The International Court of Justice on Kosovo: Missed Opportunity or Dispute 'Settlement'?

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Abstract

This article analyzes the reasons why the International Court of Justice narrowly interpreted the General Assembly's question in its *Kosovo* opinion and, arguably, missed an opportunity to opine on important questions of international law (in particular on matters of recognition, secession, and self-determination). I argue that the Court's approach was driven by a desire to avoid exacerbating tensions between the two most interested parties, namely Kosovo and Serbia. Although the opinion was overwhelmingly perceived as pro-Kosovo in its immediate aftermath, a more thorough analysis suggests that the Court sought a delicate compromise between the positions of the two entities. By interpreting the General Assembly's question narrowly, the Court was able to adopt a solution that was beneficial, at least in some respects, to both entities, thereby maintaining the fragile legal/political *status quo* in the region. For this, the Court should be commended – even though it came at the cost of a lost opportunity for the development of international law and some confusion of the Court's contentious and advisory functions.

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On July 22, 2010, the International Court of Justice (the "Court") issued its long-awaited *Advisory Opinion on the Legality of the 2008 Unilateral Declaration of Independence of Kosovo* (the "*Kosovo* opinion").[2] The *Kosovo* opinion elicited a fair measure of disappointment among academics, diplomats and practitioners of international law. Despite having taken seven months to issue its opinion,[3] the Court failed to answer important questions pertaining to recognition, secession, and self-determination which it had been expected to address. The temptation was to blame the Court for having taken the easy route by focusing on the narrow question of whether international law prohibits unilateral declarations of independence. Clearly the Court had avoided taking a definitive position on the legal consequences of such a declaration in the specific case of Kosovo. Comparisons with other advisory opinions rendered by the Court, in which it chose to directly contend with important legal issues,[4] only exacerbated the frustration of many observers.

In this article, I seek to provide an explanation for what constituted, arguably, a missed opportunity. Contrary to expectations, the Court's main objective was not to advance international law on issues of recognition, self-determination or secession. Rather, the Court's primary concern appears to have been to minimize the damage its opinion would have on the already strained relationship between the two most interested parties – namely, Kosovo and Serbia. By interpreting the General Assembly's question

[2] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J (2010).
[3] The opinion was requested in October 2008, the oral hearings ended in December 2009, and the Court rendered its opinion in July 2010.
[4] See Shabtai Rosenne, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 88-9 (Martinus Nijoff, 2003) (citing *Reparations for Injuries*, *Certain Expenses*, and *Reservations to the Genocide Convention* as opinions which "have had a major impact upon the development of international law and international relations").

narrowly,[5] the Court was able to adopt a solution that was beneficial, at least in some respects, to both entities, thereby maintaining the fragile legal/political *status quo* in the region. This compromise, however, resulted in a missed opportunity for the advancement of international law and a weakening of the specificity of advisory jurisdiction.

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Disappointment with the narrow scope of the Court's opinion came not only from commentators and outside observers but also from the Court itself. Judge Simma's separate opinion offers a glimpse of the issues that must have animated the Court during its lengthy deliberations. Judge Simma criticized the Court's conservative, passé, approach to international law.[6] While agreeing with the majority, he expressed regret that "the Court failed to seize a chance to move beyond this anachronistic, extremely consensualist vision of international law."[7]

Alternatively, Judge Simma wrote,

> "[t]he Court could have considered the scope of the question from an approach which does not, in a formalistic fashion, equate the absence of a prohibition with the existence of a permissive rule; it could also have considered the possibility that international law can be neutral or deliberately silent on the international lawfulness of certain acts."[8]

He concludes, "[t]he treatment – or rather, non-treatment – of these submissions by the Court (…) does not seem judicially sound."[9]

Judge Simma's words indicate a self-awareness of the Court's side-stepping of important judicial issues in favor of a narrow reading of the question asked to it by the General Assembly.

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[5] The question asked by the General Assembly was as follows: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" (United Nations General Assembly Resolution, A/RES/63/4 (8 October 2008)).
[6] *Declaration of Judge Simma*, paras. 2 and 3.
[7] *Id.*, para. 3.
[8] *Id.*
[9] *Id.*, para. 7.

That the Court would choose such a reading was not a foregone conclusion. In his preview of the case on the European Journal of International Law's blog days before the *Advisory Opinion* was issued, Marko Milanovic identified the importance of the "question question", i.e. how the Court would interpret the question asked to it.[10] According to Milanovic, the Court had three basic options on how to interpret the General Assembly's question: it could give a narrow reading of the question (confining itself to examining the legality of a purely verbal act adopted by a non-state actor), a moderate reading (examining the lawfulness of the secession as such), or an expansive reading (examining the lawfulness and legal implications of the secession).[11] The Court went the "narrow reading" route, as termed by Milanovic.

The Court attributed the narrowness of its approach to the terms of the question itself, stating:

> "In the present case, the question posed by the General Assembly is clearly formulated. The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. 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."[12]

The Court further noted that, had the General Assembly wished the Court to analyze the legal consequences of the unilateral declaration of independence, it would have requested so explicitly.[13] Since the General Assembly did not request the Court to pronounce on the legal consequences, the Court concluded that it "sees no reason to reformulate the scope of the question."

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[10] Marko Milanovic, *Kosovo Advisory Opinion Preview*, EJIL: *Talk!* (July 14, 2010), available at http://www.ejiltalk.org/kosovo-advisory-opinion-preview/, last visited May 30, 2011.
[11] *Id.*
[12] *Kosovo* Opinion, *supra* note 2, para. 51.
[13] *Id.* (referring to the *Namibia* and the *Wall* opinions).

There is little doubt, however, that the Court could have rephrased or interpreted the question asked to it by the General Assembly as covering broader issues of recognition, self-determination or secession – even in the absence of an explicit request to analyze the legal consequences of the declaration of independence:

> "It is not a matter for discussion, being inherent in the quality of the Court as a judicial organ, that it has the power to interpret any request for advisory opinion. This has been applied by the Court where necessary both to establish the object for which the question was put and to establish the meaning to be given to the question itself."[14]

On numerous occasions, the Court has engaged in rephrasing and other techniques in order to re-define the questions asked to it.[15] As the examples below illustrate, the Court has at times transformed a question deemed too factual or too political into a legal one; at others it has provided its own interpretation of the question asked.[16] In yet other situations – as in the *Kosovo* opinion – the Court has chosen to interpret the question narrowly. These instances include, but are not limited to, requests which explicitly called on the Court to pronounce on "legal consequences", as the examples below indicate.

In *Interpretation of an Agreement of 25 March 1951 between the WHO and Egypt*, the Court noted that:

> "[I]f a question put to it in the hypothetical way in which it is posed in the request is to receive a pertinent and effectual reply, the Court must first ascertain the meaning and full implications of the question in the light of the actual framework of fact and law."[17]

The Court then proceeded to set out "the pertinent elements of fact and of law which, in its view, constitute the context in which the meaning and implications of the

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[14] Rosenne, *supra* note 4, at 994. See also *Dissenting Opinion of Judge Koroma*, at 3 (noting that the Court either rephrased or clarified questions asked to it in several instances).
[15] See, for example, Lara M. Pair, *Judicial Activism in the ICJ Charter Interpretation*, 8 ILSA J. Int'l & Comp. L. 181 (2001-2). I should note that in the Kosovo opinion itself, the Court expressed its freedom to question or interpret elements of the question asked to it by the General Assembly. See *supra* note 2, paras. 52-54.
[16] *Id.*, at 205.
[17] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, I.C.J. Reports 1980, p. 73.

first question posed in the request have to be ascertained."[18] According to the Court, there was a need to analyze "legal principles and rules applicable" – beyond Article 37 of the agreement between the WHO and Egypt, the application of which was at issue.[19] By broadening the scope of the advisory opinion to the "general legal framework" and reformulating the question before it,[20] the Court was able to address a wider range of issues than that initially contemplated by the General Assembly.

In the 1950 opinion addressing the admission of states to the United Nations,[21] the Court altered the wording of the question of the General Assembly – though without actually reformulating it. The question required the Court to determine whether the General Assembly could admit a state to the United Nations "when the Security Council has made no recommendation for admission by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent Member upon a resolution so to recommend."[22] Instead, the Court addressed the question of whether the General Assembly could admit a state in the absence of a recommendation from the Security Council.[23] Clearly, however, there is a substantive difference between the question asked (could the General Assembly admit the state despite there being no Security Council majority or where there is a negative vote) and the question answered (could the General Assembly admit a state absent a Security Council recommendation one way or the other).

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[18] *Id.*, para. 10.
[19] *Id.*, para. 42.
[20] *Id.*, para. 35 ("[T]he true legal question under consideration in the World Health Assembly is: What are the legal principles and rules applicable to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected?")
[21] *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, I.C.J. Reports 1950, p. 4.
[22] United Nations General Assembly Resolution 1731 (XVI) (20 December 1961).
[23] *Id.*, at 7.

The Court again broadened the scope of the General Assembly's request in *Certain Expenses*,[24] declaring that it "must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion."[25] Among the issues considered by the Court was the budgetary authority of the General Assembly in respect of the maintenance of international peace and security generally speaking,[26] and the legality of certain peacekeeping operations.[27] In this opinion, the Court's approach was particularly problematic as it was at odds with the position of member states, as expressed at the time of the adoption of the General Assembly resolution requesting the opinion. The French delegation had suggested broadening the question asked to "enable the Court to determine whether or not the Assembly resolutions concerning the financial implications of the United Nations operations in the Congo and the Middle East are in conformity with the Charter."[28] Notwithstanding the fact that the French amendment had been rejected, the Court addressed the question of the legality of the peacekeeping operations.[29]

A few years later, the Security Council requested an advisory opinion from the Court regarding "the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (1970)."[30] The Court embraced the broad nature of the question, declaring that, given the illegality of its actions, South Africa was required to end its occupation of Namibia; that other States were obligated to recognize the illegality of the occupation and not to recognize any acts

[24] *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion, I.C.J. Report 1962, p. 150.
[25] *Id.*, at 157.
[26] *Id.*, at 165.
[27] *Id.*, at 175.
[28] *Id.*, at 156.
[29] This point was noted in the *Declaration of Judge Spiropoulos*, at 181.
[30] United Nations Security Council Resolution, S/RES/284 (29 July 1970).

by South Africa on behalf of Namibia in the international arena; and that States were obligated to refuse South Africa any support that would enable it to exert control over Namibia.[31] The last finding, which came close to imposing a legal obligation to sanction South Africa, entailed a broad interpretation of the words "legal consequences." In spite of the wide array of "legal consequences" the Court chose to consider, it refused to assess the "validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions."[32] These aspects were expressly excluded as not forming the subject of the request for an advisory opinion.[33]

The framing of the question in the *Namibia* opinion is not an isolated case. When asked whether the threat of nuclear weapons is, under any circumstances, permitted under international law, the Court similarly chose to ignore the pertinent issue of self-defense. In effect, the Court did not answer the question that was presented to it (Is the threat of nuclear weapon use permissible?). The Court instead focused on limitations on the use of nuclear weapons – a relatively minor aspect of the question asked by the General Assembly. That there are no existing laws dealing specifically with the use of nuclear weapons should not have precluded the Court to examine whether their use, or threat of use, may have been prohibited under general international law provisions governing the *jus ad bellum*. By not addressing this issue, the Court chose a narrow interpretation of the question.

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[31] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16.
[32] *Id.*, para. 89.
[33] *Id.* For a criticism of the Court's interpretation, which excluded the question of the competence of United Nations organs to revoke South Africa's mandate, see *Dissenting Opinion of Judge Fitzmaurice*, para. 6.

In contrast with this line of advisory opinions, the International Court of Justice adopted wholesale the following question asked by the General Assembly in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*:

> "What are the legal consequences arising from the construction of the wall being built by 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?"[34]

Neither the choice of terminology nor the *ex ante* identification of the legal framework applicable was regarded as warranting any adjustment. In paragraph 38 of the opinion, the Court recalled its ability to "broaden, interpret or even reformulate" the question, but declined to do so.[35]

Examples in which the Court rephrased or re-interpreted the question before it abound – and, as this brief overview showed, are not limited to instances where the Security Council or the General Assembly failed to specifically request the Court to envisage the legal consequences of an action or act. Given the judicial record, it appears almost self-evident that the decision of the Court not to rephrase or re-interpret the question in the *Kosovo* opinion as covering issues of recognition, secession and self-determination was intentional.

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What, then, led the Court to interpret the question narrowly – thereby avoiding the issues of recognition, secession, and self-determination? In search of an answer, it is instructive to examine how the Court's opinion has been perceived by the most relevant actors, namely Serbia and Kosovo, and by the international community more generally.

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[34] United Nations General Assembly Resolution A/RES/ES-10/14 (12 December 2003).

[35] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports (2004), p. 136, para. 38 ("*Wall* opinion").

Kosovo rejoiced at the Court's conclusion that "the unilateral declaration of independence is in accordance with international law."[36] For Kosovars (and Kosovo supporters), Kosovo had won.[37] Even within Serbia, attempts to explain that this formalistic statement was not accompanied by any definitive finding regarding the status of Kosovo were rare.[38] In the immediate aftermath of the Court's opinion, Serbia did not succeed in exploiting the silence of the Court to its advantage. The subtlety of its position required more explanation and analysis – allowing Kosovo's straight-forward interpretation to prevail. Settling for quick slogans and high-impact headlines, the media broadly reported that the Court had declared Kosovo's declaration of independence lawful:

> "[S]ignificant public reaction across the world interpreted the advisory opinion as endorsing Kosovo's independence and eventually setting a precedent for other secessionist movements."[39]

This "divergence between what the Court actually said" and how its decision was interpreted by the media and politicians was without a doubt the "most immediately

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[36] See, for example, BBC News, *Serbia and Kosovo React to ICJ Ruling* (July 22, 2010); FoxNews, *Kosovo Wins Victory as UN Court Calls Independence Declaration Legal, Rejects Serbia's Claim* (July 22, 2010); Mike Corder (AP), San Francisco Gate, *U.N. Court Says Kosovo Independence Legal* (July 23, 2010); and Vesna Peric Zimonjic, The Independent (UK), *Belgrade Loses Fight Over Kosovo Independence* (July 23, 2010).

[37] *Id.*

[38] For an example, see Clive Leviev-Sawyer, The Sophia Echo, *Reaction to ICJ Opinion on Kosovo: Deep Divisions as Before* (July 22, 2010) (quoting the Serbian President as saying that "[i]t is clear that the court was not ruling on the right to secession, but that it decided to debate only the technical content of the declaration of independence. The court avoided to rule on the essential issue and decided to let the top UN organ debate that, and all the political implications.") See also Robert Howse and Ruti Teitel, *Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by its Ruling on Kosovo?*, 11 German Law Journal 841, 841 (2010) (noting that "the angry reaction to the decision by Serbian nationalists likewise supposed that the Court had endorsed a right to secession").

[39] Robert Muharremi, *A Note on the ICJ Advisory Opinion on Kosovo*, 11 German Law Journal 867, 867-8 (2010). See also Thomas Burri, *The Kosovo Opinion and Secession: The Sound of Silence and Missing Links*, 11 German Law Journal 881, 884 (2010) ("Paradoxically though it might seem, one could avoid the *e contrario* conclusion, which if sometimes also drawn in the media, though probably unwittingly, that the ICJ's ruling that the declaration of independence was not *illegal* means that it was *legal* in absolute terms") (emphases in text).

striking aspect" of the opinion.[40] In spite of the great steps taken by the Court to give a balanced response to the request for an advisory opinion, the opinion was virtually unanimously read as pro-Kosovo.[41]

Identifying and exploiting the Court's "silences" and "missing links"[42] called for a more thorough diplomatic and public relations effort.[43] It took several months for Serbia to formulate a more sophisticated response, emphasizing the aspects of the opinion that were beneficial to its position. In September 2010, two months after the Court rendered its opinion, the President of Serbia declared before the General Assembly:

> "Let me be very clear as to what the Court said and did not say. (…)
>
> The Court chose to examine the language of Kosovo's Unilateral Declaration of Independence and the Court held the view that the text of the Declaration itself did not contain anything that violates international law. The Court, thus, did not approve the province's right to secession from Serbia nor did it support the claim that Kosovo is a sovereign state. The Court's opinion is clear: the UDI was only 'an attempt to determine finally the status of Kosovo.'
>
> The General Assembly resolution relating to the Court's opinion acknowledged this content of the Court's advisory opinion. It is within this framework that we are ready to follow your resolution and to engage in the dialogue called for in your resolution."[44]

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[40] Howse and Teitel, *supra* note 38, at 841.

[41] For rare exceptions, see Dan Bilefsky, New York Times, *World Court Rules Kosovo Declaration Was Legal* (July 22, 2010) (noting that "while the International Court of Justice had ruled that Kosovo's declaration of independence was legal, it had avoided saying that the state of Kosovo was legal under international law, a narrow and carefully calibrated compromise that they said could allow both sides to declare victory in a dispute that remains raw even 11 years after the war there."); and Chiang Huang-Chih, Taipei Times, *ICJ's Decision Is Vague and Very Limited* (July 28, 2010) (noting that "not violating international law does not necessarily mean being in accordance with it, and it does not necessarily mean that any minority ethnic group within any territory has the right to demand separation.")

[42] Burri, *supra* note 39, at 882.

[43] See Press Release of the Serbian Government, *Tomorrow Extraordinary Session Concerning ICJ's Advisory Opinion* (July 22, 2010) (noting that "the government believes the ICJ's opinion demands thorough analysis, announcing that a diplomatic initiative will be launched to prepare Serbia for a debate at the UN General Assembly."), available at http://www.srbija.gov.rs/vesti/vest.php?id=67782, last visited May 30, 2011.

[44] Statement by H.E. Mr. Boris Tadić, President of the Republic of Serbia, at the 65th Regular Session of the General Assembly (25 September 2010) (emphasis added), available at http://www.un.int/serbia/Statements/82.pdf, last visited May 30, 2011.

In his speech, the President highlighted what the Court *had explicitly not stated* – the more subtle and inconclusive aspects of the opinion that had been overlooked by the media and others in the euphoria of July 22nd.

Although the *Kosovo* opinion was initially perceived by Serbia as a loss, by Kosovo as a victory, and by internationalists as a missed opportunity, I argue that it should be understood instead as an attempt by the Court to achieve a balanced solution. A deeper analysis of the opinion suggests that the Court's silence was meant precisely to benefit – or at least not antagonize – Serbia. Whatever matters the Court left open, and which caused such disappointment among internationalists, was meant to give Serbia a little piece of the cake, too. The Court engaged in a delicate exercise, designed to avoid further fueling the tension between Kosovo and Serbia: on one hand, it held that nothing in international law prevented the declaration of independence; on the other hand, it said absolutely nothing regarding the status of Kosovo. With time, however, Kosovo's win appeared more perceived than real, and each of the interested parties were able to claim a small victory.

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Finding a solution beneficial to both parties has been a central preoccupation of the Court. The use of equity, in particular, has enabled the Court to shape win-win solutions to inter-state legal disputes.[45] Although the Court did not refer to equity in its Kosovo Opinion, it is helpful to reflect upon past instances in which the Court overtly sought to

[45] See, for example, Prosper Weil, *L'Equité dans la Jurisprudence de la Cour Internationale de Justice: Un Mystère en Voie de Disparition*, in ESSAYS IN HONOUR OF SIR ROBERT JENNINGS, FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 121 (Cambridge University Press, 1996); Christopher R. Rossi, EQUITY AND INTERNATIONAL LAW: A LEGAL REALIST APPROACH TO INTERNATIONAL DECISIONMAKING (Transnational Publishers, 1993); Masahiro Miyoshi, CONSIDERATIONS OF EQUITY IN THE SETTLEMENT OF TERRITORIAL AND BOUNDARY DISPUTES 173, 197, 198 (Martinus Nijhoff, 1993).

reach an equitable solution to the dispute. We observe that these instances do not include advisory proceedings and, instead, are limited to the exercise by the Court of its contentious jurisdiction. This observation, I argue, teaches us valuable lessons with respect to the positioning of the Court in the Kosovo proceedings.

Using equity as a complement to the law (also known as equity *infra legem*), the Court has often favored "equitable" interpretations of the law over less "equitable" ones. As explained by Francesco Francioni, "[i]n this case, equity is not used as a principle endowed with autonomous normativity but rather as a method for infusing elements of reasonableness and 'individualized justice' whenever the application of the law leaves a margin of discretion to the court or tribunal which has to make the decision."[46]

The International Court of Justice first resorted to this "result-oriented"[47] use of equity in the *North Sea Continental Shelf* case where the application of the equidistance method of delimitation of the continental shelf was deemed unfair.[48] A year later, in the 1970 *Barcelona Traction*, the Court took equity a step further by suggesting its use even when the law itself does not require the application of equitable principles. The Court declared that "it is necessary that the law be applied reasonably."[49] For example, "if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call

[46] See Francesco Francioni, *Equity in International Law*, in Max Planck Encyclopedia of International Law, para. 6.
[47] *Id.*, para. 13.
[48] *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3, at paras. 88 and 92 (noting that the Court's decisions must be just and equitable and that, in the case at hand, the equidistance principle did not provide an equitable solution).
[49] *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3, para. 93.

for the possibility of protection of the shareholders in question by their own national State."[50]

The contours of equity *infra legem* were clarified in a series of maritime delimitation cases in the 1980s. In these cases, the Court not only confirmed the role of equity as a means of interpretation, it also highlighted the need to achieve "equitable results" in the application of the law. One of the most eloquent affirmations of this need to achieve an "equitable result" appeared in the *Tunisia/Libya* case:[51]

> "[W]hen applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice (…) [The Court] is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant *in order to produce an equitable result*."[52]

The last sentence implies that the Court has a duty to achieve an equitable result in the settlement of disputes: reaching an equitable solution is not only desirable, it is required. In order to do so, the Court must use equity as a corrector to the application of the law – as the Court subsequently reiterated in the *Gulf of Maine*,[53] the *Frontier Dispute*[54], and *Jan Mayen*.[55] These cases confirm that achieving an "equitable result" constitutes an essential goal of the Court in the discharge of its judicial function.

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[50] *Id.* (emphasis added).
[51] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18.
[52] *Id.* paras. 70-1 (citations omitted).
[53] *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, I.C.J. Reports 1984, p. 246, paras. 59,191, and 230.
[54] *Frontier Dispute* (Burkina Faso v. Mali) Judgment, I.C.J. Reports 1986, p. 554, para. 27-8 (Mali called on the Court to take into account equity *infra legem,* characterized as "that form of equity which is inseparable from the application of international law." The Court accepted Mali's submission: "It is clear that the Chamber cannot decide *ex aequo et bono* in this case. Since the Parties have not entrusted it with the task of carrying out an adjustment of their respective interests, it must also dismiss any possibility of resorting to equity *contra legem*. Nor will the Chamber apply equity *praeter legem.* On the other hand, it will have regard to equity *infra legem*, that is, that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes.")
[55] See *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, I.C.J. Reports 1993, p. 38, paras. 50, 51, 54, 59, and 90 ("it is in accord with precedents to begin with the median line as a

As I noted earlier, all of the decisions mentioned above resulted from the exercise by the Court of its contentious jurisdiction. Equitable solutions, of any sort, are inherent to the Court's function as a mechanism of dispute settlement.[56] As the main judicial organ of the United Nations, the Court embodies the principal mechanism available to states wishing to resolve disputes peacefully. In this context, considerations that might drive the Court to reach an equitable solution, to the extent it is firmly grounded in law, appear legitimate. These considerations may include the desire to avoid creating additional grounds of contention between the parties, lay the ground for future negotiations between the parties, or empower the parties by providing each of them with a certain measure of leverage. While such considerations have played a growing role in the settlement of contentious cases, they raise serious questions in advisory proceedings.

In advisory proceedings, the role of the Court is to provide legal advice to other organs of the United Nations and to the broader international community. Most importantly, "[u]nlike contentious cases, the purpose of the Court's advisory jurisdiction *is not to settle*, at least directly or as such, inter-state disputes".[57] For this reason, "in advisory matters there are technically no 'parties' and no binding 'decision.' The role of individual States in advisory cases is essential to supply 'information.'"[58]

In its Kosovo opinion, the Court went beyond this essential purpose of advisory opinions. Instead, I would suggest that it was driven by considerations inherent to dispute settlement: the Court acted as an arbiter between Kosovo and Serbia and showed concern

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provisional line and then to ask whether "special circumstances" require any adjustment or shifting of that line.") For the opposite view, see *Separate Opinion of Judge Arechaga* in *Tunisia/Libya*, para. 35.

[56] See Miyoshi, *supra* note 45, at 198 ("It is only natural, it is submitted, in so far as an arbitral or judicial decision is to settle or solve a dispute."); and Rossi, *supra* note 45, at 41-56.

[57] Malcolm Shaw, INTERNATIONAL LAW 1108 (CUP, 2008) (emphasis added).

[58] Rosenne, *supra* note 4, at 87.

for how the opinion would affect their relationship.[59] This concern, reminiscent of the exercise by the Court of its contentious jurisdiction, is at odds with the essential purpose of its advisory function.

The motivation seemingly underlying the Kosovo opinion is also at odds with the *Wall* opinion, rendered only six years prior. In the *Wall* opinion, the Court repeatedly framed the issue as one of concern to the international community as a whole – carefully avoiding all attempts at characterizing the request as a bilateral dispute between Israel and Palestine. The Court emphasized this aspect of the issue as part of its discussion on propriety:

> "Furthermore, the Court does not consider that the subject-matter of the General Assembly's request can be regarded as only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court's view that the construction of the wall must be deemed to be directly of concern to the United Nations (…) The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute."[60]

Later in its decision, the Court further emphasized this point by characterizing Israel's violations as *erga omnes.*[61] By refusing to view the request for an advisory opinion as a "case" between two parties, the Court confined itself to its advisory function.

In contrast, by positioning itself (albeit not expressly) as an arbiter in the *Kosovo* opinion, the Court created some confusion between its two heads of competence. The

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[59] In other advisory opinions, the Court was criticized for doing precisely the opposite and not paying sufficient attention to how the opinion would affect interested parties. See Michael C. Mineiro, *The Cowardice of the Restrictive Advisory Opinion Approach: A Failure of the International Court of Justice to Exercise its Judicial Prerogative in the Application of the General Principles of International Law in Fulfillment of International Peace and Security*, Memo prepared for The Hague Academy of International Law – Summer Public International Law Directed Studies Program (2010), at 3 (arguing that, as a result of the Court's narrow interpretation of the question asked to it in the Western Sahara case, "both Morocco and Mauritania were able to rely on the advisory opinion to sustain international and domestic political legitimacy for continued military operations within the Western Sahara.")

[60] *Wall* Opinion, *supra* note 35, paras. 49-50.

[61] *Id.*, paras. 155-57.

Kosovo opinion illustrates that the Court's motivations or considerations in advisory proceedings may resemble those guiding it in the exercise of its contentious jurisdiction. It also raises some doubts as to whether the Court could, through its advisory jurisdiction, act as "a means of authentic interpretation of international law", as has been suggested.[62]

In an attempt to reconcile the Court's position in the *Wall* opinion and in the *Kosovo* opinion, I would suggest that the Court's approach in any given case depends on its own assessment of the scope and gravity of the political implications of the (legal) question asked. When, according to its own assessment, the Court views the implications as mostly legal in nature – such as in *Reparations for Injuries* or the *Wall* opinion – the Court is inclined to act in conformity with its advisory function. However, if the Court views the implications of the legal question as mostly political – as in the *Kosovo* opinion or the *Nuclear Weapons* opinion – the Court tends to refrain from making broad and far-reaching pronouncements. In the *Kosovo* opinion, the Court perceived an acute risk of escalating tensions in the Balkans – and perhaps other regions with active secessionist movements – and consequently adopted a position it felt would minimize such risks. The Court might also position itself differently when a large consensus exists on what the answer ought to be. With respect to Kosovo, the divisions within the international community may have led the Court to avoid taking position.

[62] Karin Oellers-Frahm, *Commentary to Article 96 of the United Nations Charter* in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, A COMMENTARY 183 (OUP, 2006) (referring to the proposals of President Schwebel and President Guillaume to "encourage all courts and tribunals, including those who are not organs of or related to the United Nations, to request through the Security Council or the General Assembly advisory opinions on issues of interpretation of international law that arise in cases pending before them and that are relevant with regard to the unity of international law").

Conclusion

Despite having an unprecedented opportunity to pronounce on such questions as recognition, secession and self-determination, the International Court of Justice preferred to adopt a narrow interpretation of its mandate in the *Kosovo* opinion. As it did in other advisory proceedings, the Court could very well have interpreted the question asked to it by the General Assembly as encompassing broader issues. In this article, I have explored the reasons why the Court did not elect to take on such broader issues.

I view the Court's position as a calculated compromise designed to avoid antagonizing the most interested parties, namely Serbia and Kosovo. Given the choice between contributing to a calming of hostilities and contributing to international law, the Court chose the former. The Court, in other words, prioritized its role as a mechanism of dispute settlement over its advisory function.

The Court has often adopted 'win-win' solutions, accepting at least some of the contentions of each party to the dispute. These equitable solutions have been common in contentious cases. It is unusual, however, for the Court to act as an equitable arbiter, even covertly, in advisory proceedings. Consider the *Wall* opinion: the Court neither attempted to reach a compromise nor lay the groundwork for better relations among the entities most affected by the opinion, namely Israel and Palestine. Instead, and in line with the spirit of its advisory jurisdiction, the Court in the *Wall* opinion refused repeatedly to regard the matter as a bilateral dispute.

The Court's approach in the *Kosovo* opinion, in contrast, blurs the line between advisory and contentious jurisdictions. Through its advisory competence, which entails providing legal advice to other UN organs and to the international community as a whole,

the Court has advanced international law on numerous occasions – as it might have in the present case. Instead, the *Kosovo* Court was driven by considerations typically foreign to advisory jurisdiction such as the desire to avoid creating additional grounds of contention between the parties, lay the ground for future negotiations between the parties, or empower the parties by providing each of them with a certain measure of leverage. Indeed, it seems that in the fear that making far-reaching legal pronouncements would further estrange Kosovo and Serbia, the *Kosovo* Court acted more as a means of dispute settlement than as an advisory body.

Although it took time for Serbia to exploit the Court's silence to its advantage, eventually both Serbia and Kosovo emerged with the sense that they "got something" that could form the basis for a satisfactory outcome. This became apparent in late 2010, with Serbia and Kosovo expressing their willingness to enter into talks.[63] It may be too early or too speculative to tell whether the outcome of the advisory proceedings contributed to the launch of these talks. But the Court seems to have avoided causing a backlash or any significant change in the region's political and legal landscape. For this it should be commended – even if it came at the cost of a lost opportunity for the development of international law and some confusion of Court's contentious and advisory functions.

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[63] See, for example, *Kosovo: La Serbie Prête à Discuter*, Europe1, (October 29, 2010) (relating an interview of Serbia's Foreign Minister, Vuk Jeremic, in the Serbian daily *Novosti*); and *Kosovo and Serbia After the ICJ Opinion,* International Crisis Group Report (2010), available at http://www.crisisgroup.org/~/media/Files/europe/206%20Kosovo%20and%20Serbia%20after%20the%20ICJ%20Opinion-1.ashx, last visited May 30, 2011, at pp. 3-6. See also United Nations General Assembly Resolution A/RES/64/298 (9 September 2010) (draft resolution submitted by Serbia and 27 European countries, adopted by consensus, acknowledging the content of the advisory opinion and welcoming "the readiness of the European Union to facilitate a process of dialogue between the parties; the process of dialogue in itself would be a factor for peace, security and stability in the region, and that dialogue would be to promote cooperation, achieve progress on the path to the European Union and improve the lives of the people.")