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SILENCE IN INTERNATIONAL LAW

By HELEN QUANE*

ABSTRACT

In any legal system there are silences, things the system does not seem to regulate, matters as to which it seems not to speak. This is also, perhaps particularly, true of the international legal system. Drawing on the *Kosovo* case, the attempt is made to develop a typology of the most common approaches to silence in international law. It analyses what these approaches have to say about the issue of silence and the range of possible responses to it. Throughout, the article makes explicit many of the assumptions that underpin these approaches and explores their potential implications for the character and structure of the international legal system, including in particular the basis of obligation and the role of non-state actors. It is suggested that, rather than being an esoteric or marginal issue, silence and how we respond to it goes to the very heart of our understanding of the international legal system today.

Keywords: Neutrality of international law, non-regulation, the *Lotus* principle, the principle of the completeness of the international legal order, *non liquet*.

I. INTRODUCTION

It is impossible to legislate for every conceivable circumstance. This is true of all legal systems including the international legal system.¹ One of the unique features of the international legal system, however, is the absence of a clear constitutional framework to direct what should

*Associate Professor, Swansea University, School of Law, Singleton Park, Swansea SA2 8PP (email: h.quane@swansea.ac.uk). I would like to thank the anonymous reviewers for their helpful comments on an earlier draft of this article.

¹ See e.g. WM Reisman, 'International Non-Liquet: Recrudescence and Transformation' (1968-1969) 3 *International Lawyer* 770, 773, 774; H Lauterpacht, *The Function of Law in the International Community* (OUP 1933) 60-61, 70; P Weil, "The Court Cannot Conclude Definitively ..." *Non Liquet Revisited*' (1998) 36 *Columbia Journal of Transnational Law* 109, 118.

happen when it is silent on a matter in need of regulation.² Usually it is left to the states concerned or to an international court or tribunal to draw on various principles or techniques to resolve the matter in hand. It is clear from this practice that there are widely divergent approaches to silence. These approaches merit examination as they reflect certain assumptions about some of the most fundamental issues concerning the international legal system, ranging from its character and structure to the basis of obligation and the role of non-state actors within the system.

A simple example will illustrate the point. One approach to silence is to assert that that which is not prohibited is legally permitted. This approach is based on the assumption that if states do not consent to a prohibition on particular conduct, they retain the freedom under international law to engage in that conduct. It suggests that the international legal system is comprised essentially of *limitations* on state sovereignty. As such, this approach reflects a state-centred view of the international legal system and a consensual basis of obligation. Other approaches are based on different perceptions of the character and workings of the international legal system.

There is a considerable body of literature on the question. The tendency, however, is to focus on specific aspects of silence. For example, there has been considerable discussion of whether courts may or may not make a *non liquet* declaration to the effect that the law is non-existent or unclear on a particular issue. This is evident in the notable exchanges between Hersch Lauterpacht and Julius Stone on the issue over fifty years ago.³ Since then, writers have revisited the question of silence, often in response to specific judgments of the International Court of Justice.⁴ In the more recent literature, there is greater emphasis on the significance of silence in terms of the structure of the international legal system. Nevertheless, there is still a tendency to focus on a relatively narrow range of issues. While the present article draws on the

² Cf the range of national law approaches outlined in Reisman, 'International Non-Liquet: Recrudescence and Transformation'; MJ Aznar-Gomez, 'The 1996 Nuclear Weapons Advisory Opinion and Non Liquet in International Law' (1999) 48 ICLQ 3, 4-5.

³ H Lauterpacht, 'Some observations on the Prohibition of "Non Liquet" and the Completeness of the Law' in *Symbolae Verzijl* (Martinus Nijhoff 1958) 196; J Stone, 'Non Liquet and the Function of Law in the International Community' (1959) 35 BYIL 124.

⁴ See e.g. IF Dekker and WG Werner, 'The Completeness of International Law and Hamlet's Dilemma: Non Liquet, The Nuclear Weapons Case and Legal Theory' (1999) 68 Nordic Journal of International Law 225; Aznar-Gomez, 'The 1996 Nuclear Weapons Advisory Opinion and Non Liquet in International Law'; J Kammerhofer, 'Gaps, the Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument between Theory and Practice' (2009) 80 BYIL 333.

existing literature, it broadens the scope of the analysis in order to develop a more comprehensive treatment of silence in international law.

To avoid an overly abstract discussion, the article makes extensive use of the ICJ's Advisory Opinion and the related proceedings in the *Kosovo* case.⁵ The absence of any explicit regulation of declarations of independence in international law prompted a sizeable cross-section of states to submit written statements to the Court on the issue.⁶ While the ICJ did not address the question of silence directly, the Opinion is still significant in terms of its implied response to silence and what it seems to say about the nature of the international legal system. Both the written statements and the Opinion make it possible to explore in a concrete setting some of the principal approaches to silence in international law. Further, the juxtaposition of these approaches in a single case helps to demonstrate the subtle but significant differences between them. The *Kosovo* case is also useful in facilitating an examination of silence in relation to the conduct of non-state actors and, in doing so, broadens the scope of the analysis beyond that of state conduct, which has tended to be the focus of attention to date.

The article begins by identifying a series of questions that can assist with analysing silence in international law (Part II). It then proceeds to examine some of the principal approaches to silence (Part III). These range from the assertion that international law is 'neutral', to the statement that there is an unregulated area of the law, to the assertion that while principles of international law exist they do not apply because of the limited international legal personality of a non-state actor. Part IV builds on the preceding sections by examining four possible responses to silence, namely, the principle that that which is not prohibited is permitted, the principle of the completeness of the legal order, the making of a *non liquet* declaration and the assertion that the situation under consideration is special or *sui generis*. The article concludes in Part V with some general observations about silence and its significance.

⁵ *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* Advisory Opinion, 22 July 2010 (the *Kosovo Advisory Opinion*).

⁶ Albania, Argentina, Austria, Azerbaijan, Bolivia, Brazil, China, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Ireland, Iran, Japan, Latvia, Libya, Luxembourg, Maldives, Netherlands, Norway, Poland, Romania, Russian Federation, Serbia, Sierra Leone, Spain, Slovakia, Slovenia, Switzerland, United Kingdom, United States and Venezuela submitted Written Statements: these are available at < <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=1> > accessed 11 March 2013.

II. SOME PRELIMINARY ISSUES

The present section identifies a series of questions that can assist with an analysis of silence in international law. The first question is whether silence indeed exists within the international legal system, either in principle or in the given case. Ilmar Tammelo is one of several commentators who have addressed the issue of principle.⁷ Drawing on modal logic, he concludes that it is possible to have an absence of law, an ‘open’ legal order and consequently the prospect of a *non liquet* declaration.⁸

The question whether silence actually exists in a particular case depends on whether it is possible to identify a relevant principle of international law to govern that case. This shifts the focus to the sources of international law and, in particular, how they are viewed by the different participants within the system. In this regard, it is useful to consider what Maurice Mendelson has termed the ‘observational standpoints’ of the ‘third party decision maker’ and the ‘principal addressees of norms and their agents’.⁹ The former views the sources of international law in terms of article 38(1) of the Statute of the ICJ, applies these sources as they exist at a specific point in time and views international law much as a black and white photograph.¹⁰ The latter are more inclined to adopt what may be termed a ‘kitchen sink approach’ to legal argument, relying on a wide range of hard and soft law to support their position and viewing international law more as a moving image.¹¹ Much of the existing literature adopts the observational standpoint of the third party decision maker and, consequently, may be unduly restrictive. A broader perspective is needed, one not confined to the courtroom context but which recognizes the existence of other forums in which states agree to resolve their disputes within the general framework of international law. The practical consequences of this broader perspective are important. In a diplomatic forum, for example, the observational standpoint of the principal addressees of norms and their agents will be more in evidence. This means that there will be a far greater willingness to resolve the dispute by

⁷ On the issue of whether gaps or lacunae can exist, see also *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (1970) 41 ILR 29, Separate Opinion of Judge Ammoun, 115; *In Case Concerning the Barcelona Traction, Light and Power Co. Ltd. (Second Phase)* (1973) 46 ILR 178, Separate Opinion of Judge Tanaka, 305; Dekker and Werner, ‘The Completeness of International Law and Hamlet’s Dilemma’.

⁸ ‘On the Logical Openness of Legal Orders’ (1959) 8 Am J Comp L 187, 193-200, 202.

⁹ ‘Formation of International Law and the Observational Standpoint’, Appendix to First Report of the Rapporteur (1986) Annex 1 to Committee on the Formation of the Rules of Customary (General) International Law, ‘First Interim Report’ in International Law Association Report of the Sixty-Third Conference (Warsaw 1988).

¹⁰ Mendelson, ‘Formation of International Law and the Observational Standpoint’, 8-9.

¹¹ *Ibid* 9-11.

reference to soft law sources, precluding a finding of the very existence of silence in the case at hand.

Assuming that silence can and does exist, the next question is how to characterise that silence. Jörg Kammerhofer, for example, raises the question whether silence is simply a ‘gap’ or whether it is a ‘gap in the law’, the latter being reserved to situations which the legal order ‘ought to govern’.¹² He takes the view that since normative orders consist only of norms there cannot be an absence of norms ‘*within* a normative order’.¹³ Silence can only be characterised as a gap within the international legal order if ‘a further normative order’ such as natural law is super-imposed on it with a view to identifying areas which this legal system *ought* to govern.¹⁴ This suggests that in thinking about how to characterise silence, it is also necessary to think about what is the proper sphere of regulation of international law and whether there is a natural law rather than a consensual basis of legal obligation.

A further question is whether silence is intentional, inadvertent or simply a reflection of the international legal system’s indifference to the conduct in question. There are various approaches to this question. According to one approach, where there is silence the legal order has simply left the area unregulated and ‘completely at large’.¹⁵ Tammelo, for example, takes the view that in these circumstances the legal order has ‘neither “willed” nor has it “willed not to will”’ to regulate the matter.¹⁶ Similarly, for Kammerhofer, silence cannot be viewed in the sense of ‘an act of will’.¹⁷ For these theorists, since the silence is not willed it cannot be deemed to be within the field of positive law.¹⁸ This leads them to reject the argument that where there is silence the legal order ‘grants a permission or accords a liberty’ to undertake the conduct in question.¹⁹ Instead, the matter is regarded as falling completely outside the remit of international law. Any permission to engage in that conduct is seen to flow from this factual state of affairs rather than any provision of international law.

An alternative approach is evident in the work of Lucien Siorat, who adopts a more calibrated approach to the existence of silence, identifying five different types of what he terms

¹² Kammerhofer, ‘Gaps, the Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument between Theory and Practice’, 340 (emphasis original).

¹³ Ibid 339, 358-359 (emphasis original).

¹⁴ Ibid 339-340.

¹⁵ Tammelo, ‘On the Logical Openness of Legal Orders’, 194.

¹⁶ Ibid.

¹⁷ ‘Gaps, the Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument between Theory and Practice’, 339.

¹⁸ Ibid. See also, Tammelo, ‘On the Logical Openness of Legal Orders’, 194.

¹⁹ Tammelo, ‘On the Logical Openness of Legal Orders’, 194.

‘deficiencies’ in the content of law.²⁰ Of interest in the present context is his distinction between the situation where the deficiency is created inadvertently (*‘lacunes’*) and the situation where it is ‘willed’ (*‘insuffisances sociales’*). Reflecting very much a consensual and state-centred approach to the international legal order, he argues that where there is an *insuffisance sociale* the court must declare a *non liquet*.²¹

While both approaches are useful, they have limitations. One of the most important is the perception of international law as though it is a black and white photograph rather than a moving image.²² By viewing international law as a moving image, it becomes more readily apparent whether silence is due to the matter being left ‘completely at large’ or whether the matter is in the process of being regulated albeit that such regulation has not yet crystallised. This has practical implications not least in terms of how to respond to silence. While a *non liquet* declaration may be appropriate when silence is ‘willed’, it may be less so when regulation of the matter is on the point of crystallising into international law.

A related question is that of the origins of silence. These are multifaceted and cannot be exhaustively described. But it can be useful to consider the origins of silence in two particular instances. The first is that silence may reflect a deliberate exercise of self-restraint on the part of the legislator. This self-restraint may be based on certain underlying assumptions concerning the proper scope of the international legal system. In particular, it may reflect certain assumptions about the appropriate division of regulatory functions between international and national law. If this proves to be the case, the appropriate response to silence may be to defer regulation to national law.

Alternatively silence may be due to the limited international legal personality of non-state actors. While these entities can have certain rights and obligations under international law, these are not coterminous with those of states. There will be many instances where international law is silent on the conduct of non-state actors, given that it does not regulate their conduct in the same extensive way as it regulates the conduct of states. This dimension to

²⁰ According to Siorat, there are five types of ‘deficiencies’ (1) *‘obscurite dans la reglementation lorsque, au regard du cas d’espece, le sens d’un traite ou de la coutume parait douteux’*, (2) *‘insuffisances logiques’* when *‘le traite ou la coutume n’a qu’un rapport indirect avec le cas d’espece’*, (3) *‘lacunes’* or silence in the strict sense where there is *‘[un] defaut des traites et de la coutume qui ne prevoient pas la solution d’un cas d’espece’* and the gap is created inadvertently, (4) *‘insuffisances sociales’* *‘lorsque les traites ou la coutume ne prevoient pas la solution du cas d’espece qui peut etre obtenu seulement par une amiable composition entre les Etats parties au differend’*, and (5) *‘carences de droit’* where the law provides a relevant rule but it is one that is deemed to be unsatisfactory by the parties: see Siorat, discussed in Stone, ‘Non Liqueur and the Function of Law in the International Community’, 141.

²¹ Ibid 142.

²² See e.g. Mendelson, ‘Formation of International Law and the Observational Standpoint’, 9.

silence has attracted little attention in the literature.²³ This is unfortunate especially when principles that were originally formulated in relation to the conduct of states are extended to the conduct of non-state actors without any consideration of their underlying rationale or potential implications. A case in point is the principle that what is not prohibited is legally permitted. The principle has been invoked in relation to non-state actors,²⁴ but it is based on a state-centred and consensual view of international law and is of doubtful relevance to non-state actors.

The range of possible responses to silence must also be considered. Unfortunately, these responses are not always formulated in a clear and consistent manner. For example, consider the principle that what is not prohibited is permitted under international law. This principle is variously described as the permissive principle, the *Lotus* principle,²⁵ the residual negative principle,²⁶ the ‘closing’ principle,²⁷ the ‘negative legal maxim’,²⁸ the negative legal regulation argument,²⁹ and, on occasion, the principle of the completeness of the legal order.³⁰ It will be referred to here as the permissive principle. The legal landscape is further complicated in that the completeness of the legal order as formulated by Lauterpacht is in opposition to the permissive principle in all its permutations.³¹ This is not just a question of linguistic tidiness. These variations in language can mask fundamental differences concerning the underlying justifications for these approaches, the extent to which they can and should be extended to regulate the conduct of non-state actors, and, more generally, for what they signify in terms of the character and structure of the international legal order.

²³ This is hardly surprising given that many of the seminal texts in this area predate the burgeoning role of non-State actors within the international legal system: see eg, Lauterpacht, ‘Some Observations on the Prohibition of “Non Liqueur” and the Completeness of the Law’, 196; Stone, ‘Non Liqueur and the Function of Law in the International Community’. It is at least acknowledged in some of the recent literature: see e.g., A Peters, ‘Does Kosovo lie in the Lotus-land of freedom?’ (2011) 24(1) LJIL 95, 100-101; T Christakis, ‘The ICJ Advisory Opinion on Kosovo: has International Law something to say about Secession?’ (2011) 24(1) LJIL 73, 79; D Jacobs, ‘International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion of 22 July 2010’ (2011) 60 ICLQ 799, 804.

²⁴ See e.g. Written Statements of Denmark (April 2009, para 2.2) and Austria (April 2009, para 22, n 39) in the *Kosovo* case.

²⁵ *Kosovo Advisory Opinion*, Declaration of Judge Simma [8].

²⁶ See the reference to the ‘Kelsenite’ view in Stone, ‘Non Liqueur and the Function of Law in the International Community’, 126, 129; D Bodansky, ‘*Non Liqueur* and the Incompleteness of International Law’ in LB de Chazourmes and P Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (CUP 1999) 161-165.

²⁷ Dekker and Werner, ‘The Completeness of International Law and Hamlet’s Dilemma’, although they would question its existence in international law.

²⁸ Tammelo, ‘On the Logical Openness of Legal Orders’, 192.

²⁹ See the interpretation of Kelsen in Kammerhofer, ‘Gaps, the Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument between Theory and Practice’, 340.

³⁰ *Ibid* 341.

³¹ ‘Some Observations on the Prohibition of “Non Liqueur” and the Completeness of the Law’, 197-198, 200-205.

III. PERCEPTIONS OF SILENCE IN INTERNATIONAL LAW

A review of the proceedings in the *Kosovo* case demonstrates that the absence of an explicit prohibition on declarations of independence in international law elicited at least three distinct responses from states. The first was that international law was ‘neutral’.³² The second was that this was simply an unregulated area of international law.³³ The third was that the authors of declarations of independence were not bound by existing principles of international law concerning, for example, respect for territorial integrity.³⁴ All three may seem to be the same principle formulated in slightly different terms but on closer inspection this is not the case. Each of these perceptions of silence is analysed in the present section in the light of the ICJ’s Advisory Opinion, the written statements submitted to the Court and the relevant academic literature.

A. International law is ‘neutral’ on a particular issue

This approach asserts that there is neither a right to engage in certain conduct nor a prohibition on such conduct under international law: international law is simply ‘neutral’ on the point. The idea that a legal system can be ‘neutral’ might strike some domestic lawyers as unusual if not unsettling. Nevertheless, there is support in the literature³⁵ for this perception of silence in international law. On closer examination, it is clear that this perception of silence is based on certain assumptions about the character and structure of the international legal system. It also becomes clear that, rather than dictating one particular response to silence, this perception of silence is capable of endorsing several possible responses.

The significance of legally neutral behaviour has been explored by Tammelo and Kammerhofer. They take the view that if international law admits the possibility of legally neutral behaviour it is an ‘open’ rather than a ‘closed’ legal order, which means that it admits

³² See e.g. the Written Statements of Albania (July 2009, para 35); Czech Republic (April 2009, 7-8); France (April 2009, para 2.5); United States (July 2009, 13); Austria (April 2009, para 38); Ireland (April 2009, para 19). Cf Written Statements of Argentina (July 2009, paras 12-13); Cyprus (July 2009, para 2); Azerbaijan (April 2009, paras 24-27); Serbia (April 2009, paras 1009-1015); Spain (April 2009, paras 13-15, 19-34).

³³ See e.g. Written Statements of Luxembourg (April 2009, para 16); Norway (April 2009, para 10); United Kingdom (July 2009, para 33); United States (April 2009, 50-52); Netherlands (April 2009, para 3.22); Poland (April 2009, paras 2.2-2.3); Albania (April 2009, paras 2, 41, 43, 44, 47); France (April 2009, para 2.1- 2.9-2.10, 2.82); Austria (April 2009, para 24); Denmark (April 2009, para 2.2); Germany (April 2009, 8, 27, 29, 32); Japan (April 2009, paras 2, 4). Cf Written Statements of Argentina (July 2009, paras 12-13); Cyprus (July 2009, para 2); Slovak Republic (April 2009, paras 1, 3-13, 18-28); Azerbaijan (April 2009, paras 24-27); Russian Federation (April 2009, paras 18-30, 54-104); Serbia (April 2009, paras 412-1039); Spain (April 2009, paras 13-15, 19-34).

³⁴ See e.g. Written Statements of Austria (April 2009, para 37, n 110); France (April 2009, para 2.6).

³⁵ See e.g. Tammelo, ‘On the Logical Openness of Legal Orders’, 194; J Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 390.

the possibility of an absence of law.³⁶ As an ‘open’ legal order, it is deemed to be indifferent to the behaviour in question, neither ‘willing’ nor ‘willing not to’ regulate it.³⁷ This indifference, in turn, is taken to signify that while there may be a gap, it is not a gap in the legal order as such.³⁸ In effect, the behaviour is deemed to fall *outside* the remit of international law.³⁹ As such, it is immaterial whether silence relates to the conduct of state or non-state actors, the response will be the same.

There is some support for aspects of this approach in some of the written statements submitted during in the *Kosovo* case. Albania, for example, in asserting that international law was neutral on declarations of independence, went on to say that they were ‘outside the realm of’ international law’ and therefore compatible with it.⁴⁰ Other states that adhered to the legal neutrality argument simply stated that declarations of independence were not contrary to international law.⁴¹ Underpinning these responses to silence is a perception of the international legal system as consisting of prohibitions rather than permissions. For these states, there must be a prohibition on declarations of independence before they can be regarded as violating international law.⁴²

This position did not go unchallenged.⁴³ But not one state contested the possibility of international law being neutral in principle, although they contested the neutrality of international law in relation to the Kosovo declaration of independence. This lends some support to Tammelo’s argument that the international legal system is an ‘open’ one. While this in itself is not a ground-breaking finding it does highlight the multifaceted nature of silence in international law. Silence may denote the complete absence of regulation so that the conduct falls outside the remit of the international legal system. Alternatively, silence may denote the

³⁶ Tammelo, ‘On the Logical Openness of Legal Orders’, 188, 200; Kammerhofer, ‘Gaps, the Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument between Theory and Practice’, 338.

³⁷ Kammerhofer, ‘Gaps, the Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument between Theory and Practice’, 338-339.

³⁸ *Ibid* 339-340.

³⁹ *Ibid* 339-340. See Tammelo who asserts that in these circumstances the behaviour will be ‘allowable’ albeit this assertion does not represent any legal norm: ‘On the Logical Openness of Legal Orders’, 196.

⁴⁰ Written Statement (April 2009, paras 73-74) albeit the discussion of declarations of independence is merged with that of secession.

⁴¹ Written Statements of Czech Republic (April 2009, 7); France (April 2009, para 2.1, 2.5, 2.9-2.10); United States (2009, 13); Austria (April 2009, para 24); Ireland (April 2009, paras 18-26).

⁴² Written Statements of Austria (April 2009, para 22); Czech Republic (April 2009, 6-7); France (April 2009, para 2.9); Ireland (April 2009, para 18). Other States shared this perception of the international legal system: see e.g. Written Statements of Germany (April 2009, 8); United Kingdom (April 2009, para 1.14); Denmark (April 2009, para 2.2).

⁴³ See Written Statements of Argentina (April 2009, para 129); Slovak Republic (April 2009, paras 1, 3-13, 8-28); Azerbaijan (April 2009, paras 10-27); Serbia (April 2009, paras 942, 1009-1015).

need to apply existing principles to novel factual circumstances. It follows that the character of silence in the case at hand needs to be carefully analysed before responding to it. If the matter falls outside the remit of international law, an unreflecting extension of existing principles to govern the situation will actually extend the sphere of regulation of the international legal system. This is problematic if it means encroaching on another legal system which may have a greater claim to regulate the matter.

While this second group of states conceded the possibility of legally neutral behaviour, they differed in their assessment of the consequences of such a characterisation. For these states, there has to be a clear legal basis for conduct before it can be in accordance with international law.⁴⁴ In the absence of any clear legal basis, the declaration of independence was not in accordance with international law.⁴⁵ Thus even if there is a consensus that international law can be neutral in principle, this perception of silence as ‘neutrality’ does not lead inevitably to one specific response. Instead, it depends on whether the international legal system is seen as a system of prohibitions or permissions. As the *Kosovo* case demonstrates, there is no consensus among states on this question.

The ICJ, for its part, took the view that it was not necessary to examine whether international law authorised the declaration of independence.⁴⁶ Instead, it was simply a question of determining whether the declaration violated international law.⁴⁷ Indeed, the Court considered it ‘entirely possible for a particular act not to be in violation of international law without necessarily constituting the exercise of a right conferred by it’.⁴⁸ In the light of this reasoning, it will be difficult to argue that there must be some authorisation for conduct before it will be in accordance with international law, at least to the extent that this argument is raised in proceedings before the Court.⁴⁹

To sum up, silence can signify that international law is neutral on a particular issue. However, as the *Kosovo* proceedings demonstrate, this perception can mask fundamental differences about the nature of the international legal system and the consequences that flow

⁴⁴ See Written Statements of Argentina (April 2009, paras 116, 127); Azerbaijan (April 2009, para 25); Bolivia (April 2009, para 4); Cyprus (April 2009, para 88); Estonia (April 2009, 4-5, 12); Romania (April 2009, paras 7, 162).

⁴⁵ *Ibid.*

⁴⁶ Advisory Opinion [56].

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Although it has been argued that the ‘question of permission/prohibition has to be addressed with specific reference to the issue area at hand’: see e.g. M Weller, ‘Modesty can be a virtue: judicial economy in the ICJ Kosovo Opinion?’ (2011) LJIL 127, 134.

from its neutrality on a given point. Depending on whether the international legal system is seen as a system of prohibitions or permissions, silence or ‘neutrality’ can lead to different conclusions as to the legality or illegality of the conduct in question.

B. The absence of regulation in international law

According to a second approach, silence denotes the absence of regulation in international law. This may be seen as a reformulation of the legal neutrality approach. Indeed, it can be difficult to distinguish between the two. Yet, they are not always seen to be co-terminous. This is evident from some of the written statements when they were advanced as alternative lines of argument.⁵⁰ What also emerges from the written statements is that the non-regulation approach places more emphasis on the perceived origins of the silence and produces a wider range of responses to it.⁵¹

States asserting the non-regulation of declarations of independence in international law tended to rely on two distinct arguments. The first was that these declarations were regulated by national law and therefore fell outside the remit of the international legal system.⁵² This reflects a certain view of the division of regulatory functions between the international and national legal systems. The second was that no principles of international law could be found to regulate these declarations.⁵³ This approach reflects the specific observational standpoint adopted by these states to the sources of international law.⁵⁴ While all these states asserted that declarations of independence were not regulated by international law, they differed in their responses to that conclusion.

Some asserted that since these declarations fell outside the remit of international law they could not be incompatible with it,⁵⁵ or they relied on the *Lotus* principle to render these declarations in accordance with international law.⁵⁶ Others argued in the alternative that there

⁵⁰ See e.g. Written Statements of Albania (April 2009, paras 41-47, 73); France (April 2009, paras 2.2, 2.5); Austria (April 2009, paras 24, 38).

⁵¹ See e.g. Written Statements of Albania (April 2009, paras 2, 41-47); Austria (April 2009, para 22); United States (April 2009, 13, 51); Germany (April 2009, 8, 29).

⁵² See e.g. Written Statements of Albania (July 2009, paras 35, 53); Germany (April 2009, 29); United States (April 2009, 51).

⁵³ See e.g. Written Statements of France (April 2009, paras 1.4-1.5, 2.1-2.10); Austria (April 2009, para 24); Denmark (April 2009, para 2.2); Germany (July 2009, 6-7); United States (April 2009, 50-52); Japan (April 17, 2009, paras 2, 4); Luxembourg (April 2009, para 16); Norway (April 2009, para 10); United Kingdom (July 2009, para 36); Netherlands (April 2009, para 3.22); Poland (April 2009, paras 2.2-2.3).

⁵⁴ See e.g. Written Statement of France (April 2009, para 2.6).

⁵⁵ See e.g. Written Statements of Luxembourg (April 2009, paras 16, 27); United Kingdom (July 2009, para 33); United States (April 2009, 51, n 211).

⁵⁶ See e.g. Written Statements of Austria (April 2009, para 22, n 39); Denmark (April 2009, para 2.2); Germany (April 2009, 8).

could be a legal basis to the Kosovo declaration of independence by virtue of the right to remedial self-determination.⁵⁷ Given the absence of any significant body of state practice in support of such a right, it seems that these states were asserting more what the international legal system *should* do⁵⁸ and, in this respect, seem to endorse a naturalist rather than a consensual basis of obligation in international law.

A more controversial response was the argument that non-regulation deprived the Court of jurisdiction.⁵⁹ This was contested even by states adhering to the non-regulation argument.⁶⁰ In addressing this argument, the Court focussed on the actual *formulation* of the request.⁶¹ It observed that the question whether a particular action is compatible with international law ‘certainly appears to be a legal question’.⁶² Rejecting the argument that it did not have jurisdiction because declarations of independence are regulated by national law, the Court noted that the question posed is whether the declaration was in accordance with ‘international law’.⁶³ Given that virtually all issues in both contentious and advisory proceedings can be formulated in terms of the compatibility of particular conduct with international law, it is difficult to conceive of circumstances in which the Court would find that it is not dealing with a legal question. This suggests that the denial of jurisdiction is not a credible response to silence.⁶⁴

Other states rejected the non-regulation argument.⁶⁵ In doing so, they often relied on a series of soft law instruments to argue that declarations of independence violate international law.⁶⁶ Again, this demonstrates the importance of the observational standpoint to the sources

⁵⁷ See Written Statements of Netherlands (July 2009, paras 3-4); Poland (April 2009, para 6).

⁵⁸ This assessment of the approach adopted by these States finds some support in the Advisory Opinion itself when the Court noted the ‘sharp difference of views’ on the question of remedial secession or remedial self-determination [82]. The existence of such difference of views undermines arguments that there is a right to remedial secession or self-determination under customary international law.

⁵⁹ See Written Statements of Albania (July 2009, para 34); France (April 2009, paras 1.4-1.5, 2.9).

⁶⁰ See Written Statement of Czech Republic (April 2009, 3). Other States who adopted the non-regulation argument did not contest the jurisdiction of the Court but urged it to use its discretion to decline the request: see e.g. Written Statement of United States (April 2009, 41-45).

⁶¹ See Advisory Opinion [25].

⁶² Ibid.

⁶³ Ibid [26].

⁶⁴ There is some support for this position in the literature. See Lauterpacht, *The Function of Law in the International Community* 86, rejecting the argument that there was either a theoretical or practical possibility of an international court declining jurisdiction because of an absence of a legal rule applicable to the case.

⁶⁵ See e.g. Written Statements of Argentina (July 2009, paras 12-13); Cyprus (July 2009, paras 2, 13-21); Serbia (April 2009, paras 412-1039); Slovak Republic (April 2009, paras 1, 3-13, 18-28); Azerbaijan (April 2009, paras 10-27); Russian Federation (April 2009, paras 18-30, 54-104); Spain (April 2009, paras 13-15, 19-34).

⁶⁶ See e.g. Written Statements of Cyprus (July 2009, paras 15, 16); Slovak Republic (April 2009, paras 5, 8, 9, 11). These States also relied on a particular interpretation of SCR 1244 (10 June 1999) to argue that the Kosovo declaration of independence was regulated by international law and had violated it.

of international law when dealing with silence. One state also acknowledged that while some declarations of independence fall within the remit of national law, others do not,⁶⁷ thereby suggesting the need for a more calibrated approach. This highlights the need to consider the particular conduct in the light of all the circumstances and to avoid a broad brush approach to the question of whether such conduct is regulated by international law.⁶⁸

C. The existing legal principles do not bind non-state actors

According to this approach, the existence of silence is due to the (lack of) international legal personality of the non-state actors in the case at hand. It asserts that there are no international legal principles and, more importantly, none that can be assumed to apply due to the limited and derivative international legal personality of non-state actors. Clearly, there is some overlap between this position and those outlined previously in the sense that all three approaches focus on the absence of explicit legal principles. Nevertheless, it is useful to distinguish it from those other approaches. It focuses to a far greater extent on the fundamental structure of the international legal system, notably the status of non-state actors within it, and how this is relevant in determining whether silence exists.

The *Kosovo* case highlights the salience of this approach. In several instances, silence was attributed directly to the lack of international legal personality of the authors of the declaration of independence.⁶⁹ In other instances, the absence of international legal personality was integral to many of the arguments advanced and, by implication, to the existence of silence in international law. For example, one of the main points of contention was whether the principle of territorial integrity applied to non-state actors such as the authors of the declaration. This elicited a series of responses ranging from the assertion that the principle applied only to states,⁷⁰ to the assertion that it applied also to non-state actors,⁷¹ with the variation in between that it applied to non-state actors but could be overridden in exceptional circumstances by the principle of self-determination.⁷² Issues of international legal personality also featured in the

⁶⁷ Written Statement of Russian Federation (April 2009, para 12).

⁶⁸ See also, in a similar vein, *Kosovo Advisory Opinion*, Dissenting Opinion of Judge Koroma [20].

⁶⁹ Written Statements of Norway (July 2009, para 13); Austria (April 2009, paras 16, 24).

⁷⁰ See e.g. Written Statements of Austria (April 2009, para 37, n 110); France (April 2009, para 2.6); Switzerland (May 2009, para 55); United Kingdom (April 2009, paras 5.9-5.11); United States (July 2009, 15-20).

⁷¹ See e.g. Written Statements of Argentina (April 2009, para 75); Brazil (April 2009, ninth para) ; Cyprus (July 15, 2009, paras 14-18); Iran (April 2009, para 3); Bolivia (April 2009, 1); Spain (April 2009, paras 24-25); Slovak Republic (April 2009, paras 3-13); Romania (April 2009, para 108); Serbia (April 2009, paras 413-439). This view was also shared by some members of the Court. See e.g. Dissenting Opinion of Judge Koroma, [9].

⁷² See e.g. Written Statements of Slovenia (April 2009, para 8); Netherlands (July 2009, para 3); Switzerland (May 2009, paras 56, 63, 67-68); Finland (April 2009, para 7); Poland (April 2009, para 6.9).

arguments concerning the second main point of contention, namely, whether the authors of the declaration were bound to respect the territorial integrity of Serbia by virtue of Security Council Resolution 1244 (1999).⁷³ One state went so far as to call into question whether the resolution *could* have imposed international legal obligations of this nature on non-state actors under the UN Charter.⁷⁴ It observed that the emergence of direct legal obligations for non-state actors under international law is carefully circumscribed and that such ‘obligations and responsibilities cannot be assumed without a clear legal basis’.⁷⁵ Presumably, the emergence of direct legal rights for these actors would be similarly circumscribed. This demonstrates the need to proceed cautiously whenever silence concerns the conduct of non-state actors. What also emerges from the written statements is that this analysis of silence is capable of producing more than one response. While some states argued that the declaration was in accordance with international law because of the absence of any breach,⁷⁶ others relied on the *Lotus* principle.⁷⁷

The Court ultimately found that the authors of the declaration of independence were not bound by the principle of territorial integrity on the basis that the principle applied only to states.⁷⁸ It also found that they were not bound by UNSC Resolution 1244 (1999) as the resolution did not contain any prohibition on the authors of the declaration from declaring independence.⁷⁹ In this case, relevant legal principles existed but they did not apply to the authors of the declaration of independence due to their status as non-state actors and the specific rights and obligations that attached to that status. This highlights, once again, the potentially multifaceted nature of silence. Silence may be due to the limited legal personality of the actor in question and, where this is the case, their conduct seems to fall outside the remit of international law.

IV. A TYPOLOGY OF RESPONSES TO SILENCE IN INTERNATIONAL LAW

There are various possible responses to silence in international law. They include the assertion that that which is not prohibited is permitted, the ‘completeness’ of the international legal system, the issuing of a *non liquet* declaration, and the assertion that the situation is *sui*

⁷³ See e.g. Written Statement of United States (July 2009, 37-42).

⁷⁴ Written Statement of Norway (July 2009, para 13).

⁷⁵ *Ibid.* Cf Written Statement of Serbia (April 2009, para 524).

⁷⁶ See e.g. Written Statement of Norway (July 2009, para 13).

⁷⁷ See e.g. Written Statement of Austria (April 2009, para 22, n 39).

⁷⁸ *Kosovo Advisory Opinion* [79]-[81].

⁷⁹ *Ibid* [102]-[119].

generis.⁸⁰ Each potential response will be analysed with a view to determining its precise meaning(s), its underlying rationale, the extent to which it can apply to the conduct of states and non-state actors, and the broader implications that can flow from it.

A. ‘That which is not prohibited is permitted’

The various labels applied to the ‘permissive principle’ have already been mentioned. The use of these labels interchangeably is problematic as they can entail quite different responses to silence. The absence of a prohibition can be equated with being legally permitted to engage in the conduct under international law (a ‘legal’ permission). Alternatively, it can signify that the conduct falls outside the remit of international law and that any permission to engage in it simply flows from this factual state of affairs (a ‘factual’ permission). References to the ‘permissive principle’ the ‘negative legal maxim’ and the ‘residual negative principle’ imply a legal permission,⁸¹ while references to the ‘negative legal regulation’ argument imply a purely factual permission.⁸² The situation is further complicated by the fact that certain terms such as the ‘*Lotus* principle’ are often used to denote either a legal or a factual permission and that their precise meaning is rarely made explicit. The present section seeks to explore the principal meanings, underlying rationales and potential implications of the various approaches. It begins by analysing the approach adopted by Hans Kelsen before considering the judgment of the Permanent Court in the *Lotus* case and concluding with an analysis of the various ways in which the terms were used in the *Kosovo* case.

Kelsen is often associated with the permissive principle.⁸³ This is understandable given his assertion that ‘what is not legally forbidden to the subjects of the law is *legally* permitted to them’.⁸⁴ But this interpretation is rejected by Kammerhofer as a misreading of Kelsen’s work. He argues that the permissive principle would contradict Kelsen’s Pure Theory of Law

⁸⁰ Other responses include (a) the denial of the jurisdiction of the international court or tribunal; (b) the argument that since a declaration of independence is not regulated by international law ‘there is no point assessing its legality, as such, under international law’ albeit this did not mean that the Court lacked jurisdiction (See *Kosovo Advisory Opinion*, Separate Opinion of Judge Yusuf [5]; *ibid*, Dissenting Opinion of Judge Skotnikov, [17]), and (c) the possibility that there could be ‘possible degrees of non-prohibition, ranging from “toleration” to “permissible” to “desirable”’: *ibid*, Declaration of Judge Simma [8]. Judge Simma also suggests that the fact that ‘an act might be “tolerated” would not necessarily mean that it is “legal”, but rather that it is “not illegal”’: *ibid* [9].

⁸¹ See e.g. Stone, ‘Non *Liquet* and the Function of Law in the International Community’, 136; Bodansky, ‘*Non Liquet* and the Incompleteness of International Law’, 164.

⁸² See e.g. Kammerhofer, ‘Gaps, the Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument between Theory and Practice’, 340-344.

⁸³ See e.g. Stone, ‘Non *Liquet* and the Function of Law in the International Community’, 135; Bodansky, ‘*Non Liquet* and the Incompleteness of International Law’, 162.

⁸⁴ H Kelsen, *Principles of International Law* (Rinehart & Company 1952) 306 (emphasis added).

since it would mean positive normative orders include things other than positive norms.⁸⁵ This leads him to conclude that when Kelsen refers to freedom, this simply refers to ‘negative freedom’ which is the ‘absence of norms as defined by the sum-total of positive norms, not the creation of positive freedom (as permission) because of the absence of positive norms of prohibition or obligation’.⁸⁶ Viewed from this perspective, he argues that Kelsen endorses the negative legal regulation argument rather than the permissive principle.⁸⁷ The distinction between these approaches needs to be made explicit. If the negative legal regulation argument is adopted, then the freedom that flows from the absence of a prohibition is not based on any positive norm of international law. It is a purely factual matter. Kammerhofer illustrates the point well with the example of the absence of any prohibition on the sharpening of a pencil.⁸⁸ In the absence of any regulation of this activity under international law, one can hardly say that the sharpening of a pencil is *legally* permitted. It is simply an area that falls outside the remit of the international legal system and should be recognised as such. It also means that no distinction needs to be drawn between the conduct of states and the conduct of non-state actors. The negative legal regulation argument is equally applicable to both. In terms of the broader implications of this approach, Kammerhofer observes that entities are ‘not acting contrary to international law if they behave in a way international law does not regulate’.⁸⁹ In accordance with this approach, the conduct will always be compatible with international law.

Turning to the *Lotus* case,⁹⁰ the judgment of the Permanent Court continues to exert a lasting, albeit controversial, influence. The Court was presented with two competing approaches to the question of whether the exercise of jurisdiction by the respondent state was compatible with international law. The first approach asserted that jurisdiction is allowed whenever it does not come into conflict with a principle of international law.⁹¹ According to the second, it is necessary to point to some title to jurisdiction recognized by international law.⁹² The Court opted for the former on the basis that it was ‘dictated by the very nature ... of international law’ where the rules binding on states emanate ‘from their own free will’.⁹³ It

⁸⁵ Kammerhofer, ‘Gaps, the Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument between Theory and Practice’, 342.

⁸⁶ *Ibid.*

⁸⁷ *Ibid* 340-344.

⁸⁸ *Ibid* 337-338.

⁸⁹ *Ibid* 358.

⁹⁰ S.S. ‘*Lotus*’, PCIJ, Ser A, No 10, 1927 <http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf > accessed 13 March 2013.

⁹¹ *Ibid* [18].

⁹² *Ibid.*

⁹³ *Ibid.*

followed from this that restrictions ‘upon the independence of states cannot therefore be presumed’⁹⁴ and all that can be required of a state is that it should not overstep the limits which international law places upon its jurisdiction.⁹⁵ This led the Court to conclude that, in the absence of any prohibition, the exercise of jurisdiction was compatible with international law.⁹⁶

The judgment is susceptible to different interpretations. The most common interpretation is that the Court endorsed the view that what is not prohibited is legally permitted in international law.⁹⁷ Viewed from this perspective, the *Lotus* principle is synonymous with the permissive principle. This interpretation has provoked some controversy.⁹⁸ As Judge Nyholm observed in the *Lotus* case, any assertion of a legal principle must find its basis in one of the established sources of international law.⁹⁹ The Court’s perceived failing is that while it undertook a careful analysis of whether there was a rule of customary international law stipulating that only flag states could exercise criminal jurisdiction on the high seas,¹⁰⁰ it did not undertake a similar exercise in relation to its assertion of the principle that what is not prohibited must be permitted. For Judge Nyholm, the Court effectively equated a situation of fact (the absence of prosecutions and protests to the assumption of jurisdiction by non-flag

⁹⁴ Ibid.

⁹⁵ Ibid [19].

⁹⁶ Ibid [31].

⁹⁷ See e.g. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 < <http://www.icj-cij.org/docket/files/93/7407.pdf> > accessed 13 March 2013, Dissenting Opinion of Judge Shahabuddeen [390]; Declaration of Judge Bedjaoui [271]; Separate Opinion of Judge Guillaume [291]; Dissenting Opinion of Judge Weeramantry [494]-[496]; A Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2006) 822; R Higgins, *Themes and Theories* (OUP 2009) 1295; M Koskenniemi, ‘The Politics of International Law’ (1990) 1 EJIL 4, 13, 18; RA Falk, *The Status of Law in International Society* (Princeton University Press 1970) 260, 262; O Spiermann, ‘*Lotus* and the Double Structure of International Legal Argument’ in de Chazournes and Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons*, 133, 146; Bodansky, ‘*Non Liqueur* and the Incompleteness of International Law’, 164; CF Amerasinghe, ‘The Legality of the Use of or Threat to Use Nuclear Weapons’ (1999) 10 Finnish YB Int’l L 5, 7-8; MJ Glennon, ‘The Road Ahead: Gaps, Leaks and Drips’ (2013) 89 Int’l L Stud 362, 373-374; the discussion in Aznar-Gomez, ‘The 1996 Nuclear Weapons Advisory Opinion and Non Liqueur in International Law’, 8-9; the discussion in H Handeyside, ‘The *Lotus* Principle in ICJ Jurisprudence: Was the Ship ever Afloat?’ (2007-2008) 29 Mich J Int’l L 71, 75-76.

⁹⁸ See e.g. Lauterpacht, *The Function of Law in the International Community*, 94-95; G Fitzmaurice, ‘The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law’ (1953) BYIL 1, 16-18; H Lauterpacht and CHM Waldock (eds), *JL Brierly, The Basis of Obligation in International Law* (Clarendon Press 1958) 143-144; Spiermann, ‘*Lotus* and the Double Structure of International Legal Argument’, 137-143; H Thirlway, ‘The Law and Procedure of the International Court of Justice 1960-1989 (1989) 60 BYIL 1, 87, 91; M Koskenniemi, *The Politics of International Law* (Hart 2011) 49; Dekker and Werner, ‘The Completeness of International Law and Hamlet’s Dilemma’, 235-237, 243-245, 247; the discussion in H Handeyside, ‘The *Lotus* Principle in ICJ Jurisprudence: Was the Ship ever Afloat?’, 76-77.

⁹⁹ S.S. ‘*Lotus*’, Dissenting Opinion by Judge Nyholm [59]-[61]. See also Dissenting Opinion by Judge Altamira [103], [106]-[107].

¹⁰⁰ S.S. ‘*Lotus*’ [24]-[27].

states) with a legal principle (where there is no special rule, absolute freedom must apply),¹⁰¹ thereby raising doubts as to its existence as a substantive principle of international law.

Reviewing the literature and case law in this area, it seems that the existence or otherwise of a legal basis for the principle depends on how the character and structure of the international legal system is understood.¹⁰² According to one approach, the principle is based on a positivist and voluntarist conception of international law.¹⁰³ The starting point here is state sovereignty as the *source* of the international legal system.¹⁰⁴ Viewed from this perspective, international law simply operates to limit state sovereignty: in the absence of a prescriptive or prohibitive rule, states are legally free to act as they wish.¹⁰⁵ Given its underlying rationale, it is questionable whether this approach can be extended to the conduct of non-state actors, at least in the absence of any clear legal basis for doing so. Where the approach does apply, it means that the conduct will be in accordance with international law. In contrast, the alternative view asserts that states can only act where there is a legal basis for doing so.¹⁰⁶ Here, the international legal system is seen essentially as one of permissions rather than prohibitions. In the absence of any permission, the conduct in question will not be regarded as being in accordance with international law. In view of this, the absence of any explicit legal basis for asserting that what is not prohibited is legally permitted is regarded as a fundamental flaw in the Court's reasoning in the *Lotus* case.

¹⁰¹ Ibid, Dissenting Opinion by Judge Nyholm [60]-[61].

¹⁰² For a brief overview of the different approaches adopted in this area, see, Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law', 8-18; Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989', 84-92.

¹⁰³ See e.g. *Legality of the Threat or Use of Nuclear Weapons*, Declaration of Judge Bedjaoui [12]-[13], although he does not endorse this view; *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (1970) 41 ILR 29, Separate Opinion of Judge Ammoun [115]; Zimmermann, *The Statute of the International Court of Justice: A Commentary*, 724, 767; Weil, 'The Court Cannot Conclude Definitively ... "Non Liqueur" Revisited', 113; Falk, *The Status of Law in International Society*, 176, 260; the discussion in Aznar-Gomez, 'The 1996 Nuclear Weapons Advisory Opinion and Non Liqueur in International Law', 8-9.

¹⁰⁴ See e.g. *Legality of the Threat or Use of Nuclear Weapons*, Separate Opinion of Judge Guillaume [291]; Glennon, 'The Road Ahead: Gaps, Leaks and Drips', 373-374; JL Brierly, 'The "*Lotus*" Case' (1938) 44 LQR 133, 155-156, although he does not subscribe to this view.

¹⁰⁵ See e.g. the account in Weil, 'The Court Cannot Conclude Definitively ... "Non Liqueur" Revisited', 112; Amerasinghe, 'The Legality of the Use of or Threat to Use Nuclear Weapons', 8; Koskenniemi, *The Politics of International Law*, 44; the discussion in Aznar-Gomez, 'The 1996 Nuclear Weapons Advisory Opinion and Non Liqueur in International Law', 8-9.

¹⁰⁶ Weil, 'The Court Cannot Conclude Definitively ... "Non Liqueur" Revisited', 113, although he describes it as an 'unrealistic doctrine'.

Of course, these controversies only arise if the Court is asserting that in the absence of a prohibition, there is a legal freedom or permission to act.¹⁰⁷ This interpretation is not universally held. According to Kammerhofer, for example, the Court simply restated the positivist idea of law, notably, that restrictions are only applicable if they are found to be part of positive law. If there ‘is no law, there is no law. Nothing more than this was meant’.¹⁰⁸ Consequently, the “freedom” to act is merely factual’.¹⁰⁹ Viewed from this perspective, the judgment is not an endorsement of the permissive principle but a simple acknowledgement of the absence of a prohibition in the case at hand. Consequently, references to the *Lotus* principle are not synonymous with a legal permission to act. They can also denote a factual freedom to act. What might seem to be a singular response to silence can encompass very different responses with different spheres of application.

By recognizing that the *Lotus* principle is capable of different interpretations it is possible to make sense of some of the written statements in the *Kosovo* case. For example, it is hardly consistent to argue simultaneously that declarations of independence are unregulated in international law and that there is, nevertheless, a legal permission to make these declarations.¹¹⁰ If, however, the reference to *Lotus* simply denotes a factual freedom to make a declaration, this position becomes coherent. Further, it is one that is capable of addressing some of the criticisms raised by several states concerning the use of the *Lotus* principle in the *Kosovo* case. In particular, if all that is asserted is a factual freedom, the criticism that the use of the *Lotus* principle entails two ‘implausible conclusions’ of a ‘right’ or an ‘authorisation’ to secede¹¹¹ is unfounded. As a factual freedom applies to both state and non-state actors, it is also possible to reject the criticism that the *Lotus* principle is irrelevant to the conduct of a non-state actor ‘whose powers are limited by international institutions and which only has such powers as are conferred on it’.¹¹² At the same time, it must be acknowledged that the references to the *Lotus* principle did not always denote a purely factual freedom. Occasionally, they seemed to refer to a legal freedom to act, thereby raising questions about the appropriateness and internal consistency of this particular response to silence insofar as it relates to the conduct

¹⁰⁷ Indeed, this is the interpretation held by some members of the PCIJ: see *S.S. “Lotus”*, Dissenting Opinion by M. Loder [34]; Dissenting Opinion by M. Nyholm [60].

¹⁰⁸ ‘Gaps, the Nuclear Weapons Advisory Opinion and the Structure of Legal Argument between Theory and Practice’, 343.

¹⁰⁹ *Ibid* 357.

¹¹⁰ See e.g. the simultaneous references to the non-regulation argument and the *Lotus* principle in the Written Statements of Austria (April 2009, paras 22, 24); Denmark (April 2009, para 2.2); Germany (April 2009, 8).

¹¹¹ Written Statement of Serbia (April 2009, para 1017).

¹¹² Written Statement of Cyprus (July 2009, para 26). See also, Written Statement of Serbia (April 2009, para 1018).

of a non-state actor.¹¹³ It highlights the need to make explicit which interpretation of the *Lotus* case is being endorsed when responding to silence.

This ambiguity is evident in the Advisory Opinion itself. Although the Court did not refer explicitly to the principle that what is not prohibited is permitted, it is possible to argue that the principle is implicit in its approach. Indeed, it is difficult for it to be otherwise given the Court's assertion that in the absence of a prohibition the conduct 'is in accordance with' international law.¹¹⁴ This leaves open the question of whether the resulting freedom to make declarations of independence is grounded in fact or in the normative legal order. Support for the former might be gleaned from the Court's observation that the declaration would be in accordance with international law provided it did not violate any prohibition, irrespective of whether international law confers a '*positive* entitlement' to make a declaration of independence.¹¹⁵ At the same time, the matter is not entirely free from doubt. Judge Simma, for example, regarded the Court's approach as a 'straightforward application of the ... *Lotus* principle'¹¹⁶ by virtue of which everything that is not explicitly prohibited 'carries with it the same colour of legality'.¹¹⁷ He was highly critical of this approach regarding it as 'redolent of nineteenth-century positivism, with its excessively deferential approach to state consent'¹¹⁸ and calling into question its relevance in a contemporary legal order. What could also have been called into question is the relevance of this approach where the conduct is not that of a state but of a non-state actor.¹¹⁹

For Judge Simma, the adoption of the *Lotus* approach also meant that the Court did not explore whether international law could be deliberately neutral or silent on the issue and whether it could break from 'the binary understanding of permission/prohibition'.¹²⁰ These observations are interesting for several reasons. They highlight the need to consider the internal coherence of arguments asserting the neutrality or silence of international law while simultaneously asserting that what is not explicitly prohibited is *legally* permitted. They suggest that these positions are not mutually reconcilable and that either one would preclude

¹¹³ See Written Statement of Denmark (April 2009, para 2.2) where it refers to the conduct being 'permitted *under* international law' (emphasis added). See also, Written Statement of Austria (April 2009, para 22, n 39).

¹¹⁴ *Kosovo Advisory Opinion* [56], [83].

¹¹⁵ *Ibid* [56] (emphasis added). See also, in similar vein, H Hannum, 'The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?' (2011) 24 LJIL 155, 156.

¹¹⁶ *Kosovo Advisory Opinion*, Declaration of Judge Simma [8].

¹¹⁷ *Ibid*.

¹¹⁸ *Ibid*.

¹¹⁹ Neither the Court nor Judge Simma addressed this issue.

¹²⁰ *Kosovo Advisory Opinion*, Declaration of Judge Simma [9].

the deployment of the other. At a more general level, they highlight the significance of various responses to silence in terms of how the international legal system is viewed. Here, the Court's approach seems to be based on a perception of international law as a binary legal system composed of prohibitions and permissions.¹²¹

To sum up, the assertion that what is not prohibited is permitted is susceptible to more than one interpretation and is underpinned by very different perceptions of the international legal order. One asserts the existence of a legal permission and bases it on a positivist and voluntarist conception of international law. This interpretation is often referred to as the permissive principle or the residual negative principle, and is commonly identified as the *Lotus* principle. However, it has to be acknowledged that the *Lotus* principle, together with the concept of negative legal regulation, is also used to refer to a second interpretation, one which asserts the existence of a mere factual permission and bases it on the perception of international law as a normative order composed exclusively of positive legal norms.

All variants can be referred to as 'closing' principles, that is, principles that operate to ensure that the international legal system is closed in the sense of precluding the existence of any gaps. The first does so by adopting something akin to a default position, that is, in the absence of a prohibition the conduct is legally permitted, thereby precluding the existence of gaps in the law. The second does so by asserting that since a normative legal order can only comprise positive legal norms it is not possible to speak of gaps within the order. Beyond this minimal commonality, the two interpretations encompass important variations in approach both in terms of their impact and underlying justificatory basis. Although the second interpretation can apply equally to state and non-state actors, it is doubtful whether the same can be said for the first interpretation, given that it is based so firmly on the principle of state sovereignty. Further, while the second interpretation simply asserts the existence of a state of fact, the first asserts a legal principle, an assertion that is far from being generally accepted.¹²² Finally, the origins of silence must be considered before using any version of the principle. As the Canadian Supreme Court observed in *Reference Re Succession of Quebec*, the principle

¹²¹ For a critique of this approach, see e.g. Dekker and Werner, 'The Completeness of International Law and Hamlet's Dilemma'.

¹²² See e.g. Tammelo who argues that there 'is no conclusive evidence for a norm of general international law directly ... embodying the negative legal maxim': 'On the Logical Openness of Legal Orders', 201.

that what is not prohibited is permitted has little relevance where international law refers the legality of the conduct to national law.¹²³

B. The principle of the completeness of the international legal order

According to this view, the principle of completeness is not simply a descriptor of the current state of the international legal system but also a general principle of substantive law. At first sight, there might appear to be some overlap with the permissive principle. The principle that what is not prohibited is permitted can be deemed to ‘close’ or ‘complete’ the international legal system and, in this sense, may be equated with the principle of the completeness of the legal system. Indeed, this is the view taken by several commentators.¹²⁴ On closer analysis, however, it is better to regard them as embodying two distinct approaches, given their differences in terms of the techniques used to respond to silence in international law and the final assessment of the legality of the conduct. The principle that what is not prohibited is permitted effectively directs one to a default position, that is, in the absence of a prohibition, the conduct is permitted. The principle of the completeness of the legal order adopts a fundamentally different approach, one that focuses on a specific methodology and does not necessarily lead to the conclusion that the conduct is legally permitted.

Central to an understanding of the principle of completeness is the recognition that gaps can exist in the applicable substantive law.¹²⁵ According to Lauterpacht, the reference to ‘completeness’ does not refer to the completeness of substantive international law. Instead, the principle of completeness dictates that existing legal principles be interpreted in such a manner as to render them capable of regulating the situation under consideration. At its core, it asserts the ‘fertility’ of existing principles of international law as a source of rules for new situations.¹²⁶ Taken to its logical conclusion, it implies that there will be no areas of international concern left completely unregulated.¹²⁷ Indeed, for Lauterpacht, the principle of the completeness of the legal order is a positive formulation of the prohibition of *non liquet*.¹²⁸

¹²³ (1999) 115 ILR 537, 590.

¹²⁴ See e.g. the discussion in Tammelo, ‘On the Logical Openness of Legal Orders’, 188, 192; the discussion of the Kelsenite view of the completeness of the legal system based on the permissive principle in Stone, ‘Non Liqueur and the Function of Law in the International Community’, 135; the discussion in Weil, ‘The Court Cannot Conclude Definitively ... “Non Liqueur Revisited”’, 110.

¹²⁵ See e.g. Lauterpacht, *The Function of Law in the International Community*, 64-65, 86-87. Support for the principle of completeness can also be found in *Oppenheim’s International Law*, 12-13.

¹²⁶ See Stone, ‘Non Liqueur and the Function of Law in the International Community’, 133.

¹²⁷ Particularly when it is formulated in conjunction with a prohibition on declaring a *non liquet*: *ibid* 131-137.

¹²⁸ ‘Some Observations on the Prohibition of “Non Liqueur” and the Completeness of the Law’, 199.

Lauterpacht advanced three separate sources for the existence of the principle. According to the first, the reference to general principles of law in article 38 of the Statute of the International Court of Justice ‘incorporated into international law “the principle of the completeness of the legal order” as one of these “general principles”’.¹²⁹ The second is the adversary principle of judicial procedure by virtue of which a court must find for the respondent in the absence of a rule supporting the applicant’s claim: this operates to ‘complete’ the legal order.¹³⁰ Thirdly, the principle is supported by extensive judicial and arbitral practice.¹³¹ While there is nothing in these three sources *per se* that would preclude the application of the principle to both state and non-state actors, the extension of rights and obligations to non-state actors should not be assumed lightly, given the limited and derivative nature of their international legal personality.

Even in terms of its application to states, it is clear that these sources of the principle are problematic. For example, attempts to base it on international practice have always been contentious.¹³² Attempts to base it on the adversarial principle are equally problematic, not least because of the difficulty in applying this principle to advisory proceedings where there is no applicant or respondent and consequently no one to ‘lose by default’.¹³³ While Lauterpacht did not consider this to be a problem as he thought that every request for an Advisory Opinion could be reformulated as a claim,¹³⁴ it is questionable whether the Court would be willing to reformulate a request in such a manner, and certainly not in every case.¹³⁵ All these concerns seem to be borne out by the *Kosovo* opinion where no reference was made to the principle of completeness either by the ICJ or in the written statements and where, in any event, the non-contentious nature of the proceedings could have been seen as a disguised request in relation to a current dispute, formulated by the state most affected (Serbia).

¹²⁹ Ibid 205.

¹³⁰ Ibid 199. See also, G Schwarzenberger, *A Manual of International Law* (6th edn, Professional Books Ltd 1976) 198, who argues that the problem of *non liquet* is a ‘sham problem’ since it is ‘always possible to decide a case in favour of the defendant’ on the ‘presumption in favour of the freedom of States under international law’.

¹³¹ Lauterpacht, *The Function of Law in the International Community*, 200-205, 206.

¹³² See e.g. the critique in Stone, ‘Non Liqueur and the Function of Law in the International Community’, 126, 137, 146-147, 160.

¹³³ Kammerhofer, ‘Gaps, the Nuclear Weapons Advisory Opinion and the Structure of Legal Argument between Theory and Practice’, 335. See also, the critique of the adversarial principle in Stone, ‘Non Liqueur and the Function of Law in the International Community’, 136-137; and the significance of the distinction between contentious and advisory proceedings in the applicability of the principle in Weil, ‘“The Court Cannot Conclude Definitively ...” Non Liqueur Revisited’, 117.

¹³⁴ ‘Some Observations on the Prohibition of “Non Liqueur” and the Completeness of the Law’, 199, n 2.

¹³⁵ See also, Kammerhofer, ‘Gaps, the Nuclear Weapons Advisory Opinion and the Structure of Legal Argument between Theory and Practice’, 336.

In addition to concerns about the legal bases of the principle, there are concerns about some of its implications. One of the principal concerns relates to the role of an international court.¹³⁶ While it is generally accepted that existing principles of international law may be the source of rules for new situations, it is not always evident which principles should be applied in a given situation. Where this occurs in the context of court proceedings, the choice is essentially one for the court: Stone describes it as ‘a law-creating choice’.¹³⁷ Consequently, the principle of completeness can raise questions concerning the proper role of an international court and the point at which interpretation transgresses into law creation with all the attendant issues this can raise in terms of legitimacy and due process.¹³⁸ Stone’s criticism is not, however, universally shared. As Prosper Weil observes, in these instances the court is not engaged in a legislative function but is simply developing the law, a task which is ‘inherent in the judicial function’.¹³⁹ Nor can one ignore the specific context in which Lauterpacht formulated the principle of completeness, which was formulated not in the abstract but in the context of the international adjudication of a dispute by a court or tribunal. The consensual basis to the jurisdiction of these bodies is very much to the fore in Lauterpacht’s formulation. Once the parties to a dispute agree to entrust a court or tribunal with jurisdiction, Lauterpacht argues that they cannot avoid their obligations by claiming that the dispute is not a legal one in the sense that no relevant legal principles exist to resolve it.¹⁴⁰ It follows that when the court gives its judgment, it is doing so on the basis of the consent of the parties and their acceptance that there are some legal principles capable of being applied to resolve their dispute. Viewed from this perspective, it is difficult to assert that the court is acting outside the remit of its judicial function.¹⁴¹ It is doing precisely what it has been mandated to do.

¹³⁶ On different perceptions of the role of an international court, see e.g. R Higgins, ‘Policy Considerations and the International Process’ (1968) 17 ICLQ 58; CJ Tams and A Tzanakopoulos, ‘Barcelona Traction at 40: the ICJ as an Agent of Legal Development,’ (2010) 23 LJIL 781; T Ginsberg, ‘Bounded Discretion in International Judicial Lawmaking’ (2004-2005) 45 Va J Int’l L 631.

¹³⁷ ‘Non Liqueur and the Function of Law in the International Community’, 133, 134-135.

¹³⁸ There are, of course, different views on this issue. See e.g. *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Judge Weeramantry [237]-[238]; *Case Concerning Certain Questions Relating to Western Sahara (Rio de Oro and Sakiet El Hamra)* (1980) 59 ILR 30, Declaration of Judge Gros [94].

¹³⁹ “The Court Cannot Conclude Definitively ...” *Non Liqueur Revisited*, 110. For some writers, the idea that courts make law is a given: the ‘critical question is less one of the location of prescriptive authority than of appropriate operational procedures: how much should the judge prescribe in the particular case?’: see Reisman, ‘International Non-Liqueur: Recrudescence and Transformation’, 774.

¹⁴⁰ ‘Some Observations on the Prohibition of “Non Liqueur” and the Completeness of the Law’, 200.

¹⁴¹ One also has to bear in mind art 59 of the Statute of the International Court of Justice which provides that the ‘decision of the Court has no binding force *except between the parties* and in respect of that particular case’ (emphasis added).

C. *A sui generis approach*

A *sui generis* approach can encompass a range of quite complex positions not all of which are predicated on the existence of silence in international law. Some states deploy the *sui generis* argument in order to invoke an exception to an existing principle or to choose among competing principles the one that is perceived to be the most appropriate to the circumstances of a particular case. In other instances, the *sui generis* argument is used to demonstrate the absence of any relevant principles of international law and the need for a bespoke response to the circumstances of the case at hand. A third variant completely sidesteps the issue of silence and argues instead for a resolution of the case based on pragmatism rather than legal principle. Where this argument is deployed, the silence of international law is not due to the absence of legal principles but to their perceived inappropriateness in regulating what is asserted to be a unique situation.¹⁴² In these circumstances, silence stems not from a factual state of affairs (that is, the absence of legal principles) but from a qualitative assessment of the existing principles (that is, the appropriateness of the principles that do exist to address the situation at hand). This demonstrates an additional dimension to the nature of silence in international law. It also demonstrates the need for a careful delineation of the various *sui generis* arguments in formulating a response to silence. While the first variant does not recognize the existence of silence and is therefore largely irrelevant as a response to it, the third is relevant but can have far-reaching implications in terms of respect for the principles of legal certainty and the rule of law within the international legal system.

Aspects of all variants can be found in the written statements in the *Kosovo* case. Several states argued that Kosovo was a *sui generis* case on the basis of a unique combination of factors.¹⁴³ For some, the *sui generis* character of the case meant that the principle of self-determination took priority over the principle of territorial integrity,¹⁴⁴ or that at least it fell within an exception to the principle of territorial integrity. Of greater interest, perhaps, are the written statements that asserted that Kosovo was a *sui generis* case and that declarations of

¹⁴² See also, in a similar vein, the observation that there can be a '*lacuna* in the political sense, a gap improperly so-called' where law exists but is regarded as 'contrary to requirements of peace and the sense of moral propriety': Lauterpacht, 'Some Observations on the Prohibition of "Non Liqueat" and the Completeness of the Law', 198.

¹⁴³ See e.g. Written Statements of Finland (April 2009, para 10); France (April 2009, paras 2.16-2.19); Germany (April 2009, 26-27); Japan (April 2009, para 3(3)); Luxembourg (April 2009, paras 5-7); Poland (April 2009, paras 5.1-5.2.5); Slovenia (April 2009, paras 6, 9); Ireland (April 2009, para 33); United Kingdom (April 2009, paras 0.17-0.23).

¹⁴⁴ See e.g. Written Statements of Poland (April 2009, para 6.10); Ireland (April 2009, para 33, albeit as an explicit alternative to the legal neutrality argument). See also, in a similar vein, *Kosovo Advisory Opinion*, Separate Opinion of Judge Yusuf [13].

independence were not regulated by international law.¹⁴⁵ This approach was criticised on the grounds that it was ‘fundamentally antithetical to the rule of law’¹⁴⁶ and would result ‘in an unacceptable dilution of the quality of legality of the international legal system’.¹⁴⁷ In response, several states observed that the *sui generis* nature of the situation simply meant that Kosovo did not establish any wider precedent.¹⁴⁸ It did not mean that Kosovo was ‘outside the law’ or that ‘special legal rules’ applied to it.¹⁴⁹ The difficulty with this line of reasoning is that these same states were asserting simultaneously the non-regulation argument, that *all* declarations of independence were outside the remit of international law and, for this reason, *all* were in accordance with it. This gives rise to the second criticism of this approach, namely, its apparent inconsistency.¹⁵⁰ This criticism relates to the fact that these states were asserting that all declarations of independence are in accordance with international and, notwithstanding this, the Kosovo declaration of independence established no wider precedent because of its *sui generis* nature. More importantly, the *sui generis* approach highlights the need to think through its potential implications so that it does not undermine respect for the rule of law and the principle of legal certainty within the international legal system.

D. Non liquet

A *non liquet* declaration is one that specifies that the law is non-existent or unclear on a particular matter. As such, it seems to constitute a single, straightforward response to silence in international law. As a concept, however, *non liquet* is capable of producing more than one response. This is due to the range of positions that can be adopted on the permissibility or otherwise of a court declaring a *non liquet* and the consequences that attach to these positions.¹⁵¹ Broadly speaking, these positions range from the existence of a prohibition on a

¹⁴⁵ See e.g. Written Statements of Japan (April 2009, para 4); United Kingdom (July 2009, paras 33, 12); France (April 2009, paras 2.16-2.19, 1.4-1.5, 2.1, 2.5, 2.9); Germany (April 2009, 8, 26-32); Luxembourg (April 2009, paras 5-7, 16); Poland (April 2009, paras 2.2-2.3, 5).

¹⁴⁶ Written Statement of Cyprus (July 2009, para 2). See also, in a similar vein, Written Statement of Argentina (July 2009, para 33).

¹⁴⁷ Written Statement of Cyprus (July 2009, para 30). See also, Written Statements of Argentina (April 2009, para 81); Serbia (July 2009, paras 124-125).

¹⁴⁸ See e.g. Written Statements of Poland (April 2009, para 5.2.5); United Kingdom (July 2009, para 12).

¹⁴⁹ See e.g. Written Statements of Germany (July 2009, 6); United Kingdom (July 2009, para 12).

¹⁵⁰ See e.g. Written Statement of Cyprus (July 2009, para 29).

¹⁵¹ For a general overview, see Reisman, ‘International Non-Liquet: Recrudescence and Transformation’, 771-772; Bodansky, ‘*Non Liquet* and the Incompleteness of International Law’, 153-170. It can also depend on the specific terms of an arbitration agreement: see e.g. *Island of Palmas Arbitration Case (United States v Holland)* (1931) 4 ILR 492.

court declaring a *non liquet*,¹⁵² to the requirement on a court to declare a *non liquet*,¹⁵³ to the permissibility of a court declaring a *non liquet*.¹⁵⁴ Implicit in these positions are two potential responses to silence in international law. For those who argue that the court is permitted or even required to declare a *non liquet*, the appropriate response to silence is a stark acknowledgement of its existence, nothing more. For those who argue that there is a prohibition on a court issuing a *non liquet* declaration, it means that the court has what amounts to *carte blanche* to decide the case notwithstanding the silence of the law. In effect, the court is entrusted with what may be regarded as a quasi-legislative role. While there are fundamental differences between the two approaches, they do have certain features in common. Both are confined in their application to a courtroom context. Neither is unduly concerned about whether or not the silence is intentional or, indeed, about the origins of silence more generally. Both can be applied irrespective of whether silence relates to the conduct of state or non-state actors.

According to the first approach, courts are required or permitted to issue a *non liquet* declaration whenever the law is silent or lacking in clarity. The difficulty in identifying an occasion when the International Court of Justice has unequivocally issued a *non liquet* declaration would tend to cast doubt on the existence of a legal requirement on the Court to make such a declaration. Of course, reference may be made to the Advisory Opinion in the *Nuclear Weapons* case where the ICJ stated that ‘in view of the current state of international law .. [it] could not 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’.¹⁵⁵ But opinion is sharply divided on whether or not this constitutes a *non liquet* declaration.¹⁵⁶ Even if it does, the dearth of occasions on which a court has

¹⁵² Lauterpacht, ‘Some Observations on the Prohibition of “Non Liqueur” and the Completeness of the Law’, 199; Lauterpacht, *The Function of Law in the International Community*, 63-65; *Oppenheim’s International Law* 13. See also, the references cited in Reisman, ‘International Non-Liquet: Recrudescence and Transformation’, 771. According to Reisman, the majority of doctrinal writers adhered to this position although one has to bear in mind the time in which he was writing.

¹⁵³ See e.g. Siorat, in Stone, ‘Non Liqueur and the Function of Law in the International Community’, 142, albeit only in relation to ‘*insuffisances sociales*’.

¹⁵⁴ See e.g. Stone, ‘Non Liqueur and the Function of Law in the International Community’, 160; Dekker and Werner, ‘The Completeness of International Law and Hamlet’s Dilemma’, 237; Aznar-Gomez, ‘The 1996 Nuclear Weapons Advisory Opinion and Non Liqueur in International Law’, 14-17; Tammelo, ‘On the Logical Openness of Legal Orders’, 201; BH Weston, ‘Nuclear Weapons and the World Court: Ambiguity’s Consensus’ (1997) 7 *Transnat’l L & Contemp Probs* 371, 391. Thirlway, ‘The Law and Procedure of the International Court of Justice 1960-1989’, 77, 80, 92, suggests the permissibility of a *non liquet* declaration while recognizing that this view is not universally accepted.

¹⁵⁵ *Legality of the Threat or Use of Nuclear Weapons* [266].

¹⁵⁶ See e.g. J Crawford and P Sands, ‘Legal Aspects of a Nuclear Weapons Convention’ (1998) 6 *Af YB Int’l L* 153, 169; Kammerhofer, ‘Gaps, the Nuclear Weapons Advisory Opinion and the Structure of Legal Argument

declared a *non liquet* tends to call into question the existence of an obligation to make the declaration in all instances when the law is absent or unclear.¹⁵⁷ However, it is difficult to take issue with the contention that international courts have a discretion to issue a *non liquet* declaration as it is clearly within a court's jurisdiction to decide on the existence or otherwise of legal principles relevant to the case at hand.

Where a court decides to issue a *non liquet* declaration it simply acknowledges the current state of international law on the matter. It does not purport to rule on whether the conduct in question is in accordance with international law and no conclusions in this regard can be drawn from such a declaration.¹⁵⁸ In contrast with the other responses to silence, this approach does not offer any guidance on the legality of the conduct or on how the parties should resolve their dispute. The matter is left open. Perhaps for this reason, international courts are very reticent about issuing *non liquet* declarations. Indeed, given the Court's approach in the *Kosovo* case, it is doubtful whether the concept of *non liquet* has any practical significance.¹⁵⁹ If the Court will only look to the absence of a prohibition to determine whether conduct is in accordance with international law (rather than the broader issue of the absence of *any* regulation) then it is difficult to think of circumstances in which it would pronounce a *non liquet*.¹⁶⁰ This reticence to invoke the concept is not confined to courts. It is interesting to note that in the *Kosovo* case not one state argued that the Court should declare a *non liquet*, even

between Theory and Practice', 348-349; Bodansky, '*Non Liquet* and the Incompleteness of International Law', 170; SC Neff, 'International Law, the International Court of Justice and nuclear weapons' (2000) LQR 511, 512; *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Judge Shahabuddeen [426]. Others take the view that it did constitute a *non liquet* declaration: see e.g. *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Judge Schwebel [322]; Dissenting Opinion of Judge Higgins [590]-[591]; Weil, "'The Court Cannot Conclude Definitively ...'" *Non Liquet Revisited*', 110, 117; Koskeniemi, *The Politics of International Law*, 142, 198; Dekker and Werner, 'The Completeness of International Law and Hamlet's Dilemma', 243; G Abi-Saab, 'The Court and the Bomb: A Case of Mutual Deterrence?' (1997) 7 *Transnat'l L & Comtemp Probs* 429, 456; Amerasinghe, 'The Legality of the Use of or Threat to Use Nuclear Weapons', 44-45; Weston, 'Nuclear Weapons and the World Court: Ambiguity's Consensus', 388; the discussion in S Mahmoudi, 'The International Court of Justice and Nuclear Weapons' (1997) 66 *Nordic Journal of International Law* 77, 95-96. The lack of clarity on this point is recognized explicitly by RA Falk, 'Nuclear Weapons, International Law and the World Court: A Historic Encounter' (1997) 91 *AJIL* 64, 73.

¹⁵⁷ *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Judge Higgins, 592.

¹⁵⁸ Although it should be noted that some would argue that when a Court cannot definitively decide, it means that the conduct is lawful: see *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Judge Shahabuddeen [426]. However, it is difficult to reconcile this approach with the general understanding of the concept. The fact that in several national jurisdictions *non liquet* is prohibited on the ground that it would be regarded as a denial of justice tends to suggest that it is not equated with a decision in favour of either party. Arguably, the correct view is that a *non liquet* declaration leaves the issue 'at large *de lege lata*': see also, Tammelo, 'On the Logical Openness of Legal Orders', 191.

¹⁵⁹ See also, *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Judge Shahabuddeen, [390].

¹⁶⁰ Indeed, for one member of the Court, 'that the international legal order might be consciously silent or neutral on a specific fact or act has nothing to do with *non liquet*': see *Kosovo Advisory Opinion*, Declaration of Judge Simma [9].

though many of them argued that international law was silent on declarations of independence.¹⁶¹

The alternative approach, according to which courts are prohibited from issuing a *non liquet* declaration, can be just as problematic. This approach has provoked considerable controversy not least due to its potential implications for the law making process and the international legal system more generally. As Stone observed, taken to its logical conclusion this approach imposes a duty on the court to ‘develop new rules limited only by the novelty and range of the matters coming before it for decision’.¹⁶² Admittedly, this prospect does not appear to be a problem in other legal systems. Several national legal systems explicitly prohibit *non liquet* declarations,¹⁶³ in others there is no express regulation but such declarations are never made in practice. It is doubtful, however, whether such practices are easily transferable to the international level. Unlike the position in national law, there ‘is no international legislature capable, independently of the consent of the states concerned, either of conferring law-creative authority upon courts, [or] of correcting the pronouncements of the courts as to the applicable law’.¹⁶⁴ This serves as a useful reminder of the need to reflect on the distinctive structure of the international legal system in responding to silence.

This is reinforced by other considerations. The assertion that courts are always precluded from issuing a *non liquet* declaration fails to take sufficient account of the multifaceted nature of and the reasons for silence. Although Lauterpacht did recognize the existence of different types of gaps,¹⁶⁵ he adhered to the view that the court did not assume the role of a legislator but performed a legitimate judicial activity even if it had recourse to a ‘most abstract rule’ in order to fill the gap.¹⁶⁶ Once again, the voluntary character of international adjudication and the fertility of existing legal principles are central to Lauterpacht’s

¹⁶¹ Writing in 1958, Lauterpacht observed a similar trend in the state practice: ‘Some Observations on the Prohibition of “Non Lique” and the Completeness of the Law’, 203.

¹⁶² ‘Non Lique and the Function of Law in the International Community’, 132, 133-134

¹⁶³ See e.g. Reisman, ‘International Non-Lique: Recrudescence and Transformation’ International Non-Lique: Recrudescence and Transformation’; Kammerhofer, ‘Gaps, the Nuclear Weapons Advisory Opinion and the Structure of Legal Argument between Theory and Practice’, 336; and *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Case No. STL – 11 – 01/I)*, Special Tribunal for Lebanon (Appeals Chamber) (2012) 145 ILR 232, 252.

¹⁶⁴ ‘Non Lique and the Function of Law in the International Community’, 127. See also, Reisman, ‘International Non-Lique: Recrudescence and Transformation’, 774.

¹⁶⁵ According to Lauterpacht, gaps could stem from imperfections in the law making process or result from discrepancies in state practice: *The Function of Law in the International Community*, 71-76.

¹⁶⁶ *Ibid* 76.

approach.¹⁶⁷ For him, once the decision can be brought within the ‘frame of a major legal principle or the will of the parties, it is rendered in conformity with existing law’, precluding any suggestion that the court is transgressing its judicial function.¹⁶⁸ At the same time, this approach appears to set few if any limits on the creativity of the court in filling gaps. Nor does it address completely the argument that silence may be intentional, thereby raising questions concerning the legitimacy of the court effectively legislating where the states have deliberately refrained from doing so. Even where this is not the case, the requirement *always* to find a solution, irrespective of the existence of any potentially relevant legal principles, undoubtedly puts a severe strain on the proper functions of a court as commonly understood, and particularly within the international legal system.

Aside from these considerations, the question arises whether a prohibition on *non liquet* declarations has any basis in international law. As we have seen, Lauterpacht grounded the prohibition on what he perceived to be ‘firmly established uniform practice’ and on the principle of the completeness of the legal order as a general principle of law recognized under article 38(1)(c) of the Statute.¹⁶⁹ But this same practice has been interpreted differently by others as imposing a duty on a court to declare a *non liquet* in particular circumstances, as permitting a court to do so or as explainable on other grounds.¹⁷⁰ Clearly, state practice does not provide an unequivocal basis for the existence of the prohibition. In view of all these considerations, it is doubtful whether the assertion of a prohibition on *non liquet* declarations offers a viable or credible response to the existence of silence in international law.

V. CONCLUSION

Silence in international law is a complex and multifaceted phenomenon. How we respond to it can have important ramifications for the international legal system as a whole as well as the specific conduct in need of regulation. For this reason, it is vital to analyse silence in a systematic and comprehensive manner. A useful way of doing so is by examining silence in the light of a series of questions relating to its existence, origins and character as well as the range of possible responses to it. Each of these four categories of questions provides useful

¹⁶⁷ See also, in a similar vein, the argument that whenever states agree to ‘judicial settlement of a dispute, they impose on the judge ... an obligation to settle the dispute. Therefore, *ipso jure* they confer on the tribunal the normative and quasi-legislative power necessary to produce that result’: Weil, ‘“The Court Cannot Conclude Definitively ...” Non Liqueur Revisited’, 115.

¹⁶⁸ *The Function of Law in the International Community*, 75-79, 84.

¹⁶⁹ ‘Some Observations on the Prohibition of “Non Liqueur” and the Completeness of the Law’, 197, 198.

¹⁷⁰ Stone, ‘Non Liqueur and the Function of Law in the International Community’, 138-139, 139-140.

insights into the many unspoken assumptions about how we view the nature and operation of the international legal system.

The first category relates to the existence of silence in international law and raises questions of a doctrinal and evidentiary kind. Whether silence can even exist in international law depends on whether it is regarded as an 'open' system, thereby permitting the possibility of silence, or whether some 'closing' principle exists which precludes it. If silence can exist, the next question is whether it does so in the case in hand. This highlights the need to consider the actual forum in which the matter arises and the possibility that in some forums there may be a greater willingness to consider soft law sources so as to preclude a finding of silence. It demonstrates the importance of the observational standpoint.

The second category relates to the origins of silence. Silence may be due, for example, to novel factual circumstances or to the conduct falling outside the remit of the international legal system. The former can be dealt with by applying existing legal principles to the new fact situation, an exercise that is a standard feature of the judicial function. The latter is less clear cut. It can mean that the matter should be regulated by some other (national) legal system, that the international court or tribunal is without jurisdiction or that the conduct cannot be regarded as violating international law since it is not regulated by it.

The third category raises questions concerning the multifaceted character of silence. Is it intentional or inadvertent or a reflection of the complete indifference of international law to the conduct in question? Should silence be characterised as a mere 'gap' or a 'gap in the law'? Is there a qualitative as well as quantitative dimension to silence so that it is not simply a question of looking at the existence of legal principles but also at the appropriateness of these principles to the case at hand? For example, if silence is intentional it is possible to argue that a court is precluded from using interpretive techniques to close the 'gap' and that the most appropriate response is a *non liquet* declaration. This is based very much on a state-centred view of international law and of the consensual basis of obligations. In comparison, if silence is seen as a 'gap in the law' rather than simply a 'gap', this seems to assume that international law 'should' regulate the issue, permitting a court to engage in a creative interpretation of existing legal principles. This may seem, however, to superimpose a further normative order upon international law in order to identify areas which this system of law *should* govern and may even suggest a natural law rather than consensual basis of obligation within the international legal system.

The final category raises questions concerning the most common responses to silence in international law, notably, the permissive principle, the principle of completeness, the *sui generis* approach and the issuing of a *non liquet* declaration. While each response is capable of dealing with silence in a concrete case, they entail very different consequences for the international legal system. The *sui generis* approach, for example, can facilitate a bespoke solution to the case at hand, but can have worrying implications in terms of respect for the rule of law and the principle of legal certainty. In comparison, the implications that attach to the principle of completeness and the prohibition on a *non liquet* declaration relate more to the judicial function and raise different concerns about the proper role of an international court in the formation of international law.

Perhaps a more fundamental issue is what these responses mean in terms of the legality of the conduct on which international law *is* silent. All too often, these responses are articulated as self-evident propositions that lead inexorably to the conduct being regarded as either legal or illegal. In reality, however, they are usually based on unspoken and highly contentious assumptions about the character and structure of the international legal system. This is evident from a review of the written statements submitted during the *Kosovo* proceedings. Even where states were in agreement that international law was silent on declarations of independence, there were sharply divided over the legal implications of this state of affairs. For some, silence meant the declarations were illegal, thus implicitly requiring some normative basis for the conduct before they could be regarded as producing legal effects under international law. For others, it meant the declarations were legal due to the absence of a prohibition, with the underlying perception of the international legal system as essentially a system of limitations. This highlights the difficulty in separating out issues relating to silence from broader issues concerning the character, structure and formation of international law. It demonstrates that, far from being a marginal or esoteric issue, silence and how we respond to it goes to the very heart of our understanding of the international legal system.