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ICJ DISCRETIONARY POWERS: JUDICIAL ACTIVISM V. RESTRAINT IN THE ADVISORY OPINION ON KOSOVO[**]

In response to Serbia's request, the United Nations General Assembly sought an Advisory Opinion from the International Court of Justice regarding the legality of Kosovo's 2008 unilateral declaration of independence. Employing a conceptual framework grounded in judicial activism and restraint, this analysis critically examines the Court's inconsistent exercise of its discretionary powers, applied in stretching and retracting both the scope of the question posed, as well as its own judicial propriety. The Court's selective engagement with these legal questions reveals an underlying judicial strategy: one that avoids unresolved ambiguities, reflects implicit views on statehood, and navigates the uneasy space international law occupies between norm entrepreneurship and the Court's commitment to apolitical neutrality and political restraint. Tracing the Court's reasoning through this lens offers insight into the multifaceted drivers of its interpretive approach to politically sensitive issues, and ultimately, to the evolution of international law.

Key words: *Advisory opinion. – Judicial activism. – Judicial restraint. – Kosovo. – Statehood.*

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1. INTRODUCTION

Kosovo has been subject to UN Security Council (UNSC) Resolution 1244 since 1999, which authorizes the North Atlantic Treaty Organization's military presence in Kosovo to defuse the armed conflict that followed the removal of Kosovo's administrative autonomy in 1989.[1] Resolution 1244 set up a cooperative administration between the United Nations Interim Administration Mission in Kosovo (UNMIK) and the Provisional Institutions of Self-Government (PISG) (Christie 2010, 205–206). The resolution's arrangement seeks to preserve peace until a political settlement is reached regarding the status and autonomy of Kosovo, while "reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia".[2] However, in 2007, without UNSC input, UN special envoy Martti Ahtisaari formulated a plan which guided Kosovo's 2008 Unilateral Declaration of Independence (UDI).[3] Amidst a political deadlock in diplomatic negotiations with Serbia, and with Kosovo's struggle for autonomy continuing to make the UNSC agenda for issues threatening international peace and security, Serbia requested that the United Nations General Assembly (UNGA) to seek the International Court of Justice's (ICJ) opinion on the question "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"[4] In 2010, following a 9–5 vote to accept the UNGA's request, a 10–4 vote at the Court upheld that Kosovo's UDI did not breach international law. The votes reflect a divided Court, with judges Tomka, Koroma, Bennouna and Skotnikov voting against this finding, and nine out of the fourteen judges expressing dissenting or separate opinions.[5]

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1 UN Security Council, Resolution 1244 10 June 1999, S/RES/1244.

2 UN Security Council, Resolution 1244 10 June 1999, S/RES/1244, 2.

3 ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 22 July 2010, para. 75.

4 ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, summary of the Advisory Opinion, 22 July 2010, 1.

5 ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, summary of the Advisory Opinion, 15. Author's correspondence with Vuk Jeremić, former Minister of Foreign Affairs of Serbia (2007 to 2012), and former president of the United Nations General Assembly: "The principal recognizers wanted it to happen quickly [ICJ 2010 Advisory Opinion]... Normally the procedure would have taken quite a while... We used this time to convince states not to recognize Kosovo and wait for the Court... the momentum of the recognition came down as a result... our position that this creates a very dangerous precedent had already started materializing...

Nevertheless, the UNGA's posing of this question marked a pivotal point in the discussions of Kosovo's statehood, as the issue, although partially, was shifted from the political to the international legal arena.

In its 2010 Opinion, the Court's reasoning arguably exhibited an inconsistent exercise of its interpretive powers, applied in stretching and retracting the scope of its interpretation to avoid contemplating the UDI's legal consequences on Kosovo's statehood. This paper seeks to answer the question whether the Court's interpretive choices in its 2010 Opinion reflect the Court's implicit views on the right to remedial secession under international law in the case of Kosovo, an issue that fifteen years later remains a politically and legally contentious one.[6] This will be done through a two-step analysis. Firstly, a conceptual framework grounded in judicial activism and restraint will be employed to explain the underpinnings of the Court's judicial strategy at key junctures of its deliberation. After tracing the Court's reasoning through this lens, this paper will analyze the Court's approach in light of its wider interpretive culture to offer insight into the ICJ's stance on politically sensitive issues, bearing in mind the ICJ's role as a post-World War II mechanism designed to provide peaceful dispute resolution while fostering the evolution of international law to address emerging challenges. Thus, the relevance of the Court's opinion to Kosovo today lies in its enduring political salience as well as in how it exemplifies the uneasy space international law occupies, between legal necessities of norm entrepreneurship, while maintaining apolitical neutrality and the political necessity of restraint.

South Ossetia and Abkhazia declared independence and Russia recognized them... The West realized that it was not going well and needed to accelerate this. It came as a surprise for our legal team that the Court would not spend too much time deliberating on it [the Advisory Opinion], especially given that the Court was divided... which was not a good indication because it became obvious to us political pressures are happening on the Court, and then when the Chinese retired their judge [Shi Jiuyong], with no direct replacement, it started to turn on the alarm lights for us."

6 Author: What is the significance of the Advisory Opinion today? Jeremić: "If you look at how the Russians did it in Ukraine, in the creation of the republics of Donetsk, Luhansk, and Crimea... They first went through that unilateral declaration of independence [of Kosovo], followed by the act of accession to the Russian Federation. Crimea, Donetsk, and Luhansk followed the template of Kosovo, exactly, almost word by word. They even cited the 2010 ICJ opinion on Kosovo in the preamble. The first step explicitly used the precedent of Kosovo. I think this is a consequence of the theater they played with us at the ICJ."

2. THE LEGAL SIGNIFICANCE AND CONTROVERSIAL NATURE OF THE QUESTION

The question posed by the UNGA held great potential to address a *non liquet* in international law, a gap or ambiguity where no existent law suffices, as is, to address an emergent issue (Bodansky 2006). In this case, the existing law was unclear on whether the right to self-determination could extend to a remedial right to unilateral secession in a post-colonial context (Ćirković 2019, 910). The question garnered considerable international attention, given the prevalence of separatist movements and states' sensitivity to them across the various regions of the world.[7] Thirty-six states participated in written proceedings, with the case marking the first instance where all five permanent members of the Security Council participated in both the oral and written proceedings (Yee 2010, 763).[8] However, the ICJ maintained that the wider issues attached to the UNGA's request fell outside the legal dimension of the question it confined itself to address (Hannum 2011, 155–167).[9]

"The General Assembly has requested the Court's opinion only on whether or not the declaration of independence is in accordance with international law. Debates regarding the extent of the right of self-determination and the existence of any right of "remedial secession", however, concern the right to separate from a State... That issue is beyond the scope of the question posed by the General Assembly."[10]

As argued in the dissenting opinions of Judge Yusuf and Judge Simma, the Court's conclusion could be seen as a missed opportunity to evolve international law and address the question of whether Kosovo has a positive right to independence.[11] However, at the same time, the Court's

[7] In testament to the global anticipation of the Court's take on self-determination, the ICJ website was inaccessible for several hours after the advisory opinion was published, due to immense traffic. See Jovanović 2012, 1.

[8] Noting that not even the Advisory Opinion on nuclear weapons' proceedings was able to draw in all five permanent members of the UNSC.

[9] Jeremić: "The wording opened the way for the Court to give a very weird interpretation... My opinion now with the benefit of hindsight is that regardless of what we asked, the majority of judges in the Court would have come up with a way to interpret it so that it does not come across as crushing for the independence movement, because the independence movement was supported by the most powerful [states] at that time."

[10] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, para. 83.

[11] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to summary, 3–5, 16.

stance risks inadvertently encouraging separatist movements around the world to emulate Kosovo's actions, best illustrated by comments of the then-President of Republika Srpska, Milorad Dodik, who said that the ICJ's opinion "hypothetically opens the possibility for Republika Srpska to secede from Bosnia-Herzegovina" (Papić 2015, 6–10; B92 2010).[12] The significance of the issue is further demonstrated by diplomatic reactions of states to the UDI, which reflected a global division between major state powers, with the US and some EU states recognizing Kosovo's statehood, while Russia and China supported Serbia's claim over the territory (Milanović 2015, 4). Hence, it becomes imperative to this analysis to understand how and why the Court arrived at the conclusion that Kosovo's UDI was legal, and why it avoided engaging with the more substantial issue of the right to self-determination.

3. JUDICIAL ACTIVISM AND RESTRAINT: THEORETICAL FRAMEWORK

Judicial activism is an emerging theoretical framework in international law, with still limited scholarly literature and varying definitions of the concept (Zarbiyev 2012, 251). Hence, this analysis will attempt to reconcile existing definitions and parameters for assessing judicial activism and restraint in a manner that enables their situation within the broader culture of the ICJ's jurisprudence. While the ICJ's 2010 Advisory Opinion has been the subject of extensive critique, judicial activism has not been systematically utilized to examine the Court's reasoning in relation to Kosovo's UDI. Existing scholarship merely cites the 2010 Opinion as an example of judicial restraint when attempting to define judicial activism as a framework, however, these terms are not explicitly employed, nor are the underlying concepts fully developed in analyses of the opinion on Kosovo (Orakhelashvili 2011, 74; Hannum 2011, 21, 155; Zarbiyev 2012, 258; Kooijmans 2007, 752). Therefore, for the purposes of this paper, the terms "judicial activism" and "judicial restraint" will be used to denote the characteristic elements identified in this section.

[12] State proponents of Kosovo's independence, including the UK, the US, and France, welcomed the Court's opinion and leveraged the moment to urge wider recognition of its statehood. See Papić 2015, 7.

3.1. Judicial Activism

The terms "judicial activism" and "judicial restraint" emerged from conflicting beliefs about the role of the judicial function. According to Leoni Ayoub (2022, 30–31), they are best understood in relative terms to the Court's balancing between what is perceived as fulfilling its legitimate judicial functions and what is seen as potential political influence.

Fuad Zarbiyev (2012, 248) suggests that judicial activism "differs from politics not so much in kind as in degree." In setting the parameters for assessing judicial activism, Zarbiyev settles on points of affinity within existing literature on the framework, centered on the Court's expansion of its scope of jurisprudence. Other scholars then help detail what an activist expansion of jurisprudence entails. Deepak Mawar (2019, 427), for instance, defines judicial activism as the proactive development of law to adapt to contemporary needs, which can extend to "non-legal dimensions". Ayoub supports this position, claiming that judicial activism – often seen as a controversial term with negative connotations due to its association with political activity – is now closely tied to the "role of the modern judge" (2022, 30). Former ICJ Judge Kooijmans proposed a third type of classification, "proactive judicial policy", that combines, out of necessity, both activism and restraint in evolving the law, suggesting that both approaches are needed to tackle disputes emerging from a changing international environment (Ayoub 2022, 36).

For the purpose of this analysis, Ayoub's more specific criteria for identifying judicial activism provide a clearer framework through which elements of the Court's approach become more easily recognizable as activism. Ayoub's criteria include judges "explicitly going against what the parties to the dispute had indicated *ex ante*, [...] changing the judicial procedures in flagrant opposition to the written rules or regulations or modifying the law from what it was previously accepted to be" (Ayoub 2022, 37). This will be combined with Keenan Kmiec's five interpretations of judicial activism: "invalidation of arguably constitutional actions of other branches, failure to adhere to precedent, judicial 'legislation', departures from accepted interpretive methodology, result-oriented judging" (Zarbiyev 2012, 249–250).

3.2. Judicial Restraint

Beyond being the antonym of judicial activism, judicial restraint is defined as the active and deliberate avoidance of providing answers that diminish existing ambiguity in international law. Adopting the essence of Mawar's definition, it is the strict and rigid adherence to established legal precedents, with minimal expansive interpretation of international legal norms when applying them to contemporary disputes (Mawar 2019, 431–433).

A characteristic feature of judicial restraint is the predictability of resulting decisions, based on previous Court decisions and approaches – stare decisis – a rationale the Court inherited from the PCIJ in order to, according to Mawar, maintain the "objectivity" of decision-making. By strictly following precedent without considering whether or how existing law can be modified in its application to a new situation, judges appear more politically neutral. However, a criticism is that stare decisis is "seen as an act of judicial restraint when the development of the law is required," which can detract from the Court's ability to administer justice in subsequent cases (Mawar 2019, 430–432).

Simply put, both terms are ultimately subjective evaluations, with judicial activism entailing an expansion of the scope of jurisprudence beyond what is perceived as strictly legal, to include political considerations, as well as the development of new interpretive approaches not based on precedent – i.e., when "the Court is encroaching upon territory not clearly reserved to it" (Kmiec 2004, 1465). However, it must be noted that several limitations arise from the scope and level of analysis adopted in this study. First, the ICJ is treated largely as a unitary actor, whereas in practice its decisions are the outcome of a collective drafting process, in which different judges prepare distinct operative paragraphs that are then voted on. The need to secure a majority across a heterogeneous bench – composed of judges trained in divergent legal traditions including, for instance, both common-law and civil-law cultures of jurisprudence – may itself produce the kind of oscillation between restrictive and permissive interpretive moves that this paper attributes to the Court as a unitary actor.[13] The compromise

[13] The interpretive approaches embraced by individual judges, including the influence of civil law's textual formalism or common law's pragmatism and reliance on precedent, which stems from judges' diverse backgrounds, could have also contributed to the final opinion's fragmented interpretive lens. For a comprehensive analysis of the influence of judges' legal culture on international jurisprudence, illustrated with judges Skotnikov, Bennouna, and Tomka's approaches in the opinion on Kosovo, and how particular legal cultures tend toward juridical restraint, see Pratap 2023.

between divided judges within the bench could be studied separately from institutional philosophy, for instance, in explaining judicial outcomes. Secondly, the analysis cannot apply the conceptual framework of judicial activism and restraint developed in this study to the broader history of ICJ jurisprudence, thereby enabling a wider comparative assessment that would better substantiate findings and enhance the validity of this study, especially given the relative and subjective nature of the framework. Instead, this study leans heavily on existing analyses by legal scholars, which, while informative, may carry inherent biases or assumptions that could influence the interpretation of judicial activism and restraint, and may not fully encapsulate the complexity and nuance of its application.

This analysis is also helped by Volker Röben's (2010, 1065) classification of rule-centered and principle-based approaches to the interpretation of legal norms, in the context of the ICJ's 2010 Advisory Opinion on Kosovo. Röben delineates "rules" as formal prescriptive norms (such as treaties and customary law) that impose specific obligations, as opposed to "principles", which provide interpretative guidance and flexibility across diverse legal contexts. The principle-based approach that the Court resorts to when interpreting international legal norms, therefore, embodies a flexibility identifiable with Ayoub's activist criteria of exceeding the boundaries of existing law (Ayoub 2022, 37). Meanwhile, a rules-based approach exhibits elements of judicial restraint by attempting to adhere to legal precedents with minimal expansive interpretations (Röben 2010, 1073). The key junctures, which are emphasized by Röben as most illustrative of the Court's utilization of one of either approach, will be further scrutinized for their utility to this analysis.

4. A HISTORY OF THE ICJ'S MIXED APPROACH

The concept of judicial activism emerged with the migration of political debates on the US Supreme Court's approach to Europe in the 1950s, as new legal problems demanded an evolved and more flexible understanding of the law.[14] This discussion eventually reached the ICJ, since the changing world order and emergence of new states and power dynamics necessitated that

[14] Notably, the concept of judicial activism in its initial more ambiguous conception as the need to balance strict adherence to precedent with evolution and change, caught traction with the judges of the new Constitutional Court of Germany, the Bundesverfassungsgericht, during the post–World War II reconstruction period, see McWhinney, 2010.

courts adapt their jurisprudence to maintain their relevance and ability to adjudicate new disputes (McWhinney n.d.; Kmiec 2004, 1446–1447). The incorporation of a more activist approach by the ICJ was also inspired by political backlash against the Court following its 1966 ruling on South West Africa (Higgins 2009, 758). This was due to the Court's focus on procedural issues of standing rather than on the substantive claims on South Africa's imposition of racially based segregation laws under its apartheid regime, via its mandate over South West Africa.[15] International critics accused the Court of prioritizing narrow legalism over broader principles of justice, viewing the 1966 Opinion as consequently having failed to uphold international justice (Higgins 2009, 773–774). The 1966 case is described by Edward McWhinney as having posed "intellectual–legal divisions in terms of judicial philosophy and approach to judicial decision-making that have not been fully resolved to this day" (McWhinney 2006, 6). However, aided by the introduction of new judges to the ICJ, the Court's approach began to "liberalize" throughout the 1970s and 1980s, according to McWhinney, oscillating between conservative and activist thinking (McWhinney n.d.).

The 1990s then bore further momentum for ICJ change as the Court witnessed the transformation of the post-Cold War world order, the breakup of Yugoslavia and the threat of nuclear proliferation. The Court was further encouraged to devise new laws and understandings of existing law, in order to keep up with the rapidly changing environment. However, despite the progress, the ICJ retained a now characteristic oscillation between judicial activism and judicial restraint, with its 2010 Advisory Opinion being one such example of the Court resorting to more "technically oriented" restrained jurisprudence (Mawar 2019, 427; McWhinney n.d.).

5. JUDICIAL DISCRETION IN THE KOSOVO CASE

In assessing the legality of Kosovo's UDI, the Court consulted general international law, UNSC Resolution 1244, and the Constitutional Framework established by UNSC Resolution 1244, as the applicable binding laws for the

[15] The vote between the judges was tied, hence the President cast a deciding vote to reject the claims of the Empire of Ethiopia and the Republic of Liberia. See South West Africa (Liberia v. South Africa) Judgment of July 18, 1966, para 100.

authors of the declaration.[16] In the following key junctures the Court can be seen oscillating between judicial activism and restraint as it reached its final verdict.

5.1. The Lotus Principle

The Court begins its deliberation by noting that the question posed to it was clear enough as to not require reformulation.[17] However, it immediately took a narrow procedural approach in explaining that it would check only for existing law that prohibited the promulgation of a UDI, with the absence of such a prohibition implying permissibility – an approach based on the 80-year-old Lotus principle developed by the ICJ's predecessor.[18] By applying the Lotus principle – a rule-based approach as identified by Röben – the Court was able to avoid engaging with the broader substantive principles of general law and focus on prohibitions (Röben 2010, 1075–1077).

> "During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation. A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases."[19]

The Court hence refused to clarify whether there can exist a positive right to unilateral secession in international law, as an extension of the right to self-determination, concluding only that declarations can be legal. The Court's approach in this context exemplified an effort to confine the scope of

[16] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, para. 83.

[17] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, para. 51.

[18] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to summary, 4.

[19] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, para. 82.

the question in such a way that it would not require an extension or deeper exploration of the right to self-determination and a subsequent considering of if and how it could be applied to the case of Kosovo (Röben 2010, 1071, 1075–1076).[20] This contraction of the purview of jurisprudence is hence characteristic of judicial restraint (Zarbiyev 2012, 248).

In contrast, while attempting to consider a narrower form of the question posed to it, the Court proactively reformulates the UNGA's question to effectively become whether Kosovo's UDI was not prohibited by international law? Despite the overarching restrained approach, elements of Ayoub's criteria for judicial activism became apparent within the same line of reasoning, as the Court strayed from the intended meaning made obvious through the question's wording by Serbia, in an approach perhaps akin to Kooijmans' understanding of "proactive judicial policy" (Ayoub 2022, 30–31, 35–37). As best formulated in Judge Simma's deceleration:

> "the opinion not only ignores the plain wording of the request itself, which asks whether the declaration of independence was 'in accordance with international law', but that it also excludes any consideration of whether international law may specifically permit or even foresee an entitlement to declare independence when certain conditions are met."[21]

Other Judges, including Yusuf, Cançado Trindade and Sepulveda, similarly criticized the Court's reformulation of the question, arguing that it blatantly ignored the wider discussion Serbia sought to initiate before the Court (Christie 2010, 210).

5.2. Interpreting UNSC Resolution 1244

In its interpretation of Resolution 1244, the Court continued its restraint approach of looking for prohibitive rules and presuming legality where such rules are absent. The Court noted that the UNSC's use of the term "final

[20] Jeremić: "The tensions behind the closed doors of judges' deliberations were such that almost no leakage occurred. Then we started receiving some leakages which indicated that the majority of the judges were trying to find a phrasing that will come across as supportive to Kosovo."

[21] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to summary, 4.

settlement" – in reference to the ultimate goal of the interim administration framework – did not explicitly preclude the promulgation of a UDI (Christie 2010, 205–206).[22]

> "The Court cannot accept the argument that Security Council resolution 1244 (1999) contains a prohibition, binding on the authors of the declaration of independence, against declaring independence; nor can such a prohibition be derived from the language of the resolution understood in its context and considering its object and purpose. The language of Security Council resolution 1244 (1999) is at best ambiguous in this regard."[23]

However, despite the persistence of the logic driven by the Lotus principle, significant elements of judicial activism also emerge in the Court's interpretation of UNSC Resolution 1244. Foremost, and as highlighted by Judge Skotnikov, a UNSC resolution is a political decision, and attempting to interpret a political decision is in itself a political act.[24] While the Court has been asked on multiple occasions to assess compliance with UNSC resolutions, none of these requests demanded as thorough and substantive an interpretation of a UNSC resolution as was required in the Kosovo opinion (Hjort 2019, 6). The ICJ nevertheless opted to interpret Resolution 1244 despite having previously diverged in its understanding of the UN Charter from the UNSC's on the same issues, including in the *Construction of a Wall in the Occupied Palestinian Territory* and the *Lockerbie* cases (Mrázek 2022, 402–404). Consequently, by degree of political engagement the Court departed from accepted interpretive methodology, grounded in "(i) the rules for treaty interpretation in the Vienna Convention as a point of departure, and (ii) interpretation in light of the UN Charter," a deviation that is characteristic of judicial activism (Hjort 2019, 6; Kmiec 2004, 1473–1474).[25] Specifically, the Court deviated from conventional practice by applying treaty interpretation rules to a resolution, particularly its understanding of the resolution's "terms" in "ordinary meaning", and its requirement to interpret

[22] UN Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, para. 11(c).

[23] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to summary, 14.

[24] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to summary, 9.

[25] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, para. 94.

the resolution in "good faith" and in light of its "object and purpose" and "context", per the Vienna Convention (Hjort 2019, 7–12). Notably, Judge Skotnikov argued that if the term "final settlement" were to encompass a unilateral decision by one party, negotiations toward a political resolution – facilitated by the interim framework per its object and purpose – would be rendered "meaningless".[26]

Furthermore, Zarbiyev (2012, 248) posits that when judicial activism is used in extending the scope of jurisprudence, this often comes at the cost of "limiting other actors' discretion". Having established that the Court was able to interpret UNSC resolutions, its choice to do so in the case of Kosovo limited the UNSC's ability to interpret the resolution as its author and as the UN's executive political organ. As the Court acknowledged, and judges Skotnikov and Bennouna emphasized in their separate opinions, the issue of Kosovo's status was a recurrent and ongoing one at the UNSC.[27] Hence, to preserve the harmony between UN organs, as a result of the ICJ's 2010 Opinion, both the UNGA and UNSC had to operate on the assumption that Kosovo's UDI was legal in their subsequent proceedings. For instance, although the UNSC did not condemn Kosovo's UDI, it had still at the time been in the process of deliberating on the matter. The Court noted that the UNSC had previously condemned the UDIs of Southern Rhodesia, Northern Cyprus and Republika Srpska, but that their illegality stemmed from their association with the unlawful use of force – not from their unilateral nature.[28] The Court leveraged this observation in determining that Kosovo's UDI, having not been promulgated through the use of violence, was not illegal. In turn, the ICJ's opinion constricted the UNSC's ability to address the issue in the future by elaborating on its Resolution 1244, its previous practice, and how they should be applied to the matter at hand.[29] The ICJ's interpretation of the Resolution was hence a modification of judicial procedure in Ayoub's meaning of judicial activism, due to the unprecedented degree of substantive interpretation of a UNSC resolution and UNSC practice (Ayoub 2022, 35–37; Hjort 2019, 6).

[26] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, summary of the Advisory Opinion, 9, Annex to summary, 9–10 on object and purpose of the interim framework.

[27] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to summary, 7–9.

[28] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, para. 81; and UNSC Resolutions 216–217 (1965), 541 (1983) and 787 (1992).

[29] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to summary, 1.

5.3. The Authors of the UDI

In evaluating the applicability of laws established under Resolution 1244, the Court noted its binding of only the interim administrative framework it set up, including the PISG and UNMIK.[30] The authors of the UDI hence could only be held accountable for violating the Resolution 1244 framework insofar as they acted within their capacity as the PISG when promulgating the UDI. The Court hence proceeds to deduce whether the authors intended to be bound by Resolution 1244 based on the language of the UDI. Although the UDI was issued by the PISG, the declaration lacks any reference to the institution itself or any indication that it exclusively represented the institution's views. Notably, documents issued by the PISG use the third person singular, whereas the UDI opens with, "We, the democratically-elected leaders of our people".[31] Additionally, the Court noted that the wording of the UDI indicates its authors' awareness of the failure of status negotiations and their resolve to achieve a specific final settlement.[32] Being that the purpose of the interim framework was to facilitate negotiations towards a resolution without dictating the form of the final settlement, a declaration of independence falls outside the scope of activities that the UNSC established framework is set up to oversee. Hence, the Court concluded that the UDI's authors intended it to be an expression of the popular will, and have "acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration."[33]

In their dissenting opinions, judges Koroma, Bennouna, and Skotnikov leveled much criticism against the Court's consideration of the identity of the UDI's authors. The three judges believed that the UDI violated the framework established by Resolution 1244, as well as that the Court allowed

[30] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, paras. 104–106.

[31] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, para. 107.

[32] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, para. 105.

[33] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, para. 109. Author: Why did the court decide that the drafters of the resolution were acting outside their capacity as the PISG? Jeremić: "It was manifest that it is a violation of norms, but they [ICJ judges] were under such huge pressure not to say it explicitly, because it would be a slap in the face to America, to Britain, France, and whoever recognized Kosovo. The pressure on the Court was to come up with this juggly act."

the authors to evade their legal responsibility under the framework.[34] Judge Koroma accused the Court of using flawed reasoning to avoid concluding that Resolution 1244 was violated. Koroma described this approach as a "judicial sleight-of-hand", used to justify characterizing the declaration's authors as representatives of the Kosovar people.[35] Judge Skotnikov, similarly posited that

> "the authors of the UDI are being allowed by the majority to circumvent the Constitutional Framework created pursuant to resolution 1244, simply on the basis of a claim that they acted outside this Framework [...] The majority, unfortunately, does not explain the difference between acting outside the legal order and violating it."[36]

Additionally, Judge Bennouna argued that "if such reasoning is followed to its end, it would be enough to become an outlaw, as it were, in order to escape having to comply with the law."[37] Bennouna concluded that regardless of whether the authors of the UDI represented the PISG, "under no circumstances were they entitled to adopt a declaration that contravenes the Constitutional Framework and Security Council Resolution 1244 by running counter to the legal regime for the administration of Kosovo established by the United Nations."[38] Hence, the conclusion reached by the Court on the authors of the declaration (per the dissenting judges' emphases on its perceived effect of relieving the authors of the UDI from legal responsibility

[34] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to Summary 2–3, 6–7, 9–11 for opinions of judges Koroma, Bennouna and Skotnikov respectively.

[35] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to Summary, 2–3

[36] For reference to "judicial sleight-of-hand", see ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to Summary, 3; for Judge Skotnikov's dissenting opinion, ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to Summary, 10.

[37] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to Summary, 8.

[38] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to Summary, 9.

if the interim framework was deemed to be violated) suggests a degree of unorthodox – if not outcome-based and thus activist – decision making (Kmiec 2004, 1473–1474).[39]

Nevertheless, the continuation of reasoning based on the Lotus principle and the Court's reluctance to engage with the substantive structure of the law to evolve it, despite elements of judicial activism, drives the citation of the ICJ's 2010 Opinion overall as a textbook example of judicial restraint (Bianco 2010, 26; Zarbiyev 2012, 257–258; Mawar 2019, 442)

6. CONTEXTUALIZING THE COURT'S INTERPRETIVE STRATEGY

Having discerned the ways in which the ICJ's reasoning appeared more activist or more restrained in relation to Kosovo's UDI, the following section will examine the general factors influencing the Court's inclination toward either approach in an effort to elucidate the underlying motives that shaped the Court's reasoning in its 2010 Opinion.

6.1. The Court's Approach to Political Questions

The Court's history of approaching political questions is characterized by a narrowing of its focus in an effort to maintain political neutrality. In justifying its engagement of questions with a larger political than legal dimension, the Court contends that,

> "whatever its political aspects, it cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, an assessment of an act by reference to international law."[40]

For instance, in the ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court avoided a definitive ruling by stating that

[39] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to Summary, 10.

[40] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 27.

> "in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[41]

The Court's contraction of its scope, and resulting inability to answer fully or all the political questions posed to it, are distinctive attributes of judicial restraint. Similarly, in its 2010 Opinion the Court excluded from the scope of its jurisprudence a consideration of what Kosovo's right to self-determination and Serbia's right to territorial integrity entail.[42]

It is also worth noting that the ICJ's discretionary powers to provide advisory opinions, rooted in Article 65 para. 1 of its Statute, allow but do not obligate the Court to give its opinion. As clarified by the ICJ:

> "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."[43]

As a result, Mawar (2019, 439–440) observes that the ICJ inherited the PCIJ's approach in accepting but only partially answering politically charged questions as it attempts to focus only on their legal dimension.

Regarding the attempt to separate the legal and political dimension of issues before the Court, judges and scholars disagree on whether the Court can and should separate the two dimensions, as well as on whether it attempted to do so in its 2010 Opinion. Several judges in their separate opinions regretted the Court's decision to accept the question regarding Kosovo, considering its political weight.[44] Notably, this included Vice President Tomka, who voted against the Court's conclusion, arguing against the decision to answer the question, given the UNSC's ongoing consideration of the same situation, while emphasizing the political sensitivity of the

[41] ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, para. 105.

[42] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Request for Advisory Opinion, para. 83.

[43] ICJ, Statute of the International Court of Justice, Art. 65 para. 1.

[44] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to Summary, separate opinions of Vice-President Tomka, Judges Koroma, Keith, Bennouna, and Skotnikov.

matter.[45] International lawyer Martti Koskenniemi challenged the attempt to separate legal and political aspects in international disputes, arguing that law is inherently influenced by politics, and legal issues cannot be fully understood without considering their political context (Koskenniemi 2005, 198). In turn, ignoring this interplay risks incomplete analysis and may lead to flawed judgments that fail to address the complexities of the dispute. Meanwhile, Zarbiyev contends that international law often lacks clarity regarding what constitutes "law", doubting that Article 38 of the ICJ Statute provides a complete definition (Zarbiyev 2012, 259). Hence, the ICJ's restraint in its attempt to stay politically neutral risks overlooking key factors that influenced Kosovo's declaration, while allowing a *non liquet* to remain in the Court's stance on unilateral secession. As a result, the need to evolve international law to keep up with the world's rapidly changing environment and resulting disputes is ignored (Mawar 2019, 447).

On the other hand, Richard Caplan (2010) argues that the Court's conclusion in 2010 itself was a deliberate political decision to prevent its opinion from serving as a solid legal precedent for other separatist cases. Similarly, Judge Bruno Simma's criticism of the "unnecessarily limited" scope of the Opinion is a result of an intentional choice to avoid inflaming global separatist sentiments.[46]

However, this analysis has shown that elements of judicial activism were present despite the Court's adoption of an overarching strategy, characterized by rigidity in its 2010 Opinion and attributed to the inextricability of legal issues from political ones. Therefore, the 2010 Opinion overall can be seen as a political decision reached through an ostensibly restrained approach. Meanwhile, the oscillation between judicial activism and restraint maintains ambiguity as the consistent denominator in the ICJ's approach to politically charged questions, warranting further scrutiny.

7. THE ICJ'S RESTRAINT IN RELATIVE TERMS

The ICJ's approach to jurisprudence remains more restrained relative to that of other international courts. The European Court of Human Rights (ECtHR), for instance, exhibits a more balanced strategy in addressing the

[45] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to Summary, 1.

[46] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to Summary, 3.

international courts' dual objectives of administering justice while preserving its legitimacy as a politically neutral institution. Ezgi Yildiz (2020, 73–99) identifies a range of approaches to the development of norms that are applied by the ECtHR depending on the complexity and political sensitivity of different cases. The ICJ's approach would fall almost consistently under Yildiz's "arbitrator" category – the middle strategy between what are perceived as more judicially active and restrained approaches, wherein the Court seeks to resolve disputes narrowly to avoid setting precedents, as a result producing only incremental developments to legal norms. Given that the ICJ operates under similar general limits and expectations of international adjudication as the ECtHR, this raises the question as to why the ICJ demonstrates a comparatively more restrained approach.

7.1. Rigidity for Legitimacy?

The ICJ's general tendency to opt for a positivist, predictable approach in its jurisprudence is driven by its uniquely stringent requirement of state consent. Mawar (2019, 447–448) suggests that this cautious stance limits the ICJ's judicial activism compared to other international courts, as states become reluctant to resort to ICJ adjudication for fear of unpredictable decisions. For instance, while Article 38 para. 2 of the ICJ Statute enshrines *ex aequo et bono* as sources of law the Court can refer to, which allows the Court to move away from judicial restraint to adjudicate based on what it perceives as equitable and fair, the Court seldom refers to it. Rather, the Court has traditionally favored the more rigid framework of Article 38 para.1, based on primary sources of law, to deliver more predictable rulings. This preference arguably aims to uphold the Court's perceived jurisdictional integrity and judicial certainty at the expense of foregoing the exploration of other decision-making avenues allotted to it by its statute (Alvarez 2024).

A qualified parallel can be drawn here with David Bosco's (2014, 20–22) account of the International Criminal Court (ICC), in which he argues that the interests of the Court and those of powerful states are continually renegotiated in a process of "mutual accommodation", producing a cautious and calibrated approach to politically sensitive issues. Transposed to the ICJ, especially in high-stakes proceedings, "pursuing an ideal apolitical form of justice by ignoring the need for state support would only sap the institution's credibility" and its capacity to contribute to the evolution of international law, as the very existence of an international legal mechanism hinges on

maintaining states' buy-in (Bosco 2014, 19).[47] Yet, unlike the ICC, the ICJ's legitimacy rests more heavily on the consent-based architecture of interstate adjudication rather than enforcement power, which generates a more stable but still politically conditioned form of judicial restraint.[48] The ICC has been able to adopt a more assertive posture vis-à-vis state interests – notably in the *Al Bashir* appeals decision of 6 May 2019, which ultimately rejected claims of head-of-state immunity despite states' protest.[49] Meanwhile, the ICJ's activism is most accentuated through its advisory jurisdiction, but remains more limited.

A distinct evolution can be observed in the ICJ's advisory function where the Court's jurisdiction is not contingent on state consent as it is in contentious cases, allowing advisory opinions to emerge as a prominent avenue for judicial activism. In recent years there has been a growing tendency for states to seek international jurisprudence, particularly advisory opinions. According to Stravridi (2024), this is due to the opinions' utility as a "soft litigation strategy". The ICJ opinions help eliminate power imbalances between states, which can especially benefit smaller or weaker states, while the non-binding nature of the opinions mitigates the risk of political backlash against decisions more explicitly seeking to evolve international law.[50] Additionally, the advisory process also avoids the complicated consent requirements of mediation, and is less risky for states than adjudication in contentious proceedings in terms of creating explicit "winners" and "losers".

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[47] Especially considering the potential pressure from the several participants in the proceedings, which, as the Court acknowledges, "contended that a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity." See ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Request for Advisory Opinion, para. 80.

[48] The ICC, by contrast, is tasked with determining international criminal responsibility by prosecuting individuals and issuing arrest warrants, with the execution of its decisions constrained more by its dependence on state cooperation than finding initial grounds for jurisdiction.

[49] Author's correspondence with Judge Gilbert Bitti, former Senior Legal Adviser of the ICC Pre-Trial Division. When asked the question: "Does state participation in proceedings usually prompt a more cautious consideration of the legal ramifications of the decision by international legal jurists?" Judge Bitti referred to the decision from May 6, 2019 in the *Al Bashir* case at the ICC, concerning immunities of a sitting Head of State, where several States, including Jordan, the African Union and the League of Arab States, defended the existence of personal immunities for Heads of States being not parties to the ICC – immunity which was rejected by the ICC Appeals Chamber.

[50] For instance, the ICJ delivered an Advisory Opinion in 2024 that was instigated by the South Pacific island state of Vanuatu on states' obligations regarding climate change.

Additionally, Sthoeger (2023) observes the inconsistent history of state compliance with ICJ advisory opinions due to their non-binding nature, arguing that they are usually ascribed more political than legal weight. Consequently, advisory opinions can provide important political leverage in international negotiations, while still appearing less confrontational than formal litigation (Stravridi 2024).

The prominence of the Court's advisory function as a platform for judicial activism – a utility of advisory opinions encouraged by both court presidents Schwebel and Guillaume – reflects the Court's awareness that a degree of activism is necessary to achieve substantive justice (Mawar 2019, 440). Thus, the Court's reliance on the Lotus principle and its resultant focus on prohibitions under international law that characterized its 2010 Opinion, can neither be entirely attributed to a strict mandate of political neutrality nor the Court's attempt to preserve a stable and predictable legal framework.[51] Rather, the growing reliance on advisory opinions – where the Court's tendency towards judicial activism is heightened – suggests that the ICJ may be strategically responding to the interests of various stakeholders, balancing the demands of political realities with its judicial mandate.

8. THE BALANCING ACT AT THE ICJ

The ICJ can change its approach from restrained to activist as a result of political backlash, underscoring its potential awareness of the need to adapt its jurisprudence to the changing international environment and public sentiments.[52] For example, public criticism following the ICJ's 1966 ruling in the *South West Africa* case was centered on the Court's prioritization of procedural issues over substantive justice. The Court stopped at issues of standing, preventing itself from adjudicating on claims relating to the racial segregation witnessed under South Africa's apartheid regime. The political backlash it received as a result was hence inspired by the Court's refrain from an activist approach that would forego such technical considerations in order to address large-scale violations of human rights (McWhinney n.d.).

[51] Although it is worth noting that despite the confidence of both Kosovo and Serbia that the Court would rule in their favor, international law experts had rightly predicted a decision sufficiently ambiguous as to not concretely serve either party's political agenda. See Barlovac, Çollaku 2010; Hilpold 2011, 1.

[52] This however, does not exclude the possibility of political backlash if the Court's jurisprudence is perceived as too activist, nor does it preclude the possibility that the Court may address potential criticism preemptively by adjusting its approach from overarching restraint to activism or vice versa.

Consequently, the ICJ was prompted to take a more activist approach in its 1970 *Barcelona Traction* case, where it developed the concept of erga omnes obligations (Zarbiyev 2012, 276; Kmiec 2004, 1471–1472). By recognizing issues such as racial discrimination as matters of international legal interest, i.e. erga omnes, the Court was able to bypass issues of standing such as those that impeded its address of Liberia's claims in 1966 (Zarbiyev 2012, 276; Lepard 2010, 261–262). The development of erga omnes in contravention to precedent in 1966, represents an act of judicial activism, and potentially a response to an acknowledged need for international law to prioritize the protection of fundamental human rights by evolving international law (McWhinney n.d.). Hence, the ICJ is aware that its legitimacy is not solely contingent on its tradition of restraint and resultant "normative authority" (Mawar 2019, 431).

Through its responsiveness to criticism, the Court demonstrates that an extent of activism is necessary to align its decision-making with evolving universal values. In relation to the ICJ's 2010 Opinion, it therefore becomes plausible that the Court's alternation between activism and restraint in reaching its conclusion on Kosovo's UDI – which avoided a conclusion on Kosovo's status – is an attempt to respond to past criticism or preempt future backlash, i.e., balancing the two approaches to maintain an image of legitimacy while adjudicating on new and politically contentious issues. Nonetheless, it is important to note that criticism is not the sole driver behind the ICJ's judicial activism and its willingness to adapt its jurisprudence. For instance, despite much criticism of the Court' notoriously difficult threshold for genocide, it continues to adhere strictly to established precedent (Essawy 2024).

9. CONTEMPORARY OPINIONS AT THE ICJ

Turning to more recent advisory opinions of the ICJ for comparison, the Court's adjudicative style has notably taken a more activist character, though it remains constrained by the aforementioned factors to varying degrees. The Court's 2025 Advisory Opinion on the *Obligations of States with Respect to Climate Change*, for instance, has been hailed by scholars as a "watershed moment" in how the Court adopted a proactive approach, in integrating multiple sources of international law into a unified, action-forcing framework on an emergent issue (Wewerinke-Singh 2025; Frydlinger 2025). The Court stretched the scope of its interpretation to connect the issue of climate change with customary law, the principle of no-harm, and human rights, finding that states have binding obligations under international

law – beyond those emanating from treaties onto their signatories – to address climate change. The Court also concluded that treaty obligations to safeguard the climate system as a "global common good" are obligations erga omnes.[53] This represents a distinctly activist turn in the Court's interpretive practice, filling a normative gap in international law between political or aspirational climate commitments (such as the 1.5°C target) and enforceable legal standards. Testament to the political significance of the case was the unprecedented participation in its proceedings – 91 written statements, 62 comments, and oral submissions from 96 states and 11 international organizations, including major polluters and at risk low-lying island states – making it the most widely attended proceeding in the Court's history.[54] While comparing the leap between transboundary harm to obligations related to climate change, and the right to self-determination to unilateral secession may be challenging – and one could theorize about the compatibility of the levels of political sensitivity surrounding each case – it is worth noting that, unlike the divided bench on Kosovo, the advisory opinion on climate was adopted unanimously.[55]

By contrast, the Court's 2024 Advisory Opinion on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory* revealed a more cautious interpretive posture, reflecting the Court's enduring concern with balancing judicial authority against the political sensitivities inherent in questions of statehood. The 2024 Opinion has been described as "one of the most important decisions that the ICJ has ever delivered" (Milanović 2024) and hailed as a "breakthrough" for Palestinians (BADIL 2024).[56] It is worth noting that, at the time, 135 UN members recognized Palestine's statehood, though divisions among the permanent Security Council members – all of whom participated in written proceedings – persisted (Ferragamo, Roy 2025). Ultimately, the Court found Israel's practices in the occupied Palestinian territory to be unlawful, including in impeding the Palestinians from exercising the right to self-determination.[57]

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[53] ICJ, Obligations of States in Respect of Climate Change, Advisory Opinion. 2025. para 440.

[54] ICJ, Obligations of States in respect of Climate Change, Press release No. 2025/36. 2025, 1.

[55] ICJ, Obligations of States in respect of Climate Change, Press release No. 2025/36. 2025, 1.

[56] Noting that the Court's 2004 Opinion on the building of a wall in occupied Palestinian territory stopped short of calling Israeli practice "annexation".

[57] Noting that this is the fifth time in the Court's history that it arrived at a unanimous conclusion.

The Court drew on its 2004 *Legal Consequences of the Construction of a Wall* opinion but extended it to conclude that Israel had annexed the occupied territory, and that:

"[i]t is the view of the Court that to seek to acquire sovereignty over an occupied territory, as shown by the policies and practices adopted by Israel in East Jerusalem and the West Bank, is contrary to the prohibition of the use of force in international relations and its corollary principle of the non-acquisition of territory by force."[58]

As Milanović (2024) rightly points out, the Court avoided specifying what Article 2 para. 4 of the UN Charter applies to protect in this context – whether Israel's use of force should be understood as force against the Palestinian people, a Palestinian state, or something else – and, in doing so, failed to clarify whether Article 2 para. 4 can apply to non-state actors. In this opinion the Court leans toward activism by explicitly invoking the prohibition of the use of force in a way that connects the occupation with an internationally wrongful act beyond humanitarian law violations. While the Court reached its conclusions by means of maintaining (and arguably creating) ambiguity around when occupation becomes unlawful and whether the prohibition on the use of force applies to force used against non-states, it was able to deliver a far-reaching conclusion – even promulgating obligations for third states – but was able to avoid the discussion of Palestinian statehood. Although it can also be argued that the court was more reserved when considering other practices by Israel. Notably, the Court found that Israel had violated Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination on racial segregation and apartheid, by affirming the existence of racial segregation, but omitting a discussion of whether this also amounted to apartheid.[59]

All considered, even as the ICJ adopts novel interpretive decisions through its activist capacity, with the aim of reaching more politically far-reaching conclusions – albeit when the political climate appears more favorable to such pronouncements – the Court continues to employ a judicially restrained

[58] ICJ, Legal Consequences Arising From the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem. 2024. Advisory Opinion, para. 179. Notwithstanding the ambiguity of the meaning of the term "corollary" in this context, see Brunk, Hakimi 2024.

[59] Judges issued 14 separate opinions, discussing, inter alia, the categorization of Israeli practices as use of force and as apartheid. In their effort to reach consensus, however, they may well have compromised on clarity and held back on fulfilling a broader activist capacity, which shaped the appearance of the Court's final interpretive strategy.

approach to preserve a legal ambiguity that prevents it from making pronouncements on statehood. In continuity of what could be inferred from the Court's cautious approach to the case of Kosovo in 2010, as of the time of writing, the international legal mechanism still remains unable or unwilling to elaborate on what the right to self-determination entails – despite its extensive consideration of and decisions on what deprives or impedes a populations' exercise of that right in contemporary non-colonial contexts.

10. THE ICJ'S JUDICIAL FUNCTION IN RELATION TO INTERNATIONAL PEACE AND SECURITY

The ICJ is less vocal on its "judicial philosophy" than other international courts. Zarbiyev suggests that such philosophies, indicative of a court's institutional core identity, serve as a foundation for its decision-making. The ICTY, for example, acknowledged its consideration of the 1990s atrocities in the Balkans during its deliberations, while the ECtHR has also openly embraced its role in clarifying and advancing the rules of the European Convention. In contrast, the ICJ's philosophy is less clearly defined, despite it is entrusted – as a UN organ – with an institutional mission (Zarbiyev 2012, 258–259).

In relation to the broader UN objective, the ICJ's judicial function can be understood as the judicial organ of a post-war institution seeking to maintain international peace.[60] Given that the issue of Kosovo's status settlement was simultaneously being considered at the UNSC, it must have pertained to international peace and security, per the UNSC mandate for issues included in its agenda.[61] Hence, the Court's approach can be thought of in relation to the right to self-determination, as well as in relation to the UN's broader goals for international peace. Considering that the Court's approach to the question embodied a deliberate effort to avoid giving a definitive answer to the substantive questions attached to Serbia's request, this raises questions about the utility of maintaining a *non liquet* in international law.

The ICJ's avoidance of definitive legal pronouncements regarding Kosovo's statehood, and its decision to leave unresolved certain aspects of the declaration's legality, can be seen as an attempt by the Court to relegate

[60] UNGA, Charter of the United Nations.

[61] UNGA, United Nations Security Council Functions and Powers.

the issue of Kosovo's status back to the political realm.[62] Caplan (2010) adopts this view, arguing that the Court's deferral of the issue to political channels attempts to balance the limits of international legal structures with the political complexities inherent to the case. The Court's conclusion could also be seen as referral to particular political mechanisms, such as the UNSC, which were already engaged with the matter. However, this line of reasoning is discouraged by the fact that the Court accepted to answer the question and took a stance on the legality of Kosovo's UDI, which the UNSC would have to recognize.

In any case, the ICJ demonstrated that it is either not yet ready or not willing to address the broader questions attached to the UNGA's request. The Court ensured that its 2010 Advisory Opinion did not set a precedent that could limit its ability to adjudicate on similar issues in the future, while reflecting its belief that no legal restraints should have been created at the time to prevent Kosovo from achieving international recognition as a state, nor should international law be in a position to determine the status of its statehood (Stravridi 2024).

11. CONCLUSION

The analysis of the ICJ's reasoning in its 2010 Opinion reveals a deliberate strategy of employing both judicial activism and restraint in tackling the question. Fifteen years later, the Kosovo Opinion endures as a reference point for understanding the uneasy space international law occupies when the Court is called upon to pronounce on questions that are as politically charged as they are legally indeterminate. This approach aligns not only with the Court's general approach to politically charged questions, but also with its wider interpretive culture, which appears to incorporate both approaches but tends toward juridical restraint on controversial issues, with heightened sensitivity to issues of statehood. Through this dual approach, the ICJ avoided addressing broader questions on the existence of a right to self-determination in post-colonial contexts – which can extend to unilateral secession – thereby preserving a *non liquet* in international law around these issues. The Court's stance on Kosovo's UDI allowed it – through an

[62] Jeremić: "The international legal system is not exactly an ivory tower of equity, of being just and fair and blind to pressures... The International Court of Justice, like all other international institutions, legal, political, economic, is simply made up of countries, and countries are made up of politics, and politics is always the main driver... International law is great, but it doesn't apply equally."

anticlimactic decision – to relegate the matter back to the political realm while maintaining that the act of declaring independence alone is not prohibited by international law.

Even when general factors that have demonstrated their sway over the ICJ's jurisprudence are considered – including perceived legitimacy, political backlash, states' expectations, judicial philosophy, and broader institutional values – the particular motives behind the ICJ's interpretive strategy in its 2010 Opinion remain uncertain. Rather, the value of the contribution this analysis makes lies in its illustration of the inherent multi-layer complexity of the pressures and considerations affecting judicial procedure at the ICJ and the discretionary means by which it navigates them. Future scholarship could deepen this inquiry while improving its validity and robustness by including the systematic application of the abovementioned criteria for judicial activism and restraint to a wider range of ICJ cases.

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