiveness. For a discussion of this section of the Opinion, see Marcelo G. Kohen & Katherine Del Mar, *The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of 'Independence from International Law'?*, 24 LEIDEN J. INT'L L 109 (2011). On the relationship of the Opinion to the *Lotus* principle, see Peters, Lotus-*Land*, *supra* note 155.

"this kind of act" because the Court's analysis is so specific that it really refers only to *this* act, in its own hyper-specific context of Kosovo under the 1244 regime.[172] This particular act, by private citizens, is simply not governed by international law, and therefore cannot violate the law, and therefore is "in accordance with" international law: QED.

What this suggests is that the Court is following but misreading the classical doctrinal implications of legal subjectivity: that is, the Court considers the authors to be actors without international legal personality, but then ignores the very old distinction that, from an international legal perspective, acts by such actors are void—they are legal non-actions. Calling the UDI void would have been quite different from saying it "did not violate international law"—and still would have allowed the Court to reach a variety of conclusions about all other aspects of the case, such as states' recognition of Kosovo. Either its authors are individuals in the classic, *geschäftsunfähig* sense—in which case voidness is a better frame for understanding their actions than "accordance with the law"—or they are capable actors in their own right, in which case the Court ought to analyze their actions as the legally consequential events they seem to have been.[173]

The Court is evidently uncomfortable with the thought that individuals or organs acting under the authority of the Security Council might declare independence, and the Opinion largely aims at showing that this wasn't happening. But on the Court's own analysis, it wouldn't have mattered if

172. As the Court is at pains to note, its analysis of the PISG's scope of action, based on its close reading 1244, does not say anything about other situations: "[T]he Court observes that the Constitutional Framework functions as part of a specific legal order, created pursuant to resolution 1244 (1999), which is applicable only in Kosovo. . . ." *Opinion*, *supra* note 3, ¶ 89.

173. *Cf.* W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 164-66 (1971). It would be interesting to consider what the Court would have found if the same actors had, say declared war against Serbia and crossed the provincial frontier with armed forces. Would the Court have declared this to be an essentially private act not in violation of international law? *See* Hans W. Baade, *Nullity and Avoidance in Public International Law: A Preliminary Survey and a Theoretical Orientation*, 39 IND. L.J. 497, 527-28 (1964) (discussing, at 527, the concept of "Nicht-Rechtsgeschäfte" and giving the same example about "a declaration of war by a private individual against a state."). Qerimi suggests that, although the Opinion does not think territorial integrity applies to non-state actors, it appears to believe that all actors must follow rules on use of force. Qerim Qerimi, comments during panel at American Society for International Law annual conference, March 2011. Whether or not this is the ICJ's view, those who believe international law should increasingly acknowledge individuals as actors with legal personality will probably be disappointed by the Opinion. The Opinion can be read as staking out a substantive position on the rights and powers of the PISG—standing alone, its analysis of Resolution 1244 would seem to indicate that the lack of specific prohibitive language gave actors created under the Resolution, such as the PISG, broad permission to act. But this is undercut and made redundant by the emphasis on the private nature of the actors, which implies that the Court believes anyone acting under color of Security Council authority probably would have been barred from declaring independence. *See* Opinion, *supra* note 3, ¶ 121.

the authors *were* part of the PISG or if there were any obligations on them as private actors, since anyone actually declaring independence would, by definition, have been acting outside the existing political order and not subject to it.[174] The organs of PISG were not authorized to take these steps, and if they had, it would have been *ultra vires*, but this obvious observation does not tell us how we should respond. After all, the "individuals" who acted may not have been prohibited, but neither were they authorized: they were acting outside the legal order, and that, in theory, is an option available to anyone, even an organ established by the Security Council. This would have made the Security Council uncomfortable, to be sure, but far from avoiding this hypothetical possibility, the Court's logic incidentally compels us to notice it.

Indeed, it merely highlights that what the Court's treatment of the UDI ignores is its effect on the behavior of others—the many recognitions of Kosovo by other states, which were in a sense based on that same document and private act. Many states clearly considered the act of issuing the UDI decisive at least for the timing of their decision to recognize Kosovo, and thus accorded the document a real-world effect that the Court entirely ignored.[175] So, even if one accepted the entirely private nature of the UDI, this interaction of the private act with public, state action—an issue with which the Court was familiar[176]—is the obvious and essential heart of the dispute.

The way the Court arrives at its conclusion again demonstrates its combination of procedural assertiveness and substantive vacuity. Much as it has done earlier, "[t]he Court considers . . . that the declaration of independence must be seen in its larger context, taking into account the events preceding its adoption, notably relating to the so-called 'final status

174. *Opinion*, *supra* note 3, ¶ 121 ("The Court has already held, however. . . that the declaration of independence of 17 February 2008 was not issued by the Provisional Institutions of Self-Government, nor was it an act intended to take effect, or actually taking effect, within the legal order in which those Provisional Institutions operated. It follows that the authors of the declaration of independence were not bound by the framework of powers and responsibilities established to govern the conduct of the Provisional Institutions of Self-Government. Accordingly, the Court finds that the declaration of independence did not violate the Constitutional Framework.").

175. Thanks to Prof. Várady for noting this point.

176. *See* Interpretation of the Statute of the Memel Territory, 1932 P.C.I.J. (ser A/B) No. 49 (analyzing a surprisingly similar claim about the international legal relevance of *ultra vires* private acts, though not cited in the Opinion); Baade, *supra* note 155, at 554 ("Careful research will probably reveal many instances where an initially private action, a non-act in international law, was validated through adoption by a state. Examples that readily come to mind are "treaties" between explorers and native chiefs and princes, conquest of territory by the private armies of the great chartered companies. . . . Thus, while an act by a non-subject of international law is a non-act, such non-acts generally are capable of subsequent validation through ratification and adoption by a subject of international law.")

process.'"[177] Yet the Court's invocation of context here serves the exclusive purpose of circumventing any suggestion that the UDI was issued by a PISG organ, in order to avoid any challenge to the Security Council's framework. The UDI is not contextualized for any of the other relevant questions on which there is also complex evidence, such as its actual effect, which was the secession of Kosovo, or the responsibilities of other states in reacting to the UDI.[178] The Court did not decide the authors were private actors not because that was obviously right or even the better reading, but because it made these problematic questions of substance go away. By setting up the analysis so that it would hinge upon the identity of the author, the Court arrived at the extraordinary—and obvious—conclusion that no international rule, general or specific, prevented this particular group of private persons from writing words that look like a declaration of independence on a piece of papyrus and signing it.[179]

VI. ANOTHER LANGUAGE IS POSSIBLE: THE *QUEBEC* REFERENCE

The Court is bold in asserting its jurisdiction and discretion, but timid in grasping the substantive question. Could it have been otherwise? Perhaps the matter was so fraught, so caught up in politics, as to be unanswerable

177. *Opinion*, *supra* note 3, ¶ 104 (referring to the factual background at paragraphs 64 to 73).

178. *Cf.* Tarcisio Gazzini, *Kosovo Advisory Opinion from the Standpoint of General International Law,* THE HAGUE JUSTICE PORTAL, at 3, http://www.haguejusticeportal.net/Docs/Commentaries %20PDF/Gazzini_Kosovo_Note_EN.pdf ("The crux of the matter is not whether international law prohibits a declaration of independence made by an entity which may develop in due time into a State, but whether international law imposes upon other States any obligations in relation to a declaration of independence. These obligations may include the obligation not to recognize the new entity, the obligation not to support the new entity and so on. In other words, international law is more concerned with the consequences of declaration of independence for other States, rather than on the lawfulness of such a declaration.").

179. *Cf.* Koroma Dissent, *supra* note 139, ¶ 3 ("Never before has [the Court] reformulated a question to such an extent that a completely new question results, one clearly distinct from the original question posed and which, indeed, goes against the intent of the body asking it. This is what the Court has done in this case by, without explicitly reformulating the question, concluding that the authors of the declaration of independence were distinct from the Provisional Institutions of Self-Government of Kosovo and that the answer to the question should therefore be developed on this presumption."); Dov Jacobs, *The Kosovo Advisory Opinion: A Voyage by the ICJ into the Twilight Zone of International Law,* THE HAGUE JUSTICE PORTAL, http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/ Jacobs_Kosovo_Note_EN.pdf. ("[T]his is . . . the first opinion or judgment of the Court which does not deal, even remotely, with the conduct, rights and obligations of either States or international organizations. It deals solely with whether the actions of a group of individuals, acting (or not) as the Provisional Institutions of Self-Government of Kosovo or not, are in accordance with international law. This might seem like an obvious statement to make in light of the question put to the Court by the General Assembly . . . .").

any other way.[180] Was there any plausible alternative? There was. The Opinion itself cites another model suggesting that substantive boldness is possible—the *Quebec* Reference.

In 1996, the Canadian government asked its Supreme Court if Quebec had the right to secede under Canadian or international law.[181] The *Quebec* Court issued a 156-paragraph nonbinding opinion, itself armored with a considerable (and consequential) procedural apparatus, but also strikingly different from the Opinion in its substantive approach. The essential move abjured in *Kosovo* but made in *Quebec* is frankly to acknowledge the political—constitutive—constraints on a court's scope for efficacious judgment, yet also, equally, the obligation and ability to place the question in its full legal and political context. The effect is a document that candidly engages the obvious and undeniable issues underpinning any question of secession.

Consider, for example, how the *Quebec* Reference frames its review of the legal and political history—the context:

> Because this Reference deals with questions fundamental to the nature of Canada, it should not be surprising that it is necessary to review the context in which the Canadian union has evolved. To this end, we will briefly describe the legal evolution of the Constitution and the foundational principles governing constitutional amendments. Our purpose is not to be exhaustive, but to highlight the features most relevant in the context of this Reference.[182]

The *Quebec* Court then examines the "underlying principles" of the

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180. *Cf.* Eric De Brabandere, *The Kosovo Advisory Proceedings and the Court's Advisory Jurisdiction as a Method of Dispute Settlement*, Hague Justice Portal, (Sept. 28, 2010), http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/De%20Brabandere_Kosovo_EN.pdf (arguing that the Opinion blurred the distinction between advisory and contentious cases).

181. The questions were:

> 1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
>
> 2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
>
> 3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

Quebec Reference, [1998] 2 S.C.R. 217, ¶ 2 (Can.). The Court declined to answer the third question, given its answers to the first two.

182. *Quebec Reference* ¶ 34.

constitutional structure, including an express discussion of the uses to which a court may legitimately put such unwritten, pre-constitutional principles.[183] In effect, the *Quebec* Court is putting its question in context by commenting on the entire history of Canada. By contrast, although the *Kosovo* Opinion also reviews a period of history, its discussion starts in 1999, as if there were nothing before then that might bear on the question of whether Kosovo's secession was justified. Despite its claims to the contrary, the Opinion is almost entirely stripped of any effort to contextualize—in fact, its effort is expended almost entirely in order to decontextualize those few facts it discusses.

In answering, the Canadian government's original question of whether or not Quebec had the right to secede unilaterally, the *Quebec* Court also indicates what it believed to be the fuller answer in context.[184] It did not, in other words, limit itself to the question asked—but neither did it use its discretion to make the question still narrower. Rather, it acknowledged the embedded and contextual nature of the question, and proceeded to craft an answer to that fuller question.

The *Quebec* Court finds that there is no legal prohibition of secession, which already goes much farther, substantively, than the *Kosovo* Court's finding that there is no prohibition against *declarations* of independence—

183. *Quebec Reference* ¶¶ 49 *ff*., and ¶¶ 53-54.

184. In brief, the Court held that there was no right to unilateral secession, but also that it was not possible simply to ignore a democratically legitimated request to secede; some form of good-faith negotiations were required that took account of the underlying principles of a democratic polity. *See id.* ¶ 104:

"Accordingly, the secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature or government of Quebec unilaterally, that is to say, without principled negotiations, and be considered a lawful act. Any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order. However, the continued existence and operation of the Canadian constitutional order cannot remain unaffected by the unambiguous expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The primary means by which that expression is given effect is the constitutional duty to negotiate . . . . In the event secession negotiations are initiated, our Constitution, no less than our history, would call on the participants to work to reconcile the rights, obligations and legitimate aspirations of all Canadians within a framework that emphasizes constitutional responsibilities as much as it does constitutional rights.

See also Johan D. Van Der Vyver, *Self Determination of the Peoples of Quebec Under International Law*, 10 J. TRANSNAT'L L. & POL. 1 at 2, (2000) (using the Quebec example to argue that "self-determination does not authorize the secession of sections of a nation from an existing state."); Obiora Chinedu Okafor, *Entitlement, Process, and Legitimacy in the Emergent International Law of Secession*, 9 INT'L J. ON MINORITY & GROUP RTS. 41 (2002) (examining international legal entitlement to secede and secessionist dispute management systems); Charles F. Doran, *Will Canada Unravel? Plotting a Map if Quebec Secedes,* FOREIGN AFFAIRS (Sept./Oct. 1996). *See generally* Pierre Bienvenu, *Secession by Constitutional Means: Decision of the Supreme Court of Canada in the Quebec Secession Reference*, 21 HAMLINE J. PUB. L. & POL. 1 (1999) (discussing the background, positions, and outcome of the case).

an issue that the *Quebec* Court simply subsumes in the question. The *Quebec* Court also does not equate textual silence—whether in the Canadian Constitution or international law—with permission, since it is looking to engage the substantive question, rather than make it go away.[185] After observing that there is no prohibition in international law—the point at which the *Kosovo* Court stops—the *Quebec* Court then moves to a discussion of the substantive law of self-determination.[186]

But far more extraordinary than its review of existing law, the *Quebec* Court notes the possibility that action in the street can overtake its opinion:

> No one doubts that legal consequences may flow from political facts, and that "sovereignty is a political fact for which no purely legal authority can be constituted . . . ." Secession of a province from Canada, if successful in the streets, might well lead to the creation of a new state. Although recognition by other states is not, at least as a matter of theory, necessary to achieve statehood, the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states. That process of recognition is guided by legal norms. However, international recognition is not alone constitutive of statehood . . . . Recognition occurs only after a territorial unit has been successful, as a political fact, in achieving secession. . . .
>
> [O]ne of the legal norms which may be recognized by states in granting or withholding recognition of emergent states is the legitimacy of the process by which the *de facto* secession is, or was, being pursued.[187]

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185. *See Quebec Reference* ¶ 84 ("It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements.") This argument is quite similar to the *Kosovo* Court's discussion of how the UDI was intended to have effect outside the Constitutional Framework and 1244, and represents the one point of substantive convergence in their discussions. *See id.* ¶ 144 ("If the principle of 'effectivity' is no more than that 'successful revolution begets its own legality'. . . it necessarily means that legality follows and does not precede the successful revolution. *Ex hypothesi*, the successful revolution took place outside the constitutional framework of the predecessor state, otherwise it would not be characterized as 'a revolution." (citation omitted) (quoting S.A. de Smith, *Constitutional Lawyers in Revolutionary Situations*, 7 W. ONT. L. REV. 93, 96 (1968))). For the *Kosovo* Opinion, this point is used to prove that the authors of the UDI were not acting as part of the 1244 regime, whereas for *Quebec* Reference, it is a substantive point unto itself—not avoiding a problem, but identifying the limits of judicial power.

186. *Id.* ¶¶ 112-13 ("International law contains neither a right of unilateral secession nor the explicit denial of such a right. . . . While international law generally regulates the conduct of nation states, it does, in some specific circumstances, also recognize the 'rights' of entities other than nation states—such as the right of a people to self-determination."). Unlike the Kosovo Opinion question, the question posed to the *Quebec* Court specifically asked about self-determination, so it was hardly difficult for the Court to take it up.

187. *Id.* ¶¶ 142-43 (citations omitted). There are several other references to the effectivity principle and unilateral secession in fact: the Court's view is that this could be an efficacious act, but, by definition, could not be legal under the *existing* Canadian constitutional order. Note also the *Quebec*

This is a clear recognition of the limits beyond which the judicial function cannot usefully provide judgment or guidance—an exercise in judicial humility[188]—even while making extraordinarily consequential pronouncements. It contrasts starkly with the *Kosovo* Court's approach: an expansive procedural reach coupled with a comprehensive avoidance of substance.

The *Quebec* Court is guileless or craven before power. When it adopts a reticent approach, it is often to considerable effect, as when it explains that it need not decide whether the whole population of Quebec constitutes a legal "people," nor what the relationship of aboriginal communities to that "people" might be—non-discussions that clearly signal serious real-world consequences for Quebecois separatism.[189]

Court's explicit discussion of recognition—an issue at the heart of the Kosovo dispute, but which the ICJ chooses not to read into its question.

188. The Supreme Court was itself criticized for timidity in the face of what some Canadians saw as treasonous behavior by Quebecois separatists. Thanks to Professor Mark Drumbl for this point. Despite such criticism, the Court's approach does not seem to be an instance of retiring behind a political question doctrine. With the judicialization of much of political life (and international affairs), such doctrines have come under assault as indefensibly arbitrary or as masks for ideological preference, or at least as means for courts to duck hard problems. This seems different, however: Not only is the *Quebec* Court not ducking and in fact making a bold pronouncement, but its occasional reticence suggests deference to a different, "constitutional question" doctrine—a doctrine not about subject-matter competence or separation of powers, but actual formational authority—something much closer to a Marshallian "courts of the conqueror" logic than to any fear of the political thicket. *See Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823) ("Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.") In the U.S. context, the political question doctrine is elucidated in *Colegrove v. Green*, 328 U. S. 549, 556 (1946) ("Courts ought not to enter this political thicket."), and limited in *Baker v. Carr*, 369 U.S. 186 (1962) (rejecting claim that reapportionment was a non-justiciable political question). On the trend towards judicialization, *see* Ran Hirschl, *The Judicialization of Politics*, *in* OXFORD HANDBOOK OF LAW AND POLITICS (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira, eds., 2009); *see also Pros. v. Tadić*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction ¶¶ 23-5 (2 Oct. 1995) (rejecting the claim that the Tribunal is barred from considering its jurisdiction by a doctrine of political questions or non-justiciable disputes).

The ICJ has not explicitly recognized a political questions doctrine, but has followed its logic. *See* Perez, *supra* note 119, at 407 ("Admittedly, the World Court explicitly denied the existence of a 'political question' doctrine based on separation of powers in the *Nicaragua Case.* Nonetheless, the ICJ has employed an 'arsenal of techniques and devices' performing the same function as such a doctrine but under other names.").

189. *Quebec Reference* ¶ 125 ("While much of the Quebec population certainly shares many of the characteristics (such as a common language and culture) that would be considered in determining whether a specific group is a 'people', as do other groups within Quebec and/or Canada, it is not necessary to explore this legal characterization to resolve Question 2 appropriately. Similarly, it is not necessary for the Court to determine whether, should a Quebec people exist within the definition of public international law, such a people encompasses the entirety of the provincial population or just a portion thereof. Nor is it necessary to examine the position of the aboriginal population within Quebec .

To be sure, the ICJ had to worry about a broader range of constituents than the Canadian Court, which serves a single master and was adjudicating a single dispute. Even though its opinion was advisory, the ICJ's view would naturally be invoked for a range of disputes, and it knew this.[190] This might be a basis for cautious judicial conservatism. Still, for all that, the Canadian Court also could reasonably expect that its opinion would have effects beyond Canada, and in any case, the *Quebec* opinion addresses the international scope of the relevant rules much more forthrightly.[191] This cannot be because the task was any easier—if

. . ."); *see also id.* ¶ 139). The implicit threat was that secession by Quebec would really be a secession by ethnic Quebecois, and areas not populated by that community—such as the north of Quebec, populated by Indian tribes—might not secede with it. *Id.* ¶ 96 ("There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights. Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty. Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec."). *See also* Mark Bennett, *"Indigeneity" as Self-Determination*, 4 INDIGENOUS L.J. 71, 73-76 (2005) (arguing that Indigenous secession is not practical in many instances); Garth Nettheim, *Indigenous Australian Constitutions,* 24 U.N.S.W.L.J. 841 (2001) ("Indigenous peoples argue that, as peoples, they are entitled to determine their political status. Some states oppose the notion, fearing the possibility of secession."). Many states have recognized the status of indigenous peoples as peoples possessed of the right of self-determination, but of a specifically qualified kind that does not encompass the classical right to external self-determination (independence) possessed by colonial peoples.

190. *Cf.* ROSENNE, *supra* note 45, at 104 (states have traditionally been concerned that advisory jurisdiction, if not constrained, could "authorize the surreptitious introduction of compulsory jurisdiction to decide concrete disputes between States by devious means"—which clearly would have been a risk here.); KAIYAN HOMI KAIKOBAD, THE INTERNATIONAL COURT OF JUSTICE AND JUDICIAL REVIEW 146 (2000) (paraphrasing Judge Winiarski's observation in a separate opinion in the *UNESCO* case that "the discretionary power vested in the Court was a way of ensuring that it was not called upon to give an opinion in cases where there was an actual dispute between two States one or both of whom had not agreed to refer the dispute to the Court"—not technically applicable to the Kosovo case, since the Court was taking no view on Kosovo's statehood, but clearly the practical context); ALJAGHOUB, *supra* note 70, at 63 (2006)("The question offered should not be narrowly defined and confined to a very specific point. On the other hand, the question should be phrased in such a way as to produce a broad answer not confined to the case initiating the question but also applicable to future cases."). *Cf.* YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 277 (2003)(discussing proposals to expand the ICJ's advisory jurisdiction, and noting concerns about "[r]eintroducing the ICJ as a mandatory global jurisdiction through the 'backdoor'").

191. The status of the Canadian Supreme Court as the highest court of a sovereign state is clearly different from that of the ICJ, which is notionally the primary judicial organ of the United Nations but possesses little real autonomous authority. In addition, there was a substantive difference in the two courts' positions vis-à-vis their respective questions: The *Quebec* Court was answering a prospective question on which it could hope to have an influence, whereas the *Kosovo* Court was answering a question effectively mooted by events—the very sort of thing, indeed, that the *Quebec* Court speculated on in discussing effectivity. It is a separate question, of course, whether irrelevance should have led the ICJ to produce a duller document or a more daring one. Thanks to Professor Mark Drumbl for the core

anything, it was far *more* likely that the parties in Canada would take the *Quebec* Court's view seriously and act in accordance with it, which made the burden all the heavier.[192]

One need not agree with the *Quebec* Reference's particular views about secession (which are quite ambiguous, and to my mind problematic), but there can be no questioning the radically different tenor of its discussion, which is often substantive, searching and engaged—everything the *Kosovo* Opinion is not.

The *Kosovo* Court plays the innocent, adjudicating matters of pure law in a political vacuum. We cannot know the judges' personal views, of course, absent some more intimate access to their reasoning, but it is implausible to suppose that they were unaware of the most basic facts of the conflict.[193]

As we have seen, the *Kosovo* Court expressly rejects the suggestion that its question was similar to the one in *Quebec*, and in many ways this was accurate, since the questions were very differently worded. The *Quebec* question was more exactly formulated, more difficult to avoid; a court assiduously following the text of the question would have a harder time avoiding substance in that case. But the ICJ has never been particularly fastidious about the questions it has been given—its own account of its jurisprudence shows as much—and so the proper question is why it did not do more here, when more was so clearly at issue. It is also true, as we have seen, that the *Quebec* Court played with its question,

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of these points.

192. Anthony DePalma, *Canadian Court Rules Quebec Cannot Secede on Its Own*, N.Y. TIMES, Aug. 21, 1998, at A ("In Quebec, separatist leaders were angered by the court's opinion and said the will of the Quebec people, the vast majority of whom speak French, could not be overruled by any legal judgment. . . . Politicians in Western Canada have long pressed the federal Government to clarify the rules for separation and demanded that the rest of Canada be involved in any decision about Quebec's future. . . . Such opinions are called references, and while not legally binding, they are important because of the moral and legal authority of the court. The Supreme Court has issued 74 references since 1892."); *Ottawa Begins to Adopt Plan B: (Allan) Rosk's Supreme Court Reference Pleases Some and Infuriates Others*, 23 ALBERTA REP. 6, 1996 WLNR 6358692, 14 Oct. 1996 ("The ruling could take a year or more, and while it is legally an advisory opinion, traditionally such rulings have been treated by Ottawa as binding. . . Mr. Bouchard's reaction to the Supreme Court reference has been to claim his government will not submit a 'defence' to the court, will ignore whatever the justices decide and, after holding a successful independence referendum, will declare sovereignty unilaterally. . . . 'The leading political figures of all the provinces and indeed the Canadian public have long agreed that this country will not be held together against the will of Quebeckers clearly expressed, said Mr. Rock. 'And this government agrees with that statement.'").

193. Some of the declarations and dissents expressly note the importance of pre-1999 events to a decision. *See, e.g.*, Tomka Declaration, *supra* note 166, ¶¶ 22-30 (discussing the political background to the case and its significance in the outcome); Yusuf Separate Opinion, *supra* note 96, ¶¶ 11-13 (discussing how Kosovo's context allows it to be considered an "exceptional circumstance" under self-determination).

avoiding some elements and introducing others—this only shows that the *Quebec* Court did not write as it did solely because it was somehow trapped by its question. The Court was an active agent of the question's ultimate formulation in its opinion; it was not compelled to boldness.

So there is more here than a technical rejection of jurisprudential homology—the *Kosovo* Court does not *want* to engage in a similar analysis. After all, the Court has the power to reformulate questions that do not engage the "legal questions really in issue;"[194] so why not do so here? It only invokes its power of reinterpretation to narrow the issue of who the authors of the UDI were and to deflect proposals that the question be understood in a more general way—understood, that is, like the *Quebec* Reference. This is a choice about policy, one might even say, about courage: the courage to say more, or barring that, to say nothing at all.

VII. THE VALUE OF NOT BEING MEMORABLE

It will not surprise the reader that the precedential value of the Opinion appears to be very nearly nothing. First, as a mechanical and doctrinal matter, the Opinion is advisory, with no binding authority whatsoever.[195] This engenders a certain liberating sensibility, and indeed the most interested parties indicated in advance of the Opinion's issuance that they both had the highest respect for the Court and would not let their policies be altered in the slightest by its ruling.[196] This was in part tactical positioning, but also a candid reflection of the strategic scope actors retained (and knew they retained) owing to the advisory quality of the Opinion and the limited power of the Court.[197]

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194. Opinion, *supra* note 3, ¶ 50 (citing Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 89, ¶ 35).

195. *See generally* MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 165-71 (1996). Under certain circumstances, ICJ advisory opinions can have binding effect, but this is an artifact of "some mechanism outside of the [ICJ] Statute proper[.]" *Id.* at 165. *See also* KAIKOBAD, *supra* note 190, at 221-28.

196. *UN Seeks Court Opinion on Kosovo,* ALJAZEERA.NET, Oct. 8, 2008, 2008 WLNR 19146548 (discussing states' reactions to Serbia's request); Zohar Nevo & Tamar Megiddo, *Lessons from Kosovo the Law of Statehood and Palestinian Unilateral Independence*, 5 J. INT'L L. & INT'L REL. 89, 96-106 (2009) (discussing history and reactions).

197. Since the Court is not well-known for adopting views at odds with the political lay of the land, firm indication by a state that its position is fixed might be intended to encourage a certain mobility in the Court's view. But this is of course speculative. On the Court's relationship to politics, *see* RICHARD FALK, REVIVING THE WORLD COURT (1986) (arguing that regional biases shape ICJ decisions); W. Michael Reisman, *Termination of the United States Declaration under Article 36(2) of the Statute of the International Court*, *in* THE UNITED STATES AND THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 71 (Anthony Clark Arend, ed., 1986) (discussing anti-American bias of the Court). *But cf.* Adam M. Smith, *"Judicial Nationalism" in International Law: National Identity and Judicial Autonomy at the ICJ*, 40 TEX. INT'L L.J. 197, 199 (2005) ("[t]he

A. Speculative Precedential Effects

Still, the Opinion's lack of binding force does not mean it could not have any effect in law. The Court's views could be seen as clarifications of customary law on questions related to self-determination, secession and so on.[198] As the Court itself portentously noted, "the authority of the Court as the principal judicial organ of the United Nations attaches to [its advisory opinions]."[199]

And the Opinion's effect in Balkan politics may have been considerable—after all, as we have seen, one of Serbia's original purposes had nothing to do with the legal question, but rather was aimed at staunching the hemorrhage of recognitions. In this it may have succeeded: there have been further recognitions, but hardly the deluge Serbia sought to prevent. Either the risk was illusory from the start, or Serbia in fact achieved its goal merely by requesting an opinion. Or, of course, there may have been no effect either way—after all, a number of states recognized Kosovo between the time Serbia put the question and the Court issued the Opinion—this is an empirical question, but one that would be very hard to answer.[200] In addition, Serbia and Kosovo have, in a sense, embraced the Opinion, having agreed to incorporate it into the so-called "footnote agreement."[201]

'nationality' bias of judges on the Court was never as powerful as claimed by alarmists and today seems to be breaking down even further"). *See also* Franck & Prows, *supra* note 178, at 242 (on the relationship of the Court to notions of sovereignty).

198. *See, e.g.*, MALCOLM N. SHAW, INTERNATIONAL LAW 86-7 (4th ed. 1997)(discussing the role of judicial decisions in the formation of customary law). *Cf. Western Sahara*, ICJ rep. 1975, p. 73, Declaration of Judge Gros ("when the Court gives an advisory opinion. . .it states the law. The absence of binding force does not transform the judicial operation into a legal consultation, which may be made use of or not according to choice. The advisory opinion determines the law applicable to the question put. . . . no position adopted contrary to the Court's pronouncement will have any effectiveness whatsoever in the legal sphere.").

199. Press Release, I.C.J., The General Assembly of the United Nations Requests an Advisory Opinion from the Court on the Unilateral Declaration of Independence of Kosovo, I.C.J. Press Release No. 2008/34 (Oct 10, 2008), *available at* http://www.icj-cij.org/docket/files/141/14797.pdf. *See also* MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 167 (1996)("No one disputes that [advisory] opinions do exert precedential influence. . . . [T]he very fact that the Court was established as a court of justice operated to invest its judicial opinions with the precedential force normally exerted by the opinions of a judicial body.").

200. *See* discussion *supra* at notes 35 and 47. One would normally expect the number of undecided or non-recognizing states to decrease over time (although in theory states could also withdraw recognition), so it is hard to make a causal claim about the question's effects.

201. *Belgrade-Pristina Saved by a Footnote*, NEW EUROPE ONLINE (Feb. 24, 2012, 3:10 PM), http://www.neurope.eu/article/belgrade-pristina-deal-saved-footnote (discussing the agreement to allow Kosovo representation in some international organizations, as long as it is identified with a footnote noting that representation is without prejudice to Kosovo's status, and invoking both Resolution 1244 and the Opinion).

The more consequential issue is whether the substantive issues unanswered by the Opinion were, by that very negligence, affected in ways that have shaped the law, whether for Kosovo or elsewhere. As Milanović has noted, the Opinion was designed not to be memorable.[202] Content-free as the Opinion may be, it was widely seen as a victory for Kosovo, and this—combined with the absence of any formal precedential effect and the Court's focus on the period of UNMIK's administration—suggests that the Court may have implicitly accepted and vindicated a view advanced by one side in the dispute: namely, that Kosovo's independence was *sui generis*.

The position of Kosovo, the United States, and other strong advocates of independence was that the UDI had no precedential value because it was the end result of a highly particular process that included a long period of suspended sovereignty and international administration.[203] This long period of international administration appears to matter to the Court's analysis, and since it describes in detail the particular qualities of the UDI's authors and the UNMIK administration, the Opinion could be read as accepting the argument that Kosovo merits independence because of these specific circumstances. This, in turn, could be read as indicating the shape of successful claims to secession in the future, and creating an exceptionally high threshold for them[204]—thus not a truly *sui generis* case, but a new rule, though in either case one that favors one substantive view of Kosovo's situation.

The Opinion says almost nothing that could tell us what this supposed

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202. Marko Milanović, Univ. of Nottingham, Panel Remarks at the Annual Meeting of the American Society of International Law, What the Kosovo Advisory Opinion Means for the Rest of the World 14 (Mar. 25 2011) ("[T]his Advisory Opinion does not set a precedent for any other situation. It was indeed designed not to set such a precedent. It is reducible to the trite statement that international law does not prohibit declarations of independence. The whole point of the opinion is that it is not memorable.").

203. *See, e.g.*, Christopher J. Borgen, *Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition* 12 AM. SOC'Y INT'L L. INSIGHTS § 5 (Feb. 29, 2008), http://www.asil.org/insights080229.cfm (discussing claims by US Secretary of State Rice that Kosovo is not a precedent, and opposing views); *cf.* UDI, Preamble ("Observing that Kosovo is a special case arising from the non-consensual dissolution of Yugoslavia and is no precedent to any other situation. . .")(English translation appended to Written Statement of the United States of America, Advisory Opinion, I.C.J. Reports, Apr. 17, 2009, http://www.icj-cij.org/docket/files/141/15640.pdf).

204. That threshold would include, at a minimum, extended international administration, failed efforts at negotiation, some form of United Nations recognition of limits on the nominal sovereign's authority, and a factually achieved independence. *See* David Wippmann, Univ. of Minn., Comments during panel at American Society for International Law Annual Conference, Mar. 2010 (developing idea that US policy characterizing Kosovo as *sui generis* was mistaken, and should instead treat it as a precedent with a high threshold). Claims that Kosovo had no precedential value seem untenable on logical grounds, but a threshold logic could achieve the same effective outcome: independence for Kosovo but not for other current claimants, like South Ossetia. In any event, the Court does not embrace either a threshold or *sui generis* logic; it simply does not engage the question.

test might be consist of: if international administration alters a sovereign's hold on territory, under what conditions does this happen? This would be a tremendously important shift of great relevance to questions of governance, control of territory and humanitarian intervention. But all we could say with confidence would be that a thing like UNMIK, in a situation like Kosovo, might have an effect on a state's territorial sovereignty.

However, this is not the Opinion's explicit view, only a possible reading: it is clear that the Opinion's formal argument is in fact built precisely on saying nothing whatsoever about the effects of the UDI, or about self-determination, secession, or any state action in relation to territorial integrity whether in Kosovo or anywhere else. So there is little traction for the idea that the Opinion has created any legal precedents.[205] Indeed, if there *were* such a test in the Court's Opinion, it would be almost shockingly capacious, given the Opinion's focus on the private nature of the actors doing the seceding. If the Opinion says anything about territory and sovereignty—and there is little reason to think it does—it would logically mean that no secession ever *violates* international law and that, therefore, no court should or could ever declare any secession contrary to international law[206]—either a global norm of *Lotus*-like permission or a global *non liquet*. There is no reason to think the Court thought it was doing either.

Finally, it is worth considering if the entire process of asking for, deliberating on, and rendering the *Kosovo* Opinion, however vacant and unseemly, is not also a victory and a vindication for the legalist project of taming violent politics.[207] After all, many states invested considerable effort

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205. Almost all commentators on the Opinion note its lack of substance. For a view arguing that in fact the Court made a number of substantive contributions, *see* Weller, *Modesty*, *supra* note 2. Even Weller concedes that the Opinion is very narrowly decided.

206. The few cases of independence bids being rejected that the Court discusses all involve other factors: Rhodesia, Northern Cyprus, and Republika Srpska. Opinion, *supra* note 3, ¶ 81 ("The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (jus cogens)."). *Cf.* Szewczyk, *Lawfulness*, *supra* note 167 ("[A]n international law principle that counts and provides authority for controlling decision-making should distinguish between irrelevant and relevant decisions, as well as between lawful and unlawful actions. . . . [H]ere the Court suggests that it is a lawless world with respect to declarations of independence where anything is permitted unless expressly prohibited by the Security Council." (footnote omitted)).

207. *Cf.* GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 7-8 (2000)(discussing legalism).

in the ICJ's deliberations,[208] while Serbia's resort to the ICJ was part of a decision—belated, probably half-hearted and almost certainly more practical than principled—to pursue policy goals by peaceful means, abjuring the more violent instruments of policy that, only recently, Serbia had taken up with a shocking and inhumane casualness.[209]And that is something.

Still, one cannot escape noticing how the incentives that structured Serbia's choice to go to law—the forceful, factual quality of Kosovo's independence, the determined support for that independence from the world's greatest military power, the European cash on the barrelhead backing the project, the undeniable sting of Serbian military defeat—encourage a rather less sanguine view of Serbia's shift, and incline us, instead, to see in its new policy proof that, in the affairs of human politics, rather less has changed than one might suppose.

B. The Institutional Value in Avoiding Substance

So, the substantive legal effects and precedents produced by the Opinion are almost nonexistent, in keeping with its formal argument. But, as we have seen, along the way the Opinion generates something else: a consistent set of claims about the Court's interpretative prerogatives, its jurisdiction, and its institutional position. Repeatedly, the Opinion stresses the Court's own ability to determine the parameters of the dispute and its dispensation: whether or not to accept a request for an advisory opinion; (re-)defining the question; policing the line between the General Assembly's and the Security Council's prerogatives; and at many other points.

This is not unusual or unfamiliar—most of the Court's work, whether advisory opinions or contentious judgments, is highly procedural and self-referential, and shares this institutional goal. Indeed, one reason we may extrapolate with some confidence the nature of the broader institution from this single document is precisely because the Opinion is so comprehensively constructed out of self-referential justifications for its moves, interpretations and decisions.[210] I have not undertaken an

208. *Cf.* Falk, *The* Kosovo *Advisory Opinion*, *supra* note 54, at 52 (discussing the efforts states put into advisory opinions and arguing against dismissing the effective authority of advisory opinions).

209. *See supra* Part I.

210. Almost all of the Opinion's legal arguments are grounded in other ICJ advisory opinions and contentious decisions, many of which are cited repeatedly. They include: Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, 1982 I.C.J. 325 (July 20); Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, 1950 I.C.J. 65 (Mar. 30); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226(July 8); Legal Consequences of the Construction of a Wall in the Occupied

exhaustive study of ICJ jurisprudence, focusing instead on this particular proceeding; still, those familiar with the Court's jurisprudence will recognize this introspective, recursive approach as typical.[211] We might see a similar pattern of procedural boldness and substantive timidity in contentious cases, especially those, such as *Bosnian Genocide* or *Use of Force in the Cong*o, in which military force has already been effectively deployed to alter factual territorial authority—the kinds of disputes for which the Court's traditional deference to sovereignty is of little help in determining a correct or acceptable answer.[212]

Asserting procedural prerogative is a strategy of weakness: Institutions whose authority is unquestioned do not remind others about it so openly and incessantly. Nor is this unique to the ICJ: the Court's procedural focus—even its assiduous avoidance of substantive questions—is not an isolated phenomenon; indeed most courts engage in this sort of strategic behavior to preserve their independence, scope of action, and institutional prerogatives.[213] This institutional instinct arises out of courts'

Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9); Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 19); Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, 1973 I.C.J. 166 (July 12); Conditions of Admission of a State in Membership of the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 57 (May 28); Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J., (Ser. B), No. 5; Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62 (Apr. 28); Certain Expenses of the United Nations, (Article 17, paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. Reports 151, 175 (July 20); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21); Questions of the Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, 1992 I.C.J. 3; Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928 P.C.I.J., (Ser. B), No. 16; Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73 (Dec. 20); East Timor (Portugal v. Australia), Judgment, 1995 I.C.J. 90 (June 30).

211. *See, e.g.*, MAHASEN M. ALJAGHOUB, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT OF JUSTICE, 1946-2005, 67 (2006) ("The Court's jurisprudence illustrates that, in giving advisory opinions, it is concerned about its position and role within the UN as its principal judicial organ."); Perez, *supra* note 119, at 409.

212. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J.43 (Feb. 27); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168 (Dec. 19). *See also* Mark Drumbl, Atrocity, Punishment and International Law (discussing the ICJ's reticence to assign responsibility for genocide to states) (on file with author); Szewczyk, *Application of CERD*, *supra* note 119, at 754 ("[W]hile an arbitral tribunal may be effective in allocating a border city between two formerly warring states on the basis of their consent to the proceedings, the vital interests that led to war are less susceptible to decentralized and nonhierarchical resolution in the immediate aftermath of the conflict.").

213. CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 244 (2006)("[T]he tradition of restraint serves to establish a

countermajoritarian position as decisional actors typically with much less democratic or popular legitimacy than political branches.[214] Even very well entrenched, respected and powerful courts, like the U.S. federal judiciary, regularly resort to "the passive virtues," avoiding or reframing certain types of questions to avoid unnecessary clashes.[215] And, as we have seen, the powerful Canadian Supreme Court in the *Quebec* Reference was hardly isolated from political considerations—indeed, the strength and value of the decision comes in part from that court's candid acknowledgement of the limits under which it operates. No court arrives at a stable equilibrium in which, its power asserted, it rules in isolation from the political powers around it, and we should not expect more of the ICJ than of the great domestic courts.

We can hardly speak of international democracy, yet at least some organs of the U.N., such as the General Assembly, are in some sense representative and have their own internal democratic processes, and states themselves are understood—often plausibly—as depositories of popular sovereignty. So any substantive decision the Court might have taken would have offended actors with considerably greater sovereign credentials than the Court—and, of course, considerably greater practical power.[216] Perhaps the ICJ, in the Opinion, was simply engaging in this same sort of strategic, defensive behavior that domestic courts deploy—if less through a discretionary avoidance of hard cases and more through their reframing.[217]

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reservoir of goodwill that preserves independence norms and thereby enables the [Supreme] Court to uphold the law by making occasional, countermajoritarian decision without fear of retaliation.").

214. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (1975)(providing the classic elaboration of the "countermajoritarian difficulty").

215. *Id.* at 111-98. (describing American courts' deployment of "the passive virtues" as strategies for avoiding conflict with the political branches); *see also* GEYH, *supra* note 195 at 223-43(describing traditions of judicial restraint and doctrinal constraints such as justicibility, constitutional construction, and federalism considerations, as well as the use of docket-setting discretion to select cases; and discussing important cases in which the Supreme Court has retreated from conflict with other branches; and mentioning, at 225, the U.S. Supreme Court's early refusal to render an advisory opinion); DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 164-5 (2008)(discussing the Supreme Court's agenda-setting discretion and constraining doctrines).

216. When the Court has undertaken to challenge power, it has gotten hurt: In the *Nicaragua* case, the "World Court put itself into a position of fundamentally damaging its relations with its most important constituent: the United States[,]" which withdrew from compulsory jurisdiction. THOMAS M. FRANCK, JUDGING THE WORLD COURT 53 (1986). *See also* MICHLA POMERANCE, THE UNITED STATES AND THE WORLD COURT AS A 'SUPREME COURT OF THE NATIONS': DREAMS, ILLUSIONS AND DISILLUSION 333 (1996).

217. *See* Perez, *supra* note 119, at 430. Whatever other tactics the Court has adopted to defend its prerogatives, it has, as noted, almost never declined an advisory opinion, a "readiness based in favour of compliance which has appeared to detract somewhat from the discretionary element in the Court's approach. . . . It is this fact which has prompted writers to suggest that the power is, for all intents and

Certainly the Court confronted a risk of political reaction every bit as great as any domestic court, and the approach it adopted in the Opinion is consistent with what other courts do when they fear for their independence. Indeed, from a close reading of the Opinion's bold phrases, it seems clear that is what it did.

At the same time, the ICJ is an institution with a considerable pedigree of its own, and has been engaged in this strategy for a long time.[218] Moreover, the purpose of the strategy is not solely defensive but a means to increase institutional power—after all, the classic expression of judicial avoidance is *Marbury v. Madison*. So, the question that should interest us is: to what end has the ICJ accrued its institutional capital? Because the cost, in this case, has been the abandonment of any effort to answer the substantive questions that might have made the Opinion itself memorable and useful.

VIII. THE VIRTUE OF SILENCE: THE COURT'S UNILATERAL DECLARATION OF IRRELEVANCE

The Opinion is an impressive display of narrow crafting, as the Court succeeded in providing a formal answer to the question before it without unnecessarily implicating other elements of law, or really almost any elements of law at all. Those opposed to judicial activism would be

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purposes, an obligatory function." KAIKOBAD, *supra* note 190, at 155 (but disagreeing with those writers). *See also* POMERANCE, ADVISORY FUNCTION, *supra* note 95, at 277-329 (surveying objections to the ICJ's advisory jurisdiction, none of which have deterred the Court from accepting questions). The Court's tactical avoidance, therefore, has come from its handling of the question.

218. The history of advisory opinions has not greatly enhanced "the general standing of the Court itself." ROSENNE, *supra* note 45, at 107. The Court has in the past demonstrated an ability to act efficaciously through avoidance, at least in some of its contentious cases. In the *Southwest Africa* and *East Timor* cases, for example, the Court refrained from adjudicating certain questions, but did so in ways that encouraged or facilitated political dialogue within the United Nations or among member states. Perez, *supra* note 119, at 413-15 ("[T]he Court's abstention in the South-West Africa cases is better understood in light of the changing balance of political power in the United Nations—a transformation of international politics that made the ICJ's embarking on a dialogue with the political organs of the U.N. likely, for the first time, to achieve an outcome that accorded with the principles of the U.N. Charter. . . The Court, having initiated a constitutional dialogue between the General Assembly and Security Council, a debate that became an international cause celebre, was in no position to reject the conclusions of that dialogue. Having made its Faustian bargain not to discharge its'duty to decide,' the Court now was compelled to observe it.") And regarding *East Timor*, *id.*, at 422-23 ("Even more revealing are the grounds upon which the ICJ exercised [its] discretion. Here it seems the Court felt the need not to anticipate prudential judgments of the political organs. . . . [The Court's logic] flows from its underlying view that the judicial role is not only to decide cases according to law but also to stimulate reasoned debate that ensures that the law the ICJ applies reflects the political community's best judgment in the application of principles to its preferred policies. The Court's reasoning thus implicitly invited the political organs to revisit the issue of East Timor in a more authoritative way. As it had in its standing decision in the second phase of the South-West Africa cases, the Court indirectly posed questions to the political organs of the U.N., that they might make their intentions clear.").

pleased, and, indeed, from a certain point of view, this is a brilliant piece of judicial work serving the valid purpose of limiting judicial overreach and promoting dialogue over contentious, unsettled questions.[219] Still, the combination of such restraint with repeated assertions of judicial prerogative suggests another, less flattering view about what the Court was trying to do, and what it achieved. For the Court was trying to protect itself, even at the cost of saying nothing about the issues that mattered.[220]

All courts engage in strategic behavior, but for the rest of us, the proper question is not "does a court have its reasons for avoidance" but "what is the benefit more broadly of such a strategy?" Courts, like all institutions, will assert their authority and advance their own interests—that is to be expected—but that exercise must also benefit constituencies beyond the institution itself if it is to merit respect and support. If it is right that the strategy seen in the Opinion is consistent with a much longer-term approach, it is possible that its strategy has slowly begun to pay off—in the post–Cold-War era, the Court's docket has become much fuller, after all, and the tendency of states to totally ignore ICJ proceedings has

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219. *Cf.* Falk, *The* Kosovo *Advisory Opinion*, *supra* note 54, at 50 ("This seemingly surgical delimitation . . . wins applause from those who seek a conservative jurisprudence from the Court that narrows findings to the extent possible, and derision from detractors who would like the Court to be less deferential to the sensitivities of sovereign states. From another angle the Court behaved in a somewhat political manner, deferring to geopolitical wishes by rather unexpectedly validating the Kosovo declaration, yet seeking to prevent wider policy effects . . . ."); Weller, *Modesty*, *supra* note 2, at 132 ("[T]he Court was not acting as an agency mandated to illuminate legal developments in the abstract. It does not see itself as an agency dedicated to advancing the law or its scholarly discussion. The jurisdiction of the Court in this matter was shaped by the request, and so was the—narrow—focus of its enquiry."); Chris Borgen, *The Kosovo Advisory Opinion, Self-Determination and Secession*, OPINIO JURIS (July 23, 2010, 10:15 AM) http://opiniojuris.org/2010/07/23/the-kosovo-advisory-opinion-self-determination-and-secession/ ("While the Court did take the reference, it has written an opinion in which it almost seems to regret having done so. It has chosen restraint and narrow readings. But better that than going well beyond the political will of the Member States in over-defining rules of self[-] determination, secession, and recognition, which may be deliberately vague (or non-existent)."). The United States Institute of Peace's brief following the Opinion, which is mostly focused on the effect on other secessionist conflicts, is likewise largely satisfied with the narrowness of the Court's approach in not reaching substantive conclusions about secession, self-determination or the UDI's actual effects. *See* Richard Caplan, The ICJ's Advisory Opinion on Kosovo, U.S. INST. OF PEACE Peacebrief 55, September 17, 2010, http://www.usip.org/files/resources/PB55%20The%20ICJs%20Advisory%20 Opinion%20on%20Kosovo.pdf; *see also* Szewczyk, *Lawfulness*, *supra* note 167 (calling the Opinion "groundbreaking" and noting that "[T]he Court properly avoided definitive statements on the concept of remedial self-determination through unilateral secession in the aftermath of fundamental violations of human rights, since there is insufficient state practice and *opinio juris*, or other relevant sources of international law.").

220. Nor is this a feature of the majority Opinion alone. *See* Bennouna Dissent, *supra* note 1, ¶ 3 ("What is at issue above all in this case is protecting the Court itself against any attempts to exploit it in a political debate, rather than protecting the balance between the principal political organs of the United Nations. . . or indeed the question of the self-determination and independence of Kosovo. . . .").

diminished.[221] But even if such a trend could be discerned and causally linked to strategies of avoidance, that still only describes an internal institutional benefit, not an outcome of direct relevance for any broader community. In the *Kosovo* Opinion, there is little evidence that law or politics was well served—that any debate was resolved, or even advanced, by the Court's institutional focus. The Opinion is fully consistent with a keen appreciation of power, and its weakness appears fully animated by just such a concern: mostly, though, it is concerned with avoiding power's influence on the *Court*, rather than on the *question*.[222]

Had the Court reached the merits and engaged them—had it shown the kind of boldness that the *Quebec* Reference displays—what might it have said? It is very hard to imagine the Court declaring a right to secession as such—as we have seen, it is even harder to believe that the *lex lata* supports such a view—or equally that it could have invalidated or directly challenged Kosovo's independence. Either way, the consequences for the Court could have been dire—quite possibly, a clear answer either declaring Kosovo's independence valid or invalid could have meant the end of the Court as a functioning institution. So it is easy to conclude that the Court had no choice but to avoid a substantive outcome either way. And, when the Court has taken a more substantive role and tried to grapple with political complexities, as in *Nuclear Weapons*, the results can be disappointing too.[223] Yet the particular outcome that the Court might have reached is not the point.

We will never know what the *Kosovo* Court might have said, and while this reminds us of the marginality and unusable nature of the Opinion, it should also remind us of the other alternative the Court did not take: to adopt a candid and transparent silence. Rather than taking the case but saying nothing, the Court could have declined the question, on the grounds that there was no meaningful question here it could engage, or

221. *See* INT'L CT. OF JUSTICE Webpage, List of Cases Referred to the Court Since 1946 by Date of Introduction, http://www.icj-cij.org/docket/index.php?p1=3&p2=2 (last visited Jan. 25, 2013); SCHULTE, *supra* note 53, at 436("There is reason for cautious optimism. The Court's prestige is at an unprecedented high. Even though compliance has not always been easy, there has been a marked shift in the attitude of parties to proceedings. Since the 1986 Nicaragua judgment, litigants have assumed a more respectful posture—in stark contrast to the open defiance of the Court in the 1970s. . . ."). *But cf.* SHANY, *supra* note 190, at 277(noting that "[o]ne of the reasons for the recent proliferation of international courts and tribunals has been the perception that the ICJ is ill equipped to address certain categories of disputes and that it is an inhospitable forum to some states.").

222. Even the defenders of the Opinion, such as Weller, Öberg, and Szewczyk, point almost exclusively to effects the Opinion might have on relations between the Court and other U.N. organs, or between the General Assembly and Security Council. Whatever value one assigns to these matters of institutional and procedural law; they are not the substance of the question asked.

223. Thanks to Profs. Hannum and Wippmann for similar versions of these points.

because the substantive issues were beyond the powers of the Court to answer, or because the law was not clear; this was, in fact, the view of some of the dissenting judges. In explaining why it refused either to answer a defective, non-legal question or to broaden the question on its own, the Court could have pointed to the "passive virtues" of judicial restraint and the need to avoid affecting other debates, or even spelled out in clear terms the real political dangers the Court would face if it ruled either way—moves that, of course, would have also signaled a reduced scope for the Court, but perhaps a more effective one, rather than a self-aggrandizing Potemkin jurisprudence. That might have provoked a more robust and fertile debate than the formalistic distraction engendered by the actual Opinion—which is to say, a real contribution.[224]

This Article is critical of the Court that wrote the Opinion—that much, I hope, is clear—but I do not mean to dismiss the difficult political and intellectual circumstances in which the judges found themselves. Individual judges demonstrated a clear-eyed sense of the consequential issues before the Court.[225] And without doubt, the question was as daunting as it was, perhaps, defective: in answering it, the individual judges faced a great challenge, and though I have taken up the role of critic, I doubt I would have done any better.[226] The critique is therefore most properly oriented

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224. *Cf.* Timothy William Waters, *Unexploded Bomb: Voice, Silence, and Consequence at the Hague Tribunals: A Legal and Rhetorical Critique*, 35 N.Y.U. J. INT'L L. & POL. 1015, 1128-31 (2003) (arguing for the value, alternatively of silence or candor at the International Criminal Tribunal for the Former Yugoslavia, whose prosecutor published an extensive set of reasons for not opening an investigation into NATO's bombing of Serbia).

225. The declarations by Judge Tomka and Judge Simma are good examples of this, each, in their way, striking directly at the heart of the insubstantial and deracinated approach taken by the Court, and its "unnecessarily limited—and potentially misguided—analysis." Opinion, Declaration of Judge Simma ¶ 1. *See, e.g.*, *id.* ¶ 10 ("For the Court consciously to have chosen further to narrow the scope of the question has brought with it a method of judicial reasoning which has ignored some of the most important questions relating to the final status of Kosovo. To not even enquire into whether a declaration of independence might be 'tolerated' or even expressly permitted under international law does not do justice to the General Assembly's request and, in my eyes, significantly reduces the *advisory* quality of this Opinion.").

226. The penultimate footnote is as good a place as any to note that my criticism of the Opinion and the Court does not mean I think the Opinion should have found *against* Kosovo or that I disapprove of Kosovo's independence. I have purposefully not said what the Court should have said, because then, whatever I recommended, half my audience would find it difficult to agree. I think the legally and normatively correct answer is, or ought to be, that Kosovo's overwhelmingly majority Albanian population had the right to form a separate state—indeed, that this right long predated the UDI and even the 1999 war. My views on Kosovo's independence, and on the application of self-determination to it and other disputes in the Balkans, can be found elsewhere. *See, e.g.*, Timothy William Waters, *Indeterminate Claims: New Challenges to Self-Determination Doctrine in Yugoslavia*, 20 SAIS REV. 111 (2000); Timothy William Waters, *Kosovo as Precedent and Pretext: New Debates and Old Lessons*, JURIST, (Feb.18, 2008) http://jurist.org/forumy/2008/02/kosovo-as-precedent-and-pretext-new.php; Timothy William Waters, "Kosovo: The Day After," OPENDEMOCRACY, Feb. 18, 2008

towards the institution rather than the individual occupants of the bench. Individual voices found courage and clarity in dissent, but in the institutional context in which the Court finds itself, it would have taken extraordinary determination for the judges, collectively, to reach to a different, substantive conclusion, or to candidly acknowledge the impossibility of doing that.

We need not blame the Opinion's individual authors for failing to engage the substantive questions confronting them; we do better to consider the pressing jurisprudential, institutional, and political reasons for the Opinion's narrowness and restraint. For even without censure, the outcome of that decisional process tells us something about the Court's very limited value. Indeed, the more we find excuses for the Court's avoidance—explaining it as an institutional instinct not so different from what domestic courts do, pointing out that, really, the Court had no choice but to avoid answering the hard questions, given the political realities—the more we must recognize that it was not some personal moral failing or contingent individual defect, but an institutional path and logic that produced this juridical nullity. The reasons why we might excuse this Court are, by the same token, reasons not to expect it to have anything useful to say in disputes like this, and therefore to question its usefulness.

For if it has utterly abjured the issues that anyone looking at this case—or, indeed, at the former Yugoslavia—would care about, the Court has, in the *Kosovo* Opinion, demonstrated a singular determination to invest in its own institutional capital without any apparent payoff. I, for one, don't think that's worth it: finding a way to avoid *all* the clashing substantive claims in this case is an act of impressive acrobatic skill, but it is not the function or purpose of a court, which is to answer hard questions. Either of the choices the Court forewent—to address the substantive issues, or to speak about the reasons for silence—might have done much more to develop in the Court a real and efficacious authority. Either of those choices would also have entailed risks to the Court as well, but such risks come with the territory, as it were: they adhere in the nature of true authority, as they do in all forms of responsibility. Perhaps we ask too much if we expect the ICJ to speak truth to power, but it might at least mention its powerlessness. As Havel reminds use, that option—to dangerously address the world—is the path toward real and legitimate

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http://www.opendemocracy.net/article/conflicts/reimagining_yugoslavia/kosovo_day_after; Timothy William Waters, "A Separate Peace," NEW YORK TIMES, Feb. 2007 http://www.nytimes.com/2007/02/01/opinion/01waters.html?_r=1&; *see also* Timothy William Waters, *Contemplating Failure and Creating Alternatives in the Balkans: Bosnia's Peoples, Democracy and the Shape of Self-Determination*, 29 YALE J. INT'L L. 423 (2004)(examining claims to self-determination in Bosnia).

power, and is always available to us, judges and greengrocers alike.[227]

We cannot yet know, of course, if the Court's strategy will pay off in the future, but it did not pay off here. The Court that wrote the *Kosovo* Opinion invested all its considerable skill and talent in producing a document that reminded the world of the Court's capacity to act and claimed further ground for its procedural prerogatives—and then used that capacity to actually reduce the useful scope of the issue and answer the narrowest, least substantive version of the question. That looks like the opposite of a wise or even promising strategy for productive judicial empowerment—a kind of *Madison v. Marbury* moment, delivering nothing now while offering little for the future. Because the Opinion's admixture of procedural boldness and substantive timidity was as unnecessary as it was impressive, we may read it, and perhaps reflect on its author, with a well-deserved measure of dismissive scorn.

227. HAVEL ET AL., *supra* note 1, at 27-39.