EDITORS' INTRODUCTION

Engagement and Escape
International Legal Institutions and Public Political Contestation

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In its advisory opinion on Kosovo's unilateral declaration of independence,[1] released about a month before this issue went to press, the International Court of Justice was forced to reflect on the appropriate role of the international judiciary in political disputes. Finding that it had the jurisdiction to consider the General Assembly's question, the Court rejected the idea that there can be a clear division between the political and the legal: "the fact that a question has political aspects does not suffice to deprive it of its character as a legal question".[2]

But the Court split on whether it should exercise its discretion to refuse jurisdiction in cases—such as the Kosovo situation—where the adjudication of a legal issue would make the Court a pivotal actor in the political realm. The majority held that the possible adverse political consequences of its judgments cannot be a factor informing the court's discretion. On this issue, the Court must defer to the (political) judgment of the requesting organ.[3]

This position was criticized by Judge Bennouna, who in his dissenting opinion argued that the General Assembly's request amounted to an attempt to have the Court "take on the functions of a political organ of the United Nations, the Security Council, which the latter has not been able to carry out."[4] To avoid being "exploited in favour of one specifically political

[1] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion (22 July 2010), online: International Court of Justice, <http://www.icj-cij.org/homepage/pdf/20100722_KOS.pdf>.
[2] *Ibid*. at para. 27.
[3] *Ibid*. at para. 35.
[4] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Dissenting Opinion of Judge Bennouna (22 July 2010) at para. 8, online: International Court of Justice, < http://www.icj-cij.org/docket/files/141/15999.pdf>.

strategy or another",[5] Judge Bennouna argued that the Court should have declined to exercise jurisdiction "on a question which is incompatible with its status as a judicial organ".[6]

Even though the majority insisted that the ICJ can validly adjudicate on the legal aspects of questions with political dimensions, its advisory opinion is carefully crafted to minimize any possible political ramifications. The Court narrowly interpreted the General Assembly's question, choosing to rule only on whether there is a prohibition at international law of unilateral declarations of independence. The broader issues raised by the request—including the limits of "remedial secession", the rules governing state recognition, and the legal consequences of such recognition—went unanswered.[7] This approach was criticized in the Declaration of Judge Simma, who was of the opinion that "the Court has not answered the question put before it in a satisfactory manner":[8] "the relevance of self-determination and/or remedial secession remains an important question in terms of resolving the broader dispute in Kosovo."[9] Newspaper reports that the ICJ had ruled "Kosovo independence" to be "lawful" were greatly exaggerated.[10]

The Kosovo advisory opinion lays bare the complicated relationship between law and politics in the global arena, manifested in what Martti Koskenniemi has identified as the two conflicting impulses of international lawyers: the utopian desire to regulate the political through objective legal adjudication, and the apologetic acknowledgment that the practice of international law cannot avoid concerns of realpolitik.[11] The Court insisted that it could and should take jurisdiction over a tense political issue, but sought to minimize the political fallout by imposing strict limits on the terms of its engagement. The Court engaged political issues at the same time that it tried to escape them. A complicated relationship indeed.

The complexities of this relationship are explored by the three articles in this issue, which contribute to the ongoing effort to conceptualize, describe,

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[5] *Ibid.* at para. 15.
[6] *Ibid.* at para. 14.
[7] *Ibid.* at paras. 51 ("The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State."), 56 ("The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it.").
[8] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Declaration of Judge Simma (22 July 2010) at para. 3, online: International Court of Justice, < http://www.icj-cij.org/docket/files/141/15993.pdf>.
[9] *Ibid.* at para. 6.
[10] Associated Press, "World Court Says Kosovo Independence Lawful" *The Globe and Mail* (22 July 2010), online: <http://www.theglobeandmail.com/news/world/world-court-says-kosovo-independence-lawful/article1648330/>.
[11] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, reissued 2005).

and model the political behaviour surrounding international legal institutions. By examining a wide variety of bodies—the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, the European Court of Human Rights, the Inter-American Court of Human Rights, the United Nations Human Rights Commission, and the United Nations Human Rights Council—these articles call attention to the various ways in which processes of norm generation in international law interact with processes of public political contestation.

Contributions to this Issue

The first paper in this issue adopts a methodology that has been well-developed within domestic legal scholarship and applies it to the international context. For international lawyers in particular, the approach constitutes a challenge to traditional perspectives. In "Understanding the Behaviour of International Courts", Sébastien Jodoin employs behavioural hypotheses to analyze overall trends in judicial decision-making. This framework is used to suggest that the ideas of individual judges, and their perceptions of their respective institutions' strategic interests, can account for patterns in the decision-making of international courts.

The author undertakes a comprehensive review of the literature on judicial behaviour. Rather than simply deciding cases on their "objective merits", the approach works from the premise that judges are political actors with their own goals and ideological tendencies. The analysis then adapts the findings in the judicial behaviour literature to the unique context of the decision-making processes at the International Criminal Tribunals for the former Yugoslavia and Rwanda. In doing so, the author takes important first steps towards identifying useful independent variables for modelling judicial decision-making in international tribunals. Significantly, this argument will force readers—particularly those coming from a background in international law—to reassess the boundary between public political contestation and independent legal reasoning that may currently inform assessments of the work done by international tribunals.

The second paper in this issue, "Partial Compliance", also considers the nature of international tribunals, but does so from the other end of the spectrum. "Understanding the Behaviour of International Courts" explores factors that affect decision-making in international tribunals. In "Partial Compliance," Professors Hawkins and Jacoby take tribunal decisions as the starting point of their analysis, and they proceed to offer a new framework to conceptualize the ways in which political actors—particularly states—respond to those decisions.

It is fairly common in the International Law/Relations literature to think of compliance as a binary concept. Indeed, Professors Hawkins and Jacoby acknowledge that the data supports the assertion that the levels of state compliance with international norms vary, but tend to cluster around the extremes of high compliance or low compliance. If a state's behaviour does not fall neatly into these dichotomous positions, it is perhaps intuitive to conceptualize it as on the path from one end of the continuum to the other. However, "Partial Compliance" uses data from the European and Inter-

American Courts of Human Rights to suggest otherwise. Rather than simply being a transitional point along a continuum, the authors argue that partial compliance appears to be a stable end point, and that it is likely to be a common—if not the most common—outcome of international adjudication.

In the final article in this issue, Professor Eric Cox details the extent to which political preferences influenced the institutional design of the United Nations Human Rights Council (HRC). Despite the widespread criticism of its predecessor—the Commission on Human Rights (CHR)—the author argues that the political compromises that enabled the formation of the new institution also stand in the way of any marked improvement from its predecessor.

The impetus for the creation of this new human rights council was born out of the well-documented disaffection for the shortcomings of the CHR. These shortcomings included its failure to engage with human rights abuses around the world to a sufficient degree; its inclusion of human rights abusers among its members; and its politicized processes of norm generation. Despite the general support for a new institution, Professor Cox argues that the structure and the behaviour of the HRC has been limited by the diverse preferences that informed its creation. For example, many western states sought a more interventionist institution with limited membership, one that would be able to issue resolutions relating to specific human rights violations. Other states, particularly those within the G-77, thought that the HRC's ability to criticize states should be more limited. Professor Cox carefully builds an argument that the general human rights records of these groups are suggestive of the rationale for their respective preferences. If the HRC is fundamentally a political body, as argued by Professor Cox, one should not expect it to function according to the lofty ideals of human rights protection, but according to the more calculating preferences of the actors that dictated its structure.

Editors' Acknowledgments

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JILIR relies on its editorial staff. The Associate Editors for Volume 6 dedicated hours to carefully reviewing the submissions for each issue, checking footnotes, and providing incisive written feedback to individual authors. The Senior Associate Editors not only participated in this process, they co-ordinated it as well. Finally, the Senior Editors subjected a narrowed selection of submissions to rigorous scrutiny, and selected the articles for publication. They played the key role in defining the issue's substantive

direction.

Once the articles were selected for publication, each one was reviewed by members of JILIR's Executive Editorial Board, along with at least two anonymous peer reviewers. The detailed comments and analysis generously provided to the authors by these individuals were an essential aspect of the publication process.

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