The Law and Politics of the Kosovo Advisory Opinion

By Marko Milanović and Michael Wood (editors).
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Much has been said and written on the *Kosovo Advisory Opinion* delivered by the International Court of Justice (ICJ or the Court) in 2010¹ and on the Kosovo situation in general.² *The Law and Politics of the Kosovo Advisory Opinion*, edited by Marko Milanović and Sir Michael Wood, makes a significant and well-timed contribution to the existing debate. The book is notable for several reasons: its outstanding selection of contributors; its big picture perspective; and its consideration of the *Kosovo Advisory Opinion* in the light of the more recent allegedly analogous developments, such as Crimea's secession.

A unique feature of this book is that it brings together contributions by leading experts in international law and international relations who, in recent years, have been participating in one way or another in shaping the debate on Kosovo. Many of the authors, including James Crawford, Harold Hongju Koh, Marko Milanović, Alain Pellet and Sir Michael Wood, acted as either counsel or advisor for the United Kingdom, the United States, Serbia, France and Kosovo, respectively, in the advisory proceedings before the ICJ.

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1 *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403.

2 Among the books dedicated to Kosovo in general and the *Kosovo Advisory Opinion*, see Peter Hilpold (ed), *Kosovo and International Law: The ICJ Advisory Opinion of 22 July 2010* (Martinus Nijhoff 2012); James Summers (ed), *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-Determination and Minority Rights* (Martinus Nijhoff 2011); Kushtrim Istrefi, *Secession, Statehood and the Recognition of Kosovo: An Examination of Kosovo's Statehood under International Law* (Lambert Academic Publishing 2010); Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence* (OUP 2009).

The Law and Politics of the Kosovo Advisory Opinion discusses in detail various legal issues arising from the political situation and the Advisory Opinion, as well as arguments submitted by the parties to the advisory proceedings. However, as reflected by its title, the book is not limited to legal analysis. An idea that runs through every chapter of the book is the interplay between the law and politics. The book examines the *Kosovo Advisory Opinion* in the broader context of the interests and motivations of the states involved, of the politics behind the ICJ's decision, its reasoning and its choice to remain silent on certain matters. It also looks at the implications of the *Kosovo Advisory Opinion* for resolution of the conflict between Serbia and Kosovo, and for international law in general.

The book consists of four parts and 18 chapters which tell the story of the *Kosovo Advisory Opinion*, starting with Serbia's decision to bring the matter before the ICJ, continuing with the discussion of the ICJ's opinion and closing with an examination of the impact of the *Kosovo Advisory Opinion* on the relations of Kosovo and Serbia both between themselves and with the rest of the world. This review follows the general structure of the publication, and gives a more detailed account of particularly engaging chapters of the book.

Part I, 'The Advisory Proceedings in Context', opens with a chapter explaining Serbia's decision to react to Kosovo's Declaration of Independence ('DoI') by bringing the issue before the ICJ and its choice of the particular question to pose to the Court.³ Serbia dismissed the idea of challenging the lawfulness of recognition by other states of Kosovo's DoI in contentious proceedings before the ICJ, as it was not willing to pursue a case against the US or any of the key EU members. At the same time, it thought that bringing a case against a small state would be considered as a sign of weakness. Bringing a case against Kosovo was naturally out of the question since it was not party to the Statute of the ICJ⁴ and, in any case, doing so would have amounted to tacitly recognising Kosovo's statehood. Belgrade was mindful of the risk of an unfavourable outcome of advisory proceedings, which affected its choice of question eventually put to the Court. It nonetheless considered that referring the matter to the ICJ would aid in its effort to quell internal discontent by showing that decisive steps were being taken at the international level to defend

3 James Ker-Lindsay, 'Explaining Serbia's Decision to go to the ICJ' in Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015) 9.

4 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16.

Serbia's interests, as well as to slow down the process of international recognition of Kosovo. Both aims were achieved.

Advisory proceedings before the ICJ generated considerable interest among states. In addition to Serbia and the authors of Kosovo's unilateral declaration of independence, who were allowed to make submissions before the Court, 42 states participated in the proceedings. Chapter 3 examines in detail how the states participating in the proceedings before the ICJ chose to argue the case.⁵ Like the remainder of the book, it is not confined to legal analysis. Chapter 3 examines the motives behind the choice of specific arguments by states participating in the proceedings. For instance, Chapter 3 analyses the reason why the pro-Kosovo states decided to make only limited arguments based on self-determination and secession. In addition, it addresses the manner in which the *sui generis* argument, as well as arguments about the identity of the authors of the DoI, the legal nature of the Constitutional Framework of Provisional Self-Government and the binding force of Security Council resolutions with regard to non-state actors emerged and developed throughout the proceedings.

The evolution of the *sui generis* argument can be taken as an example. As suggested by the author of Chapter 3, Kosovo being a *sui generis* situation was the main political argument underlying the uniqueness of the circumstances and served to discourage others from following Kosovo's example. However, in order for the argument to gain cogency in the proceedings, it needed to be translated into a general legal proposition. The pro-Kosovo states largely avoided arguing the issue as one of a conflict between the right to self-determination and the principle to respect territorial integrity. First, they realised that the ICJ would be reluctant to engage with the self-determination argument, and the wording of the question would allow the ICJ to avoid it. Secondly, supporting Kosovo's independence based on self-determination was too large a commitment for the greatest powers in the pro-Kosovo camp. Doing so would require them to act consistently with regard to any other oppressed group in future. As a result, they chose to argue that the principle of territorial integrity did not apply to non-state actors. Thus, the application of the principle of territorial integrity within a state became one of the key issues argued by the participants as the proceedings developed. The author's opinion on the matter is supported by a number of illustrative tables, which usefully trace the parties' arguments through the various stages of the proceedings.⁶

5 Marco Milanović, 'Arguing the Kosovo Case' in Milanović and Wood (n 3) 21.

6 *ibid* 37–42, 49–55.

Part II, 'The Opinion', is dedicated to the advisory opinion itself. Most of the chapters within Part II provide detailed legal analysis of various aspects of the ICJ's opinion, such as jurisdiction, the Court's discretion not to give an advisory opinion,⁷ the question the ICJ chose to answer,⁸ and the interpretation of the meaning and legal effect of the Security Council resolution establishing the United Nations Mission in Kosovo (UNMIK).⁹ These chapters also keep sight of the broader context in which the ICJ's opinion was delivered and they anticipate its ramifications. Contributions in Part II also point out relevant issues that, for various reasons, were left unanswered by the ICJ. By narrowly interpreting the question put before it, a matter discussed in Chapter 7 as 'The Question Question',¹⁰ the ICJ was able to avoid touching on certain important and controversial issues in international law, such as the consequences of a unilateral declaration of independence in general, as well as Kosovo's statehood and the effects of its recognition by other states in particular. The ICJ's approach was nonetheless justified by the considerations of judicial policy and economy, by its role as a judicial organ and the need to ensure the respect for its opinion by those directly concerned. Chapter 10 elaborates extensively on questions of secession and self-determination, issues that the ICJ essentially chose to bypass but which were discussed in some of the judges' separate and dissenting opinions nonetheless.¹¹ This chapter also discusses the consequences of the ICJ's silence for international law.

Reactions to the advisory opinion, its wider implications as well as its consequences for Serbia-Kosovo relations are discussed in Part III, 'Reactions and Implications', and Part IV, 'The Road Ahead'. Chapter 11 in Part III provides an interesting reflection on the *Kosovo Advisory Opinion* from the perspective of the ICJ's need to address interests of its multiple constituencies.¹² The chapter discusses an institutional perspective that is based on the ICJ's function, which is to give legal advice to bodies requesting its opinion, as well as its role as the principal UN judicial organ. Another perspective is that of dispute settlement, and is related to

7 Vladimir Djerić, 'Questions of Jurisdiction and the Discretion to Decline a Request for an Advisory Opinion' in Milanović and Wood (n 3) 99.

8 Daniel Müller, 'The Question Question' in Milanović and Wood (n 3) 118.

9 Sean Murphy, 'Reflections on the ICJ Advisory Opinion on Kosovo: Interpreting Security Council Resolution 1244 (1999)' in Milanović and Wood (n 3) 134.

10 Müller (n 8) 119–23.

11 Marc Weller, 'The Sounds of Silence: Making Sense of the Supposed Gaps in the *Kosovo Opinion*' in Milanović and Wood (n 3) 187.

12 André Nollkaemper, 'The Court and Its Multiple Constituencies: Three Perspectives on the *Kosovo Advisory Opinion*' in Milanović and Wood (n 3) 219.

the ICJ's contribution to the settlement of a contentious dispute by rendering an advisory opinion. A third perspective is called the 'guardian perspective' and relates to the ICJ's more general role in developing international law. The *Kosovo Advisory Opinion* cannot be studied in isolation from the political context in which it was given. Assessing the *Kosovo Advisory Opinion* from these constituency-oriented perspectives, as suggested by the author, assists in understanding why the Court chose to give the opinion in the first place, and having done so, why it gave the opinion that it did and which interests it catered to by doing so.

A separate chapter in Part III discusses another issue, which remained unaddressed by the ICJ, namely Kosovo's statehood.¹³ Chapter 14 argues that Kosovo does comply with the frequently invoked Montevideo¹⁴ criteria of statehood,¹⁵ as well as with, in its author's opinion, the more useful indicator of statehood—formal and factual independence of a given territorial community. The chapter is followed by a contribution that examines claims of a precedential nature of the *Kosovo Advisory Opinion* which, despite persistent affirmation of the *sui generis* nature of the Kosovo situation by some, is used to justify other secessionists' aspirations and which, in its author's opinion, the Court did nothing to discourage.¹⁶ Crimea is a prime example of the use of such 'Kosovo rhetoric'.

Several chapters in the two final parts deal with the implications of the *Kosovo Advisory Opinion* for the resolution of the conflict between Kosovo and Serbia, and the increased acceptance of Kosovo's statehood by the international community. The current state of relations between Kosovo and Serbia and ideas for further settlement of the tensions are also discussed in this context. It is interesting to note that the contributors of these chapters hold opposing views on the effect of the *Kosovo Advisory Opinion* on the resolution of the conflict between Serbia and Kosovo. Some believe, for example, that the ICJ's opinion has contributed to mitigate the conflict,¹⁷ whereas others state that it left the problem exactly where

13 James Crawford, 'Kosovo and the Criteria for Statehood in International Law' in Milanović and Wood (n 3) 280.

14 Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19.

15 'A permanent population', 'a permanent territory', 'a government' and the 'capacity to enter into relations with other States'.

16 Anne Peters, 'Has the Advisory Opinion's Finding that Kosovo's Declaration of Independence was not Contrary to International Law Set an Unfortunate Precedent?' in Milanović and Wood (n 3) 291.

17 Tatjana Papić, 'The Political Aftermath of the ICJ's *Kosovo Opinion*' in Milanović and Wood (n 3) 240.

it was and they propose fresh and innovative ideas regarding Kosovo's future development.¹⁸

Considerable attention is paid in these chapters to the EU's efforts to facilitate normalisation of the relationship between Kosovo and Serbia, including by the use of EU accession as a powerful leverage in this process. Immediately after the *Kosovo Advisory Opinion* was delivered, Serbia made an attempt to re-open discussion concerning Kosovo's status before the UN General Assembly. However, political pressure from other states and other bodies, especially the EU, made it give up on the idea to pursue another of its major foreign policy goals—joining the EU. The *Kosovo Advisory Opinion* in fact created an opportunity for the opening of a dialogue between Belgrade and Pristina.

The final chapter of the book, Chapter 18, reflects on the legacy of the *Kosovo Advisory Opinion*, which its author suggests is the creation of a precedent in international law as regards the international lawfulness of declarations of independence and not of an unfortunate precedent or a *sui generis* case as some may claim.¹⁹ The chapter puts the *Kosovo Advisory Opinion* in the context of the most recent developments and refutes any claims of analogy between Kosovo and Crimea. According to the author of the chapter, what is equally important in terms of the *Kosovo Advisory Opinion*'s legacy is what the Court refrained from doing—it did not reverse the process of creating an independent entity whose statehood was in fact nurtured by the UN system itself, a conclusion that once again illustrates the interplay between law and politics in the Kosovo saga.

It may seem to readers that some of the chapters of the book overlap. It is indeed the case that various chapters elaborate on similar or effectively the same issues. However, each and every chapter treats those issues from a different perspective or reflects each of the authors' distinct views on the matter. *The Law and Politics of Kosovo Advisory Opinion* will satisfy the demands of a wide and varied audience, including practising lawyers, academics, students or governmental officials interested in a thorough legal analysis of the *Kosovo Advisory Opinion* by eminent international lawyers. It will also appeal to those who are eager to learn about the influence of politics in shaping the law in the Kosovo situation and to gain insight into the broader implications of the *Kosovo Advisory Opinion*.

18 James Gow, 'Old Problems, Fresh Frameworks' in Milanović and Wood (n 3) 332.

19 Harold Hongju Koh, 'Reflections on the Law and Politics of the *Kosovo Case*' in Milanović and Wood (n 3) 350.