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# THE COURT AND ITS MULTIPLE CONSTITUENCIES: THREE PERSPECTIVES ON THE KOSOVO ADVISORY OPINION

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## Chapter 16: The Court and its Multiple Constituencies: Three Perspectives on the Kosovo Advisory Opinion

André Nollkaemper\*

### 1. Introduction

From one angle, the International Court of Justice (the Court), by delivering the Advisory Opinion on *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Kosovo Advisory Opinion),<sup>1</sup> merely did what it was asked to do: provide an answer to the United Nations (UN) General Assembly and thus fulfil its task under the UN Charter.<sup>2</sup>

A wider perspective is possible. This Chapter explores the proposition that by rendering an advisory opinion, the Court seeks to, and needs to, maintain its authority vis-à-vis multiple constituencies that have a stake in its decisions, and on which the Court to some extent is dependent. These constituencies include, in any case, first, the political organs of the UN; second, the state or other actors whose dispute gave rise to the advisory opinion (in the case at hand, Serbia and Kosovo); and thirdly, the wider international community that has an interest in the proper application and development of international law.

Seen from this angle, one's assessment of the Kosovo Advisory Opinion is thus not only determined by whether the legal answer given by the Court was the right one. It also depends on the perspective from which one considers the outcome: from that of the Court's role as an organ of the UN, with particular responsibilities vis-à-vis the other organs of the UN (I will call this an 'institutional perspective'); from that of the Court as a judicial body that is tasked to contribute to the peaceful settlement of disputes (a 'dispute settlement perspective'); or as

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<sup>1</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory opinion) ICJ GL No 141, [2010] ICJ Rep 403, ICGJ 423 (ICJ 2010), 22nd July 2010, International Court of Justice [ICJ] ) (hereafter: Advisory Opinion).

<sup>2</sup> Charter of the United Nations (adopted 26 June 1945) 892 UNTS 119, 59 Stat 1031, TS 993, 3 Bevans 1153, 145 BSP 805 (hereafter: UN Charter).

an organ on which the international community at large relies to ensure the proper interpretation and development of international law (a ‘guardian perspective’). Obviously, these perspectives do not exclude each other, and with one advice or judgment the Court may serve multiple constituencies. Nonetheless, considering the Opinion from one or another perspective may explain and clarify what the Court did or did not do, and why. In that respect, these perspectives may provide useful analytical tools to enhance our understanding and appreciation of the Advisory Opinion.

The proposition that the Court may consider and attach weight to the interests and expectations of its constituencies is neither a new nor a remarkable one. An obvious example is the *Barcelona Traction* case,<sup>3</sup> in which the Court attempted to undo the negative fall-out of the *South West Africa* judgment,<sup>4</sup> with its pronouncement on the *erga omnes* character of particular obligations, even though it had no real need to do so in order to decide that particular case. The former decision can only be explained by the Court’s awareness of the need to address the interests and expectations of developing states.<sup>5</sup>

The Kosovo Advisory Opinion was not similarly preceded by judgments or opinions which were critically received that called for a comparable ‘corrective’ decision to placate disgruntled states. However, the proposition that the Court may cater to the interests of its constituencies (including the states on which it ultimately depends) does not depend on a prior controversial judgment. Also, more generally, it is a plausible proposition that the Court cannot neglect the interests of its multiple constituencies.

Four features of a constituency-based approach should be noted at the outset. First, it will often be necessary to distinguish between short-term and long-term interests of constituencies. Answering a question posed by the General Assembly in a particular way may cater to the immediate interests of a particular constituency, but in the long term might affect the interests of other constituencies.

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<sup>3</sup> *Barcelona Traction, Light and Power Company, Limited, Belgium v Spain* (Order: removal from the list) ICJ GL No 41, [1961] ICJ Rep 9, ICGJ 163 (ICJ 1961), 10th April 1961, International Court of Justice [ICJ].

<sup>4</sup> *South West Africa, Ethiopia v South Africa* (Second phase judgment) ICJ GL No 46, [1966] ICJ Rep 6, ICGJ 158 (ICJ 1966), 18th July 1966, International Court of Justice [ICJ].

<sup>5</sup> Christian J. Tams and Antonios Tzanakopoulos, ‘Barcelona Traction at 40: The ICJ as an Agent of Legal Development’ (2010) 4 LJIL 781-800.

Second, it would be a simplification to speak of ‘the’ interests of constituencies. In the case of the Security Council (SC), for instance, one can construe different interests that were at stake in the Kosovo Advisory Opinion. The Council as such may have had an interest in the continued validity and implementation of the arrangement set in place by SC Resolution 1244, and the continued protection of the legitimate expectation of states that agree to the Council’s peace settlements. But given the shifting facts on the ground, it may also be argued that the Council had an interest in a political settlement that took into account and was based on the new political reality, even when that meant that the regime of Resolution 1244 was upset. The point is that in respect of each constituency, it may not only be necessary to distinguish between short-term and long-term interests, but also to consider different, and possibly competing, substantive interests of each constituency.

Third, and related to the previous point, in respect of collective institutions like the General Assembly and the Security Council, a distinction may need to be drawn between the collective interest of the institution as such, on the one hand, and the interest of particular (groups of) member states of those institutions, on the other. Formally, it is apparent that only the former count, as affirmed by the Court in the Kosovo Advisory Opinion.<sup>6</sup> However, behind the veil of the collectivity, individual members will take different positions – as evidenced by the different position of the permanent members of the Security Council.<sup>7</sup> The question is whether the Court can, and should, entirely neglect such divisions. Formally, the Court will say that it can and should do so. But it is difficult to escape the impression that the division within the Council made it easier for the Court to give up the regime of Resolution 1244.

Fourth, the Court’s ability to take into account and to cater to multiple constituencies depends largely on the leeway left by the question presented to the Court. If the law were to be absolutely clear and allow only for one outcome, the Court may have no other option than following that course, whatever the interests of particular constituencies may be. However, situations where a question put to the Court leaves no choice are rare. Usually the Court will have the possibility to interpret and construe a question put to it in a broader or narrower way. This was not any different for the question formulated by the General Assembly on the

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<sup>6</sup> Advisory Opinion (n 1) par. 33.

<sup>7</sup> See *infra* section 2.2.

Declaration of Independence.<sup>8</sup> In that situation, it becomes relevant to identify the multiple constituencies of the Court, and to consider the extent to which the Court's construction of the question, and the answer to that question, can be understood as an attempt to serve some or all of these constituencies.

The central argument of the Chapter is as follows. The fact that the Court declined to cater to the interests formally expressed by the General Assembly and the Security Council may be explained as an attempt to preserve the longer term authority of the Court vis-à-vis its constituencies. On the one hand, exposing the conflict between the Declaration of Independence and Resolution 1244 would have disconnected the Court from the political developments and would have marginalized the Court. On the other hand, a wider discussion of the question of whether the Declaration was in accordance with international law would have required the Court to pronounce on highly controversial questions of secession and self-determination. Thereby, it would inevitably have divided its constituencies in a manner that likewise would have endangered its stature. The result of the decision to duck these two questions was that the Court in the short term only served the interests of Kosovo and its supporters; however, this is better understood as a side-effect of its decision to serve its longer-term interests than as a strategic decision to serve this particular constituency over all others. However, the choice of reading the question as it did came with a price: it could jeopardize future international arrangements to stabilize war-torn societies if the relevant actors were to realize that they can always unilaterally pull out of such arrangements, even if they have been blessed by the Security Council. From a constituency perspective, the fact that the Court was willing to pay that price may in part be explained by the fact that the actors that will have a stake in such future arrangements were unknown.

I will review the Kosovo Advisory Opinion from the angles of three constituency-based perspectives: an institutional perspective, in which the constituencies consist of the political organs of the United Nations (section 2); a dispute settlement perspective, in which the focus is on Serbia and Kosovo – the parties whose dispute gave rise to the Advisory Opinion (section 3); and a guardian perspective, focusing on the interest of the international community at large in a stable and well-functioning international legal order (section 4). For each perspective I discuss, first, why the Court would have to serve that particular constituency; second, how it did so in the Advisory Opinion; third, how the relevant

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<sup>8</sup> Sienho Yee, 'Notes on the International Court of Justice (Part 4): the Kosovo Advisory Opinion' (2010) 9(4) CJIL763-782, at 770.

constituency assessed the Court's Opinion; and fourth, whether the Court, by doing what it did, managed to maintain its long-term stature vis-à-vis that particular constituency.

## 2. An Institutional Perspective

The first and foremost stakeholder of any advisory opinion is the institution that asks the question: 'the purpose of the advisory function is to offer legal advice to the organs and institutions requesting the opinion'.<sup>9</sup> Under Article 96 of the UN Charter, the potential constituencies of the Court are the UN General Assembly, the UN Security Council, and other bodies authorized to request opinions on legal questions 'arising within the scope of their activities'.<sup>10</sup> In the case at hand, the question came from the General Assembly; thus it was the primary constituency (section 2.1). However, the Court could not entirely neglect the interests of the Security Council (section 2.2).

### 2.1 The General Assembly

The first question of our analytical framework (why would the Court have to serve that particular constituency?) is easily answered. The Court's first and foremost consideration had to be that it had to cater to the interests of the General Assembly to obtain an answer to the question that it had put before the Court.

The need to cater to the interests of the General Assembly does not follow from a relation of dependency. The organs of the UN are not placed in a hierarchical position. While the Court does provide annual reports to the General Assembly,<sup>11</sup> and is dependent on the General Assembly for its budget,<sup>12</sup> it is only by a stretch of the imagination that an answer to a General Assembly question that would not satisfy the General Assembly could in any way, through the budget or otherwise, come back to haunt the Court.

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<sup>9</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ GL No 95, [1996] ICJ Rep 226, ICGJ 205 (ICJ 1996), 8th July 1996, International Court of Justice [ICJ], para 15.

<sup>10</sup> UN Charter (n 2).

<sup>11</sup> Rule 13 (b) of the Rules of Procedure of the United Nations General Assembly (United Nations [UN]) UN Doc A/520.

<sup>12</sup> UN Charter (n 2) art 17.



Yet, as an organ of the UN, the Court has an interest in cooperating with the General Assembly in the pursuit of the objectives of the UN.<sup>13</sup> Indeed, all organs, including the General Assembly and the Court, have a mutual responsibility to ensure that each can perform their responsibilities under the UN Charter. While the Court's Statute does not formulate this in terms of a legal obligation (Article 65 of the Statute stipulates that the Court *may* give an advisory opinion on any legal question upon the request),<sup>14</sup> in the Court's practice there is a presumption that the Court will answer a question, and thus serve this constituency, unless there are compelling reasons not to do so.<sup>15</sup> In the Kosovo Advisory Opinion the Court said that it was 'mindful of the fact that its answer to a request for an advisory opinion represents its participation in the activities of the Organization, and, in principle, should not be refused.'<sup>16</sup> As discussed elsewhere in this volume, in the facts of the case there was no compelling reason to decline the request for an opinion.<sup>17</sup>

Catering to the interests of the General Assembly requires the Court to address the interests of the General Assembly as a whole, not those of the member states. Behind the seemingly

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<sup>13</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion) (first phase) ICJ GL No 8, [1950] ICJ Rep 65, ICGJ 230 (ICJ 1950), 30th March 1950, International Court of Justice [ICJ] Sep. Op Judge Azevedo, para 8 ('the Court, which has been raised to the status of a principal organ and thus more closely geared into the mechanism of the U.N.O., must do its utmost to co-operate with the other organs with a view to attaining the aims and principles that have been set forth').

<sup>14</sup> Statute of the International Court of Justice (International Court of Justice [ICJ]) (adopted 26 June 1945) 33 UNTS 993, UKTS 67 (1946) Cmd 7015, 3 Bevens 1179, 59 Stat 1055, 145 BSP 832, TS No 993, ch IV (hereafter: ICJ Statute). This allows for discretion not to answer the question; see *Western Sahara* (Advisory Opinion) ICJ GL No 61, [1975] ICJ Rep 12, ICGJ 214 (ICJ 1975), 16th October 1975, International Court of Justice [ICJ], para 23.

<sup>15</sup> Advisory Opinion (n 1) para 30: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) I.C.J. Reports 2004 (I), 156, para 44; *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO* (Advisory Opinion) [1956] ICJ Rep 77, 86. See also *Certain Expenses of the United Nations (Article 17(2), of the Charter)* (Advisory Opinion) [1962] ICJ Rep 155; *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] ICJ Rep 27; *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* (Advisory Opinion) [1973] ICJ Rep 183; *Western Sahara* (n 14); and *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (Advisory Opinion) [1989] ICJ Rep 191..

<sup>16</sup> Advisory Opinion (n 1) para 30; See also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (n 13) para 22.

<sup>17</sup> This is subject to the discussion of the position of the Security Council, see section 2.2 below. For an extended discussion of jurisdiction and discretion issues in the Kosovo case, see the contribution by Vladimir Djerić in this volume.

simple question posed by the General Assembly, there will generally be multiple agendas of member states, and catering to one of them may neglect the others.<sup>18</sup> This was not any different in the case of the Kosovo Advisory Opinion. Some states may have had an interest in gaining clarity on the question of the legality of recognition of Kosovo, others on the question of self-determination, and still others on the legal status of Kosovo. However, these states could not get their points included in the Resolution, and the only question that was asked was whether the Declaration of Independence was in accordance with international law.

The fact that the Court should only address the question posed by the General Assembly as a whole is primarily relevant for the decision by the Court whether to exercise its discretion to decline to answer the question.<sup>19</sup> But it also pertains to the substance of the Opinion: catering to the interests of the General Assembly does not mean catering to the position of (groups of) states that are not reflected in the General Assembly's question. This is a sensible approach, and the only one which allows a workable relationship between the General Assembly and the Court as far as advisory proceedings are concerned. The Court by necessity has to accept the unity, however artificial, of the General Assembly as a single constituency. Any other approach would surely threaten the future relationship between the Court and the General Assembly, and more generally the authority of the Court.

The second question of our analytical framework is whether the Court did in fact cater to the interests of the General Assembly. The straightforward way for the Court to do so would have been to answer the question as given and understood by the General Assembly. That would have meant that the Court would consider the authors of the Declaration of

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<sup>18</sup> Generally Shabtai Rosenne, *The International Court of Justice: An Essay in Political and Legal Theory* (A.W. Sijthoff 1957) 66 (noting that '[i]n the ultimate result, the ability of the Court to perform any function in international life depends not so much on the institutional ties linking it with this or that organization or organ, or with this or that conception of the nature of its judicial task, as on the attitudes of the States towards the judicial role. There is, in this respect, no essential difference between a direct approach to the Court by States invoking the contentious jurisdiction, and indirect approach by States invoking the advisory competence. It is always in the States, individually or in groups, that the decision rests whether, and to what extent, the Court shall be used.')

<sup>19</sup> *Legality of the Threat or Use of Nuclear Weapons* (n 9) 237, para 16.

Independence as the Provisional Institutions of Self-Government,<sup>20</sup> and would answer the question of whether the Declaration was in accordance with international law.<sup>21</sup>

We can only speculate as to the reasons why the Court decided not to follow the understanding and the question as expressed by the General Assembly. It approached the question on the basis of a different understanding of the identity of the authors of the Declaration of Independence,<sup>22</sup> and significantly reformulated the question from ‘in accordance with international law’ to ‘not in violation of international law’.<sup>23</sup> Whatever the motivations, this approach allowed the Court to avoid two outcomes that for different reasons may have been problematic. On the one hand, if the Court had proceeded on the understanding (similar to that of the General Assembly) that the authors of the Declaration were the Provisional Institutions of Self-Government, it would have been very hard to escape the conclusion that the Declaration was in violation of SC Resolution 1244 as the applicable *lex specialis*.<sup>24</sup> In view of the fact that the political process had by then reached an unstoppable momentum, this would have produced an outcome that would have been largely irrelevant to practice and, moreover, in direct opposition to three permanent members of the Security Council: the United States, the United Kingdom, and France.<sup>25</sup> On the other hand, the approach taken allowed the Court to duck the question of external self-determination – a question that was certain to divide states, and thereby could endanger the long-term support of states for the Court. Both matters will be explored more fully below.<sup>26</sup>

It may be hypothesized that the Court’s deviation from the question could have undermined the long-term relationship with the General Assembly. Potential sponsors of a resolution would possibly think twice before asking a question that could be reformulated by the Court

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<sup>20</sup> See, convincingly, Marcelo G Kohen and Katherine Del Mar, ‘The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of ‘Independence from International Law?’ (2011) 24 LJIL 109, 114.

<sup>21</sup> See Yee (n 8); Kohen and Del Mar (n 20) 114.

<sup>22</sup> Yee (n 8) 770-771. Marc Weller, ‘Modesty Can Be a Virtue: Judicial Economy in the ICJ Kosovo Opinion’ (2011) 24(1) LJIL 127, 143.

<sup>23</sup> Advisory Opinion (n 1) par. 56.

<sup>24</sup> This is persuasively argued in the Separate Opinion by Vice-President Tomka to the Advisory Opinion (n 1).

<sup>25</sup> ‘Reaction in quotes: UN legal ruling on Kosovo’ (*BBC*, 22 July 2010) <<http://www.bbc.co.uk/news/world-europe-10733837>> accessed 27 January 2014. ‘France calls for all nations to recognize Kosovo’ (*Panorama*, 17 February 2008) <<http://www.panorama.am/en/politics/2010/07/23/france/>> accessed 27 January 2014.

<sup>26</sup> Respectively section 2.2 and section 4.

and thereby lead to quite a different answer than the one sought. Both facts may not necessarily have been beneficial to the long-term stature of the Court.

However, coming to the third question (how did the constituency in question assess the Opinion?), we can observe that the General Assembly did not censure and, indeed, appeared to be largely fine with the Court's deviation from the question. Despite the initiative by Serbia, the General Assembly showed no interest in reopening the status issue, let alone in reinterpreting or rejecting the outcome of the Advisory Opinion. This suggests that the General Assembly as a whole was satisfied with the outcome, and considered that the Court had properly done what the General Assembly had asked it to do.<sup>27</sup> This also suggests that the Court has substantial leeway and that catering to the interests of the General Assembly as a whole does not mean that it should do exactly what the General Assembly asks it to do.

## 2.2 The Security Council

A separate question is whether, in responding to a question posed by the General Assembly, the Court should also have catered to the interests of the Security Council. As a general proposition, it is obvious that the Security Council is indeed a relevant constituency for the Court. The Court in its advisory function 'serves' the United Nations,<sup>28</sup> and this is surely not limited to the General Assembly. Indeed, the relation between the Court and the General Assembly necessarily has to take into account the position of the Security Council, given the fact that virtually any possible answer to the question could potentially be of considerable interest for the Security Council's future involvement with Kosovo.<sup>29</sup>

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<sup>27</sup> Weller (n 22) 145.

<sup>28</sup> Karin Oellers Frahm, 'Lawmaking through advisory opinions' (2011) GLJ 12, 1033.

<sup>29</sup> In Resolution 1244 (1999) the Security Council, acting under Chapter VII of the United Nations Charter, authorized the United Nations Secretary-General to establish an international civil presence in Kosovo in order to provide 'an interim administration for Kosovo ... which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions' (para 10). The powers and responsibilities thus laid out in Security Council Resolution 1244 (1999) were set out in more detail in UNMIK Regulation 2001/9 of 15 May 2001 on a Constitutional Framework for Provisional Self-Government. See for a description of the involvement of the Council Advisory opinion (n 1) para 37 et seq. See generally Alexandros Yannis, 'The UN as a Government in Kosovo' (2004) 10 GG 67-81; Bernhard Knoll, 'From Benchmarking to Final Status? Kosovo and The Problem of an International Administration's Open-Ended Mandate' (2005) 16 EJIL 637-660.

In formal terms, the Court was required to consider the position of the Security Council, since it had to determine whether the General Assembly, by asking the question, had interfered with the powers of the Security Council. After all, Article 12 of the UN Charter provides that ‘[w]hile 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.’ It was argued before the Court, in separate opinions, and in subsequent commentaries that this implied that the Court should declare itself without jurisdiction.<sup>30</sup> Some also argued that, given the respective powers of the Security Council and the General Assembly, the request for an Advisory Opinion should instead have been made by the Security Council and that the Court should have exercised its discretion to decline to answer the question.<sup>31</sup>

In conformity with earlier opinions,<sup>32</sup> the Court concluded that Article 12(1) does not in itself limit the authorization to request an advisory opinion which is conferred upon the General Assembly by Article 96, paragraph 1.<sup>33</sup> As detailed elsewhere in this volume,<sup>34</sup> the Court found that the fact that the Security Council was involved did not constitute a compelling reason for the Court to refuse to respond to the request from the General Assembly.<sup>35</sup> These positions seem to rest on good grounds.

But such a positive assessment is not so easy to make in respect of the question of whether in substance the Court sufficiently catered to the interests of the Security Council. The preliminary question here was what were the interests of the Security Council in the first place? Comparable to what was said above in relation to the Security Council, the Court could not solve this problem by considering the position of individual members of the

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<sup>30</sup> Advisory Opinion (n 1) par. 18-28.

<sup>31</sup> Advisory Opinion (n 1) para 39; Individual opinions of Judges: Tomka, para 5 (‘I fail to see any “sufficient interest” for the Assembly in requesting the opinion’); Keith, paras 11-17 (who argues that the General Assembly’s interest is too small, and thus that the Court should refuse to render an opinion); Bennouna, paras 2-21 (who posits that decisions relating to the status of Kosovo should not be taken by the General Assembly, but by the Security Council, under whose ‘exclusive jurisdiction’ the situation in Kosovo fell); Skotnikov, para 9 (who argues that the Court unjustifiably substitutes itself for the Security Council).

<sup>32</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 15) 148, para 25.

<sup>33</sup> Advisory Opinion (n 1) para 24.

<sup>34</sup> See the contribution by Vladimir Djerić in this volume.

<sup>35</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 15) 148, para 26-27; Advisory opinion (n 1) para 42, 43, 47-48.

Security Council. If it had done so, this would not have yielded any conclusive answers, since the positions of the permanent members were far apart. As can be inferred from the inability of the Security Council to act on the Declaration of Independence,<sup>36</sup> as well as the competing positions of the United States<sup>37</sup> and the Russian Federation,<sup>38</sup> there was no single position of the Security Council on the issue to which the Court could attach weight.

In this situation of divided positions within the Security Council, the only baseline for the Court was to examine the question put to it by the General Assembly in the light of the decisions and actual practice of the Security Council in relation to Kosovo.

Measured against this yardstick, the Court's reasoning on this point is problematic. Permitted by its understanding of the identity of the authors of the Declaration of Independence, the Court found that these authors were not covered by Resolution 1244, and that hence there was no conflict with the Resolution.<sup>39</sup> It is difficult, however, to argue with the view that the authors *were* covered by the Resolution, that the Declaration did violate the Resolution, and more generally, that it upset the political process set in place by the Security Council.<sup>40</sup> De facto the Court gave its blessing to decisive steps in the political process from which there would be no return.

That the Court could so openly decline to protect a regime set in place by the Council can be explained only by the fact that while formally the Court could only consider the position of the Council as a whole, in fact it was faced with a deeply divided Security Council. The position of the Security Council as expressed in the relevant resolutions no longer corresponded to the position of the (permanent) members of the Security Council. The permanent members were now split with the United States, France, and the United Kingdom

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<sup>36</sup> The Council discussed the Declaration but took no action in respect of it; Security Council, provisional verbatim record, 18 February 2008, 3 p.m. (S/PV.5839); Security Council, provisional verbatim record, 11 March 2008, 3 p.m. (S/PV.5850).

<sup>37</sup> White House spokesman Mike Hammer said 'We were pleased that the court agreed with the long-standing view of the United States that Kosovo's declaration of independence is in accordance with international law.' 'Reaction in quotes: UN legal ruling on Kosovo' (*BBC*, 22 July 2010) <<http://www.bbc.co.uk/news/world-europe-10733837>>.

<sup>38</sup> 'ICJ opens Pandora box – Russia' (*Voice of Russia*, 22 July 2010) <<http://english.ruvr.ru/2010/07/22/13135117.html>> accessed 27 January 2014.

<sup>39</sup> Advisory Opinion (n 1) par. 119-121.

<sup>40</sup> See eg Cedric Ryngaert, 'The ICJ's advisory opinion on Kosovo's Declaration of Independence: a missed opportunity?' (2010) 57 NILR 481; Ralph Wilde, 'Self-determination, Secession and Dispute Settlement after the Kosovo Advisory Opinion' (2011) 24 LJIL 149; Kohen and Del Mar (n 20).

on one side, and China and Russia on the other. It may be speculated that if all the permanent members were to have taken the position that the regime established by the Security Council should be kept in place and that the Declaration was an unacceptable deviation from it, it would have been much more difficult for the Court to take the approach that it took – alternatively, there may in that case not have been recourse to the Court anyway.

This point is relevant, since the relationship between the Court and the Security Council may in the long term depend more on the support of the five permanent member states than on the question of whether the Court did justice to a particular position taken by the Security Council as a whole that no longer conforms to the political preferences and interests of the relevant actors. In this respect, comparable to the situation of the General Assembly, the divided position of states behind the veil of a uniform formal institutional position meant that the Court's decision to deviate from (or neglect) what the Security Council had said was without adverse effects on the long-term relationship between the Court and the Security Council.

Another aspect of this is that if the Court were to have determined that the Declaration of Independence was incompatible with the regime set up by the Security Council, this outcome most likely would have been irrelevant. If it was to avoid this, the Court had to leave a strict application of the SC Resolution and follow political realities. From this angle, the Advisory Opinion cannot only be explained by catering to its constituencies as static entities, but rather by a proper reading of the political context in which these constituencies operate.

The fact that this chosen approach, deviating from the formal position of the Security Council, did not lead to an outright rejection by at least some members of the Council would seem to be due to the fact that the narrow phrasing of the question allowed states to continue to take the position that they could respect the borders drawn at the end of the Bosnian civil war in 1995.<sup>41</sup> Russia could, without coming into conflict with anything that the Court had said, express that it did not change its position opposing Kosovo's recognition.<sup>42</sup> Given that the Court did not expressly pronounce on the legality of secession or the effect on the territorial

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<sup>41</sup> This was, for instance, expressed by Spain – 'Spanish Deputy PM: Spain Won't Recognize Kosovo' (*Novinite.com*, 23 July 2010).

<[http://www.novinite.com/view\\_news.php?id=118450](http://www.novinite.com/view_news.php?id=118450)> accessed 27 January 2014.

<sup>42</sup> 'UN court decision on Kosovo will not change Moscow's stance' (*RIA Novosti*, 22 July 2010) <<http://en.ria.ru/world/20100722/159913797.html>> accessed 27 January 2014.

integrity of Serbia, it can be said that the Court may have succeeded in satisfying, at least to some extent, the permanent members of the Security Council.<sup>43</sup>

While the Court may have maneuvered itself around the position of a potential conflict with the Security Council, it might have undermined a long-term interest of the Council. It may be speculated that the Court's limited weight given to the interim regime for Kosovo could be detrimental to the willingness of states to accept future comparable arrangements set up by the Security Council. Serbia had accepted the peace plan and the arrangement set out in Resolution 1244. Surely, if it could have envisaged that several years later its understanding of this arrangement to protect a political process, as well as its territorial integrity, would be worth very little, it would have thought twice before accepting the arrangement in the first place.<sup>44</sup> For the future, states that may find themselves in comparable situations might be reluctant to accept such arrangements if the basis of their acceptance is worth little. As noted by Wilde, the Court in effect said that

in a situation in which an international legal regime, even one, as here, crafted by the Security Council and introduced via mandatory provisions of a resolution passed under Chapter VII UN Charter, creates an interim arrangement to provide the space for a 'settlement' of a dispute, one of the disputants is free to unilaterally terminate this arrangement, without having to account for whether or not the termination constitutes a lawful 'settlement' of the situation, if the disputant is a non-State actor and, as an essential part of the settlement, has to be acting in a different capacity from its identity during the dispute settlement period—a situation which is inevitable when a sub-State group reconstitutes itself as an independent State through secession.<sup>45</sup>

This outcome is surely not in the long-term interests of the Security Council and its ability to contribute to peace arrangements.

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<sup>43</sup> See for the positive responses by the US 'Reaction in quotes: UN legal ruling on Kosovo' (*BBC*, 22 July 2010) <<http://www.bbc.co.uk/news/world-europe-10733837>> accessed 27 January 2014; 'Remarks by Secretary Clinton: July 2010' (*U.S. Department of State*, 22 July 2010) <<http://www.state.gov/secretary/rm/2010/07/145042.htm>> accessed 27 January 2014. See for France 'France calls for all nations to recognize Kosovo' (*Panorama*, 23 July 2010) <<http://www.panorama.am/en/politics/2010/07/23/france/>> accessed 27 January 2014. For China see 'Foreign Ministry Spokesperson Qin Gang's Response to the International Court of Justice's Advisory Opinion on the Kosovo Case' (*Ministry of Foreign Affairs of the People's Republic of China*, 23 July 2010) <<http://www.mfa.gov.cn/eng/xwfw/s2510/t719113.htm>> accessed 27 January 2014.

<sup>44</sup> Yee (n 8).

<sup>45</sup> See n 40.



### 3. A dispute settlement perspective

From a second perspective, we can consider the Advisory Opinion in terms of its contribution to a settlement of a dispute between Kosovo and Serbia. From this perspective, the constituent parties are primarily Kosovo and Serbia, and possibly also those states that strongly backed either of these parties.

Of course, the standard argument is that advisory opinions are not easily examined from the perspective of a settlement of disputes. Shaw observes that '[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.'<sup>46</sup> However, by definition a question in the General Assembly is driven by one or more states with a particular interest in that question. It may then be said that the Court, even if it addresses only the question put to it by the General Assembly as a whole, is in fact catering to the interests of these states – in the present situation in particular, Serbia. Some participants in the proceedings, indeed, said that 'the opinion of the Court was being sought not in order to assist the General Assembly but rather to serve the interests of one State and that the Court should, therefore, decline to respond.'<sup>47</sup> In response, the Court inevitably maintained the image of the General Assembly in unity: its opinion is given not to states, but to the General Assembly: 'the motives of individual States which sponsor, or vote in favour of, a resolution requesting an advisory opinion are not relevant to the Court's exercise of its discretion whether or not to respond.'<sup>48</sup> The Court's role in advisory proceedings is thus primarily to respond to questions posed by competent organs, rather than individual states with a concrete stake in a particular outcome. Advisory jurisdiction is not a form of judicial recourse for states seeking the help of the Court to settle a dispute.<sup>49</sup>

However, the primary advisory nature of advisory opinions does not exclude that, in a less direct way, it may contribute to the settlement of disputes. Generally speaking, the prime role of the Court is its contribution, on the basis of international law, to the peaceful settlement of disputes.<sup>50</sup> It seems too rigid to disconnect advisory opinions entirely from that role. Advisory opinions are likely to have an effect on actual disputes – if only because they will

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<sup>46</sup> Malcolm Shaw, *International Law* (CUP 2008) 1108 (emphasis added).

<sup>47</sup> Advisory Opinion (n 1) para 32.

<sup>48</sup> Ibid para 33.

<sup>49</sup> Ibid para 39.

<sup>50</sup> Rosenne (n 18).

bolster the position of some of the disputing states, and remove power from the position of others. Indeed, many states did not hesitate to rely on the Kosovo Advisory Opinion in order to support their position.<sup>51</sup> In this situation, it would be too formalistic to take the position that this should be of no concern to the Court. In the *Wall* Advisory Opinion, the Court said that ‘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.’<sup>52</sup> The fact that the subject-matter was not ‘only’ a matter for the two parties does not exclude the fact that an advisory opinion also addresses a bilateral dispute, and that the pronouncement of the Court may have relevance to the settlement of such a dispute. Interestingly, the Court could even contribute to a peaceful settlement of disputes between states and non-state actors, as was the case, at least in the eyes of some, with the facts of the *Wall* Advisory Opinion. The limitation of access to the Court by states, as it applies in contentious proceedings between states,<sup>53</sup> does not apply here.

The question then is what it means for the Court to contribute, in advisory proceedings, to the settlement of a dispute. In a narrow sense, settling a dispute may mean that the Court would simply say that A or B is right, and thereby (assuming that that ruling would in fact be given effect) effectively settle the dispute. But leaving aside the unlikelihood that whatever the Court would have said would have a direct and decisive impact on the resolution of the conflict, this of course is not what can be expected in an advisory proceeding. If the Court were to contribute to the settlement of a dispute like the one between Kosovo and Serbia, it would do so by clarifying the parameters within which the further political process would have to take place.

It has been suggested that the Kosovo Advisory Opinion was in fact ‘driven by considerations inherent to dispute settlement: the Court acted as an arbiter between Kosovo and Serbia and showed concern for how the opinion would affect their relationship.’<sup>54</sup> The argument is that

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<sup>51</sup> Eg Albanian Prime Minister Sali Berisha hailed the ruling as a ‘historic decision’ that would contribute to peace and stability in the Balkans. Berisha also called for more countries to recognize the independence of Kosovo; see ‘Albania Welcomes UN Court’s Backing of Kosovo’ (*China Radio International*, 22 July 2010) <<http://english.cri.cn/6966/2010/07/23/1461s584558.htm>> accessed 27 January 2014.

<sup>52</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 15) 148, para 49 (emphasis added).

<sup>53</sup> ICJ Statute (n 14) art 34(1).

<sup>54</sup> Daphné Richemond-Barak, ‘The International Court of Justice on Kosovo: Missed Opportunity or Dispute ‘Settlement’?’ (2010) 23 *Hague Yrbk Intl L* 3, also available at

the Court sought a delicate compromise between the positions of the two entities and thereby ‘positioned itself more as a means of dispute settlement than as a legal advisory body.’<sup>55</sup>

But it is difficult to assess whether and to what extent the Court, indeed, did to provide a contribution to the settlement of the dispute and, in that respect, cater to the interests of Kosovo and Serbia. The only criteria for making this assessment are the actual contents of the Opinion and its reception. On this point three comments can be made.

First, in the situation as it had unfolded, an agreed settlement was virtually ruled out. It was hard to see how any answer to the question could, at least in the short term, have made a productive contribution to a settlement. In this respect, the facts of the case were unfavourable for a proper application of the second perspective on a constituency-based analysis of the Advisory Opinion. Falk rightly observed that the Court deferred to geopolitical wishes by rather unexpectedly validating the Kosovo Declaration.<sup>56</sup>

In this situation, the room for the Court to manoeuvre was very limited. While the answer it did give was hardly conducive to a political arrangement as envisaged by Resolution 1244, it is not unlikely that a negative answer to the question put to the Court would have resulted in an even worse deterioration of the situation, as it may have legitimized Serbian policies to seek reintegration of Kosovo, perhaps even by military means.<sup>57</sup>

Second, quite unlike the normal situation in cases of contentious proceedings, in which it has often been observed that the Court attempts to provide something to both parties, quite clearly the Opinion was only favourable to one party, as can be inferred from the sharp distinction in responses by Kosovo<sup>58</sup> and that of Serbia.<sup>59</sup> For Serbia, the Court’s statement

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[http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=daphne\\_richmondbara\\_k](http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=daphne_richmondbara_k).

<sup>55</sup> Ibid.

<sup>56</sup> Richard Falk, ‘The Kosovo Advisory Opinion: Conflict Resolution and Precedent’ (2011) 105 AJIL 50.

<sup>57</sup> Anne Peters, ‘Does Kosovo lie in the Lotus Land of Freedom?’ (2011) 24 LJIL 95.

<sup>58</sup> After the ICJ Opinion, President Fatmir Sejdiu said the decision was positive and that it ‘explicitly on all counts spoke in favour of the right to freedom and self-determination of the people of Kosovo’. He called on the countries that had not recognised Kosovo, as well as Serbia, to ‘join the common vision of the countries in the region in their position regarding the bright future and speedy Euro-Atlantic integrations’. ‘K. Albanians hail ICJ decision as big victory’ (b92, 22 July 2010) <[http://www.b92.net/eng/news/politics-article.php?yyyy=2010&mm=07&dd=22&nav\\_id=68621](http://www.b92.net/eng/news/politics-article.php?yyyy=2010&mm=07&dd=22&nav_id=68621)> accessed 27 January 2014.

that territorial integrity was not opposable to a non-state actor<sup>60</sup> did not strengthen the negotiating power of Serbia, and nor did it bring the dispute closer to a resolution in Serbia's favour.<sup>61</sup> The lack of appreciation of the Serbian rights in question has been noted and critiqued by many scholars.<sup>62</sup> At the same time, it could be said that the fact that the Court did not endorse a right of secession of Kosovo confirmed the position taken by Serbia and allowed it to argue that even though the Declaration as such may not have been in violation of international law, international law did allow Serbia to rely on territorial integrity to oppose the secession and argue that Kosovo did not manage to attain statehood.

Third, it is necessary to distinguish between the short term and the long term interests of the constituencies. Precisely by keeping in place the principles on which Serbia could oppose secession, and by not saying anything on the status of Kosovo, the Court left open a political process that eventually could be considered as some form of settlement, though obviously one that is quite far removed from what Serbia initially had in mind.<sup>63</sup> This outcome was indeed emphasized by several other states, including China,<sup>64</sup> Germany,<sup>65</sup> and Spain.<sup>66</sup> Indeed, one can conclude that the Court, by not seeing any barrier to a unilateral declaration

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<sup>59</sup> See statement of President of Serbia, Boris Tadić – 'Serbia rejects Kosovo court ruling' (*Al Jazeera*, 10 September 2010) <<http://www.aljazeera.com/news/europe/2010/07/201072355537730152.html>> accessed 27 January 2014.

<sup>60</sup> Advisory Opinion (n 1) para 79-84.

<sup>61</sup> Roland Tricot & Barrie Sander, 'Recent Developments : the Broader Consequences of the International Court of Justice's Advisory Opinion on the Unilateral Declaration of Independence in Respect of Kosovo' (2011) 49 *CJTL* 2, 321-363.

<sup>62</sup> Mindia Vashakmadze and Matthias Lippold, 'Nothing But a Road Towards Secession: the International Court of Justice's Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo' (2010) 2(2) *GJIL* 619-647; Yee (n 8).

<sup>63</sup> 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>.

<sup>64</sup> 'Foreign Ministry Spokesperson Qin Gang's Response to the International Court of Justice's Advisory Opinion on the Kosovo Case' (*Ministry of Foreign Affairs of the People's Republic of China*, 23 July 2010) <<http://www.mfa.gov.cn/eng/xwfw/s2510/t719113.htm>> accessed 27 January 2014.

<sup>65</sup> 'German FM: UN court ruling on Kosovo "unique decision"' (*Expatica*, 23 July 2010) <[http://www.expatica.com/de/news/german-news/german-fm-un-court-ruling-on-kosovo-unique-decision-\\_85299.html](http://www.expatica.com/de/news/german-news/german-fm-un-court-ruling-on-kosovo-unique-decision-_85299.html)> accessed 27 January 2014.

<sup>66</sup> 'España seguirá sin reconocer la independencia de Kosovo' (*Por Agencia EFE*, 22 July 2010) <<http://www.google.com/hostednews/epa/article/ALeqM5gT8UtlDpZk3jBcvfxvL64w8aYo1A>> accessed 27 January 2014.

of independence, did not so much contribute to a settlement along the lines of the regime set in place by the Security Council, but in effect paved the way to a secession that in time could only be accepted by Serbia, which is, of course, one way of settling the dispute.

#### 4. A guardian perspective

A third constituency-based perspective on the Advisory Opinion is that the Court has to serve the interests of a much wider group of states (and perhaps ‘the international community’ and the invisible college of international lawyers, to which the judges normally belong/identify with) by developing international law. This obviously vastly heterogeneous constituency would expect, above all, that the Court properly applies international law, but also that it provides a contribution to the development of international law.<sup>67</sup> It has been observed that a number of decisions ‘candidly aim at influencing the general legal discourse by establishing abstract and categorical statements as authoritative reference points for later legal practice.’<sup>68</sup> By and large it would seem that in the past such contributions have been accepted as valuable by states.

The Court can contribute to such development by finding that a particular rule is or is not part of customary international law, or by identifying or clarifying a particular treaty obligation, particularly in cases of ‘dynamic’ treaty interpretation.<sup>69</sup> This role in law development also clearly applies, and perhaps even more so, for advisory opinions. Indeed, in the several advisory opinions, including the *Reparation for Injuries* Advisory Opinion,<sup>70</sup> the *Genocide*

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<sup>67</sup> Hersch Lauterpacht, *The development of international law by the International Court* (Stevens & Sons 1958); Hans Wehberg, *The problem of an International Court of Justice* (Clarendon Press 1918).

<sup>68</sup> Armin von Bogdandy and Ingo Venzke, ‘In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification’ (2010) 23 EJIL 7-41, at 15.

<sup>69</sup> Frahm (n 28) 1041-1042.

<sup>70</sup> *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) ICJ GL No 4, [1949] ICJ Rep 174, ICGJ 232 (ICJ 1949), 11th April 1949, International Court of Justice [ICJ].

Advisory Opinion,<sup>71</sup> the *Namibia* Advisory Opinion,<sup>72</sup> and the *Wall* Advisory Opinion,<sup>73</sup> the Court has provided a substantial contribution to the development of international law.<sup>74</sup>

The margins for the Court are narrow, however, and will be guarded by the diverse interests and expectations of states. In the Advisory Opinion in *Legality of Nuclear Weapons*, some states had contended that in answering the question posed, the Court would be going beyond its judicial role and would be taking upon itself a law-making capacity. The Court made clear that in the circumstances of the case it was not called upon to legislate, but that its task rather was ‘to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons.’<sup>75</sup> It also said that

the contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present corpus juris is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.<sup>76</sup>

In the *Kosovo* Advisory Opinion, in view of the unclear status of the rules of international law in issue, any answer to the ‘in accordance’ question that would touch on questions of secession and self-determination would inevitably lie in the grey area where specification of the contents and scope of rights and duties would lead to legal development.

In such cases it will immediately appear that the interests of states and the ‘indivisible college’ as a homogeneous group quickly falls apart. For the question is, who benefits from development of international law in this particular area? Development of the law is not good per se – it all depends on what interests the current law protects and what interests a development would serve. Every silence of international law, or an ‘undeveloped’ state of international law, also serves particular interests. So in each specific context it is to be

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<sup>71</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) ICJ GL No 12, [1951] ICJ Rep 15, ICGJ 227 (ICJ 1951), 28th May 1951, International Court of Justice [ICJ].

<sup>72</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (n 15).

<sup>73</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 15).

<sup>74</sup> *Frahm* (n 28) 1041-1042.

<sup>75</sup> *Legality of the Threat or Use of Nuclear Weapons* (n 9) para 18.

<sup>76</sup> *Ibid* para 18.

determined whose particular interests are served by the development of international law in a particular direction.

This holds true both for the question of whether the Declaration was in conformity with the *lex specialis* (the regime set forth by the Security Council) and for those points where the Court could have made a contribution to the development of international law, notably the right of self-determination, the right of secession, the right of territorial integrity in relation to recognizing states, and the question of whether non-state actors could unilaterally undermine a regime aimed at the settlement of a situation set up by the Security Council. Some have said that on these points the Court should have been more affirmative in developing the law.<sup>77</sup> However, none of these points are (only) abstract questions that might benefit from the development of international law – an answer either way may perhaps be said in the long run to be in the collective interests of the state parties, but at the same time inevitably serve particular interests of particular actors.

From this perspective, a few comments can be made on the Kosovo Advisory Opinion in relation to the regime of the Security Council and to the wider questions of territorial integrity, self-determination, and secession.

It was already observed above that the Advisory Opinion's approach to the regime set up by the Security Council was problematic. Kohen and Del Mar noted that the Court failed to uphold the legally binding provisions of SC Resolution 1244, and it did not qualify as unlawful or invalid an act of a subsidiary body of the Security Council that was undertaken in excess of authority and contrary to the fundamental provisions of that Resolution. Thereby, they argued the Court has not fulfilled its role as 'the guardian of legality for the international community as a whole.'<sup>78</sup>

The opinion on the Court's silence on matters of territorial integrity, self-determination, and secession has led to more mixed results. Two positions can be identified. First, some commentators appeared to be satisfied by the Opinion because the Court just did what it was asked to do. On this reading, the Court was simply not asked to pronounce on the larger questions of secession and self-determination, and the decision not to go in that direction was understandable and sound. The Court avoided these dilemmas by interpreting the question

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<sup>77</sup> This is a position taken by many scholars in the aftermath of the Kosovo Opinion, see for example: Ryngaert (n 40) 481.

<sup>78</sup> Kohen and Del Mar (n 20).

posed by the General Assembly narrowly, and saying that it was not necessary to resolve the questions of self-determination and remedial secession in the present case. The General Assembly had requested the Court's opinion only on whether or not the Declaration of Independence was in accordance with international law, and the Court found questions relating to the right to separate from a state beyond the scope of the question.<sup>79</sup> Several scholars have observed that the Court's response that Kosovo's Declaration of Independence did not violate general international law was correct and hardly surprising.<sup>80</sup>

Second, for other commentators, the Court's failure to engage with questions of secession and self-determination was incorrect. Several Judges thought that the Court should not have declined the possibility to contribute to the development of international law, and that doing so would in fact have been in the collective interests of states. Judge Yusuf wrote that the Court

had a unique opportunity to assess, in a specific and concrete situation, the legal conditions to be met for such a right of self-determination to materialize and give legitimacy to a claim of separation. It unfortunately failed to seize this opportunity, which would have allowed it to clarify the scope and normative content of the right to external self-determination, in its post-colonial conception, and thus to contribute, *inter alia*, to the prevention of unjustified claims to independence which may lead to instability and conflict in various parts of the world.<sup>81</sup>

Judge Sepúlveda-Amor argued that dealing with the underlying issues, and clarifying the law on the questions of the scope of the right to self-determination, the question of 'remedial secession', the extent of the powers of the Security Council in relation to the principle of territorial integrity, the continuation or derogation of an international civil and military administration established under Chapter VII of the Charter, the relationship between UNMIK and the Provisional Institutions of Self-Government and the progressive diminution of UNMIK's authority and responsibilities, and, finally, the effect of the recognition or non-recognition of a state in the present case would in fact have benefitted not just the General Assembly, but also the Security Council and the Secretary-General of the United Nations.<sup>82</sup>

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<sup>79</sup> Advisory Opinion (n 1) para 83.

<sup>80</sup> Hurst Hannum, 'The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?' (2011) 24 LJIL 155; Thomas Burri, 'The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links' (2011) 11 German Law Journal 881

<sup>81</sup> Advisory Opinion (n 1) para 17.

<sup>82</sup> *Ibid*, para 33.



Scholars also have expressed disappointment that the Court did not deal with this set of issues.<sup>83</sup> Dugard comments that the Court adopted a fallacious reasoning on the legality of secession. He argues that the better view is that, in the context of the Kosovo problem, a unilateral declaration of independence was as much an act of secession as a military campaign against Serbia to secure Kosovo's independence, and that as such it fell to be judged by the international law rules governing secession. The Court should therefore have enquired into questions of self-determination and its relation to territorial integrity.<sup>84</sup>

But it is one thing to say that the Court should have dealt with these questions, and quite something else to determine what exactly the Court should have said. Given that states have not been able to agree on clear answers to such questions, it was unrealistic to expect the Court to do so. In assessing the potential impact of any decision of the Court on the development of the law, the pertinent question is whether it could have made such a contribution to the development of international law given its expected impact on the behaviour of states:<sup>85</sup> 'given the formal and functional limits placed on the ICJ, its decisions only shape the law where they are taken up by other actors engaged in the process of legal development.'<sup>86</sup> If the Court were not to be followed, this would actually undermine its position.<sup>87</sup> This is a highly relevant consideration when assessing, if the Court had pronounced itself on self-determination and other contested issues, whether its Opinion could possibly have had an impact.

Inevitably, the answer would have been welcomed by some and rejected by others. While, to some extent, this may be true for all cases where the Court makes a contribution to the

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<sup>83</sup> Vashakmadze and Lippold (n 58); Thomas Burri, 'The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links' (2011) 11 GLJ 881; Robert Muharremi, 'A Note on the ICJ Advisory Opinion on Kosovo' (2011) 11 GLJ 867; Hannum (n 80); Alexander Orakhelashvili, 'The International Court's Advisory Opinion on the UDI in Respect of Kosovo: washing away the "Foam on the Tide of Time"' in *Max Planck Yearbook of United Nations Law* (vol 15, 2011) 65-104.

<sup>84</sup> John Dugard, 'The Secession of States and their Recognition in the Wake of Kosovo' (2011) 357 *Recueil des cours* 9-222, 184.

<sup>85</sup> Tams and Tzanakopoulos (n 5) 800. See also Lauterpacht (n 67) 189-190 ('judicial legislation ... cannot attempt to lay down all the details of the application of the principle on which it is based, It lays down the broad principle and applies it to the case before it. Its elaboration must be left [...] to ordinary legislative processes or to future judicial decisions disposing of problems as they arise.')

<sup>86</sup> Tams and Tzanakopoulos (n 5).

<sup>87</sup> Lauterpacht (n 67) 76; Christopher G Weeramantry, 'The function of the International Court of Justice in the Development of International Law' (1997) 10 LJIL 309.

development of international law, the issues in these cases were particularly open and sensitive. Addressing them expressly would have risked that at least one camp would have considered the Court politically irrelevant because it was either too conservative or too utopian.

Be that as it may, the often-heard critique that the Court said nothing beyond answering the narrow question is not entirely correct. By limiting its reading of the question, the Court could not entirely prevent giving any answer of broader significance.

First, the Opinion can be read as an affirmation of the old rule that secession is not prohibited by international law.<sup>88</sup> Though the Court did not say this in so many words, it seems quite inconceivable that the Court would take a formalistic position that the Declaration in itself was not prohibited by international law, whereas secession was prohibited without even alluding to that principle.

Second, the Court affirmed that ‘the scope of the principle of territorial integrity is confined to the sphere of relations between states.’ This has been critiqued because it would be an unwelcome effect in resolving future separatist conflicts by rendering countries extremely skeptical of solutions of autonomy.<sup>89</sup> For instance, the Indian government fears that the Kosovo Opinion will set ‘dangerous precedent’.<sup>90</sup> However, leaving aside the special situation existing under SC Resolution 1244, this was surely the correct conclusion as a matter of positive international law.

Third, it can be inferred from the reasons that the Court gave for not addressing the argument that ‘the population of Kosovo has the right to create an independent State either as a manifestation of a right to self-determination or pursuant to what they described as a right of “remedial secession” in the face of the situation in Kosovo’, that the Court in fact took the position that there was no such right. The Court explained its decision not to address the topic by stating that this is ‘a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question’.<sup>91</sup> Similar differences existed regarding whether international law provides for a right of ‘remedial

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<sup>88</sup> Michael Bothe, ‘Kosovo – So What? The Holding of the International Court of Justice is not the Last Word on Kosovo’s Independence’ (2011) 11 GLJ 837.

<sup>89</sup> Theodore Christakis, ‘The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?’ (2011) 24 LJIL 73, 85.

<sup>90</sup> ‘India not to recognize Kosovo’ (*Sify News*, 9 August 2010) <<http://www.sify.com/news/india-not-to-recognize-kosovo-news-national-kijuEcjbjdd.html>> accessed 27 January 2014.

<sup>91</sup> Advisory Opinion (n 1) para 82

secession' and, if so, in what circumstances.<sup>92</sup> Yee observes that these reasons for not addressing the argument show precisely that there was no *opinio juris* for it, and thus no custom regarding such a right can be found here.<sup>93</sup> While this may be taking it a bit too far, as theoretically it may be possible that while *opinio juris* could not be inferred from the participants in the proceedings, yet could be from the wider practice of states. However, a substantial gap between these two bodies of evidence would be unlikely.

The Court's narrow approach to the question posed by the General Assembly and the somewhat understated way in which it formulated its understanding of the principle of territorial integrity in relation to self-determination may not have been an unwise one. It allowed states to consider the answer to be narrow and case-specific, which permitted them both to continue their policies in relation to Serbia and to be unrestrained in relation to other situations where the question of self-determination arose. Falk observes in this context that 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.<sup>94</sup>

Indeed, many actors declared after the Kosovo Advisory Opinion was delivered that this neither affected the policies in relation to Kosovo, nor the policies in relation to other questions of self-determination. Assistant Secretary at the US State Department, Philip H. Gordon, said 'I would also underscore that the Court's opinion was closely tailored to the unique circumstances of Kosovo. This was about Kosovo. It was not about other regions or states. It doesn't set any precedent for other regions or states.'<sup>95</sup> UK Foreign Secretary William Hague welcomed the Advisory Opinion, but said 'Kosovo is a unique case and does not set a precedent.'<sup>96</sup> After the Court's Opinion, Nikolay Mladenov, Bulgaria's Foreign Minister, issued a statement that it does not change Bulgaria's position on Kosovo, which it

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<sup>92</sup> Advisory Opinion (n 1) para 82.

<sup>93</sup> See Yee (n 8) at 39.

<sup>94</sup> Falk (n 61).

<sup>95</sup> 'Bureau of European and Eurasian Affairs Remarks' (*U.S. Department of State*, 23 July 2010) <<http://www.state.gov/p/eur/rls/rm/2010/145104.htm>> accessed 27 January 2014.

<sup>96</sup> 'Foreign Secretary welcomes Kosovo ruling' (*Gov.uk*, 22 July 2010) <<https://www.gov.uk/government/news/foreign-secretary-welcomes-kosovo-ruling>> accessed 27 January 2014.

recognized in 2008; however, he also stated that the Court's decision should not be considered as a precedent in international law.<sup>97</sup>

At the same time it allowed opponents to maintain their position. Spanish Foreign Minister Miguel Ángel Moratinos expressed his 'respect' for the Court's decision, but added that it will 'in no case change the position of Spain's non-recognition of Kosovo.'<sup>98</sup> Vishnu Prakash, spokesperson for India's external affairs ministry, disagreeing with the Court's Opinion, stated that '[i]t has been India's consistent position that the sovereignty and territorial integrity of all countries should be fully respected by all states'.<sup>99</sup> Markos Kyprianou, Cyprus' Foreign Minister, declared that Cyprus will not recognize the independence of Kosovo and that the Court's Opinion will not affect this position.<sup>100</sup> Kyprianou stated that '[t]he decision of the ICJ is restricted only to the specific question which refers to the procedure of the declaration itself.'<sup>101</sup> The Cyprus government issued the following statement: 'Cyprus would like to reiterate its position of principle on the issue of Kosovo and reaffirm its unwavering position of respect to the sovereignty and territorial integrity of Serbia, which includes the Kosovo and Metohija province.'<sup>102</sup>

If anything, the narrow approach taken by the Court allowed these states, whose substantive positions were quite far apart, to maintain their position, and in that respect did not undermine or significantly influence the political process. The Advisory Opinion was thus not unsuccessful in satisfying most of the constituents of the Court and in maintaining the image that the Court can function as a guardian of the international legal order.

## 5. Assessment

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<sup>97</sup> 'Bulgaria for dialogue after ICJ decision' (*b92*, 25 July 2010) <

[http://www.b92.net/eng/news/politics-article.php?yyyy=2010&mm=07&dd=25&nav\\_id=68668](http://www.b92.net/eng/news/politics-article.php?yyyy=2010&mm=07&dd=25&nav_id=68668)> accessed 27 January 2014.

<sup>98</sup> 'España seguirá sin reconocer la independencia de Kosovo' (*Por Agencia EFE*, 22 July 2010)

<<http://www.google.com/hostednews/epa/article/ALeqM5gT8UtlDpZk3jBcvfxvL64w8aYo1A>> accessed 27 January 2014.

<sup>99</sup> *Ibid.*

<sup>100</sup> 'Cyprus Foreign Minister: Cyprus Won't Change Stance on Kosovo' (*Novinite*, 26 July 2010) <[http://www.novinite.com/view\\_news.php?id=118525](http://www.novinite.com/view_news.php?id=118525)> accessed 27 January 2014.

<sup>101</sup> *Ibid.*

<sup>102</sup> 'Reaction in quotes: UN legal ruling on Kosovo' (*BBC*, 22 July 2010)

<<http://www.bbc.co.uk/news/world-europe-10733837>> accessed 27 January 2014.

The point of distinguishing between the three constituency-based perspectives is not so much to distinguish between alternative approaches that were or could have been taken by the Court, but rather to provide lenses by which particular choices of the Court can be explained and/or assessed. In this sense the three perspectives are not mutually exclusive options; rather, they provide different lenses for examining one decision. They can provide useful perspectives which can shed light on particular parts of the process or substance of the advisory proceedings,<sup>103</sup> showing which constituencies benefited and which did not.

On the whole, however, the Kosovo Advisory Opinion is not an easy case for testing, developing, and comparing the three perspectives. Given the political stalemate on the ground, there was no real prospect that the Court could have contributed to the resolution of the dispute. Moreover, the legal issues lurking behind the question asked were so politically sensitive, and the positions and practices of states so divided, that this was hardly a case where the Court could have provided a useful contribution to the development of general international law.

In substance, the overriding conclusion is that the response provided by the Court may not have satisfactorily catered to the interests formally expressed by the main constituencies of the Court (the General Assembly and the Security Council), but the result may well have served to protect the stature of the Court in relation to its key constituencies.

Two considerations are particularly relevant in this context. On the one hand, exposing the conflict between the Declaration of Independence and SC Resolution 1244 would have disconnected the Court from the political developments. This (arguably correct) approach may have marginalized the Court, which in the long run may not have been in the interests of the Court itself and all its constituencies. On the other hand, a wider discussion of the question of whether the Declaration was in accordance with international law would have required the Court to pronounce on highly controversial questions of secession and self-determination. Thereby, it would inevitably have divided its constituencies in a manner that likewise would have threatened its position, which in the long run would also not have been in the interests of its constituencies. The fact that the Court in the short term only served the interests of Kosovo and its supporters is probably better understood as a side-effect of its

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<sup>103</sup> Not unlike Graham Allison, 'Conceptual models and the Cuban Missile Crisis' (1969) 63 *APSR* 689-718; Graham Allison and Philip Zelikow, *Essence of Decision, Explaining the Cuban Missile Crisis* (2nd ed, Pearson 1999).

decision to serve its longer term interests than as a strategic decision to serve this particular constituency over all others.

Yet, in the end, one (undefined) constituency may have lost out. These are the peoples and states that may benefit from future international administrations that serve to maintain and build the peace in conflict areas. By allowing non-state actors to unilaterally pull out of such an arrangement so easily, the Court may well have discouraged relevant actors to enter into such arrangements on future occasions. However, the fact that these actors are as yet unknown, and that the Security Council was too divided to insist on the continuation and implementation of its arrangement, suggests that this will not harm the Court – and this is probably what the Court cared about the most.