4

The Logic of Absence in Customary International Law

An Open-System Approach

ANNA IRENE BAKA

1 Introduction

Customary international law (CIL) bears an *ab initio* element of absence and thus abstractness: the lack of written formality, which, as such, can spur multitudinous interpretative debates. The profound ambiguity surrounding all elements of CIL particularly as regards the subjective, psychological element of *opinio juris* is further accentuated by the prevailing element of absence, silence or non-action and their often-monolithic interpretation as non-objection or, even, acquiescence. There also appears to be a fundamental presumption against the existence of semantic voids in CIL – a presumption that attaches negativity to silence and positive value to affirmative propositions. Indeed, negative premises appear to be less valuable and less informative than affirmative ones, while affirmatives are given semantic priority and added value over negatives. But is that true, according to the rules of informal logic? If a positive statement corresponds to a positive affirmation, to what state of affairs does a non-statement refer or correspond? What is a negative fact? What is a non-fact? What is the value of non-doing? Non-acting or abstaining? Non-believing towards the formation of a certain *opinio juris*? Is every absence, or negation, necessarily a denial of a state of affairs?

International law does not provide any clear guidance as regards the legal effects that follow from state silence. This produces further difficulties with the polysemous nature of silence, which may have several meanings, from tacit agreement to absence of view or simple lack of interest. The legal positivist eagerness to evaluate and attach negativity to absence has its roots, on the one hand, in the Wittgenstenian, contextual and consensual origins

https://doi.org/10.1017/9781009025416.005 Published online by Cambridge University Press

of legal positivism, assumed in HLA Hart's theory and his subsequent rejection of metaphysics, that is the premise that there is no meaning outside communitarian semiotics.[1] On the other hand, Kelsen's *Grundnorm* theory assumes a complete normative order consisting only of positive norms, even if those positive norms are negatively deduced.[2] However, according to the rules of logic and the canons of reasoning, absence may correspond to multiple values, a variety of propositions and modalities, which in international jurisprudence have been either equated or largely ignored. The mainstream interpretation of CIL overlooks the quantifications and varieties of meaning in non-appearances, such as the conceivable neutrality of absence.

The modalities of absence are not mere academic exercises. They affect the rationality and soundness of international legal doctrine and even have a real impact on international relations when overlooked. This repositions the whole enquiry to the proper place of informal logic in international legal and judicial reasoning. The chapter suggests that the rational deficit in international legal reasoning has led to, or has been enhanced by, persuasive-teleological argumentation, in the sense that the person or agency elaborating on silence aims at a certain end and is thus characterised by a certain 'argumentative orientation' towards a preferred conclusion. In this spirit, the ICJ has developed several techniques of superficial, persuasive argumentation, teleologically governed by the *non liquet* principle, the containment of international crises and the effective resolution of international disputes. This is a form of judicial interventionism, further accentuated by the demonstrated judicial or scholarly difficulty to 'translate' silence and/or the absence of state practice by virtue of some justification that transcends a particular case, is intrinsic to the legal system and is construed logically, that is by virtue of specialised rules of deductive thought which rely on a highly logical systemisation. An open-system approach could shed light on these inconsistencies and/or political manoeuvres.

2 Setting Up the Standards: Is International Legal Reasoning a Scientific Method of Reasoning?

The answer to this question necessitates a twofold examination, namely (a) how science and the scientific method of reasoning are generally

[1] HLA Hart, *The Concept of Law* (2nd ed, Clarendon Press 1994) 123.
[2] H Kelsen, *Pure Theory of Law* (M Knight tr, 2nd ed, University of California Press 1967) 245–46.

defined and (b) whether law as a discipline, and international legal reasoning in particular, fit into these definitions.

To respond to the first question, science is traditionally considered to refer to any kind of methodical study that 'has a definite subject matter, is systemic and comprehensive and . . . its aim is to discover the truth as far as possible',[3] whereas scientific method 'is just taking things in order, simplifying as far as necessary and possible, endeavouring to leave out nothing that ought to go in, and distinguishing true from false'.[4] Science is characterised by systematisation, linguistic and conceptual accuracy, the application of rules of logic and a concrete methodology for the purpose of generating knowledge. The scientific method consists of techniques of 'argument, conceptual clarification, logic and discussion'[5] or, if the subject matter is the investigation of natural phenomena, the application of the empirical method, namely qualitative or quantitative techniques and the process of hypothesis testing and verification.[6] The process of concept formation is an essential part of scientific knowledge, which traditionally consists of a logically ordered, hierarchical pyramid of concepts.[7] In most disciplines this pyramid takes the form of axioms, principles and derived theories that subsequently produce valid deductive inferences, provided that the working concepts are clear and unambiguous.[8]

Regarding the second question, on the scientificity of international legal reasoning, it is necessary to first inquire into the object and method of law in general. One should first distinguish between such terms as 'the sociology of law' or 'sociological approaches to law' or 'socio-legal studies', and such prepositions as 'law as a social science'. Whereas the former form part of a distinct discipline that examines law as a social phenomenon[9] the latter investigates the scientificity of law as such. In universities, law is traditionally classified among the social sciences. It is, however, questionable whether such attribute is accurate. There have been arguments in favour, namely that law 'is not just a social science but one

[3] AD Ritchie, 'Scientific Method in Social Studies' (1945) 20 Philosophy 3, 4.
[4] ibid 4.
[5] C McCrudden, 'Legal Research and the Social Sciences' in M Del Mar & M Giudice (eds), *Legal Theory and the Social Sciences Vol II* (Routledge 2010) 633.
[6] ibid.
[7] E Oeser, *Evolution and Constitution: The Evolutionary Self-Construction of Law* (Kluwer Academic Publishers 2003) 40.
[8] ibid.
[9] R Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' in M Del Mar & M Giudice (eds), *Legal Theory and the Social Sciences Vol II* (Routledge 2010) 101.

that is central to social thought in general,'[10] as well as arguments against, that law cannot be categorised as a social science because 'it is preoccupied with normative judgments and not with human interaction and behaviour'.[11] Another argument against law as a social science is that its theories cannot be falsified, according to Karl Popper's falsification test.[12]

It is useful, at this point, to apply an insider's approach and investigate how legal theory has dealt with this problem. Kelsen's formalism and his Pure Theory of Law have separated legal doctrine from social, moral and political theories. In his *Concept of Law*, HLA Hart has been somewhat less stringent in that he placed particular emphasis on the 'social functions' of law and considered his work to be both a legal theory as well as 'an essay in descriptive sociology'.[13] He applied a so-called internal and external attitude to law in different contexts and pointed out that there are elements of social psychology behind legal concepts.[14] Dworkin and Raz acknowledged the importance of the social scientific method for the study of legal institutions but both drew a clear line between jurisprudence and 'legal sociology' or 'sociological jurisprudence' as distinct disciplines.

The dominant view from both the legal and the sociological perspective is that law cannot be considered to be a social science (a) because of its very narrow subject matter which is distinct from the one of sociology and the sociology of law, and (b) because legal doctrine does not apply the traditional methods of the social sciences, that is, the qualitative and quantitative techniques. The narrow reading of law as a closed system of knowledge has attracted serious criticisms due to its isolation from the social and political settings, as well as its autopoietic nature and stringent self-referentiality.[15] Law as a closed, isolated system of knowledge inevitably leads to 'a body of knowledge [that] has nothing to contribute, epistemologically speaking, to

[10] G Samuel, 'Is Law Really a Social Science? A View from Comparative Law' in M Del Mar & M Giudice (eds), *Legal Theory and the Social Sciences Vol II* (Routledge 2010) 178.
[11] ibid 173.
[12] ibid 175.
[13] M Krygier, 'The Concept of Law and Social Theory' in M Del Mar & M Giudice (eds), *Legal Theory and the Social Sciences* (Routledge 2010) 7.
[14] ibid 16–17.
[15] 'From a legal internal perspective, modern law is formally a self-contained system that creates itself, amends itself, and justifies itself through itself.' N Kedar, 'The Political Origins of the Modern Legal Paradoxes' in O Perez & G Teubner (eds), *Paradoxes and Inconsistencies in the Law* (Hart 2006) 112; Helmut Willke argues that legal autoreferentiality leads to ontological perplexity and fragmentation. H Willke, 'The Autopoietic Theory of Law: Autonomy of Law and Contextual Transfer' in P Amselek & N MacCormick (eds), *Controversies About Law's Ontology* (Edinburgh University Press 1991) 108–19.

our knowledge of the world as an empirical phenomenon', whereas it is a narcissistic discipline that 'is of little interest intellectually speaking to those outside [it], save perhaps to those social scientists interested in studying the corps of lawyers as a social phenomenon itself'.[16]

No matter how one looks at it, law is not a social science. From this assertion alone it does not follow, however, that international legal reasoning should not conform to rules of informal logic. The scientific authority of law is a quasi-logical requirement for internal coherence and causality, which, together with other logical principles, have built a closed system of logic.[17] In this closed system of logic deductive inferences are produced from a matrix of consented legal axioms. This process forms the 'scientific' authority of the legal syllogism.[18] It is obvious that, from this perspective, legal reasoning is at best quasi-logical.

Apart from the quasi-logical nature of legal reasoning, the ambiguity of language, as well as the various legalist approaches that normally complement the legal syllogism, such as functional, hermeneutical and dialectical approaches, lead to an obscure model of reasoning that is not open to testability.[19] The legal syllogism is complemented by an erratic series of variables that include (a peculiar understanding of) logic, interpretation, functionalism and systematisation, as well as an abstract appeal to general principles such as democracy, legal certainty and the rule of law.[20] All these variables attract dialectical instrumentalism, inasmuch as they impose an additional burden to the legal theorist to be consistent 'with the multitudinous rules' of legal systems which 'should [also] make sense when taken together'.[21] It follows from the above that legal reasoning does not concur with logical reasoning. Then, our initial question needs to be reformulated thus: should this closed system of logic with its demand for coherence operate at the expense of logical rationality? And how is this logical rationality to be measured?

Kelsen himself claimed that law is a normative science and it is necessary for legal norms to be logically explained and connected.[22]

[16] Samuel (n 10) 295.
[17] ibid 197.
[18] ibid.
[19] ibid 198.
[20] ibid.
[21] N MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978) 152; for the internal approach and demand for coherence, see also McCrudden (n 5) 150.
[22] Oeser (n 7) 7; according to Kelsen it is 'common' logic and not some special, 'juridical' logic that is applied in legal science. For Kelsen, however, rules of syllogistic logic are inapplicable to prescriptive statements because

One can therefore observe a traditional association of law with the requirement of objective-external rationality. And rightly so: without objective standards of logic, legal theory and jurisprudence are contemned to drift into speculation. From the perspective of both legal theory and jurisprudence the requirement of rationality is always relevant. Such requirement, however, cannot be considered fulfilled at the narrow level of internal coherence.

To return to our reformulated question, namely whether law should be governed by something more than the superficial requirement of coherence, the chapter answers in the affirmative. Among the variables that determine the legal syllogism, namely interpretation, systematisation, functionalism and the appeal to abstract principles, the rules of informal logic appear to be the crucial constant, in the mathematical use of the term, which can direct the legal syllogism to rational, that is syllogistically sound, conclusions. It is only by transcending the closed logic of law and the limitations of legal formalism and coherence that the syllogistic credibility of law can be restored. Law cannot be rational if it operates autonomously and self-sufficiently. Law should not operate beyond logic; legal theorists need to resort to the classical understandings of logic in order to avoid superficial formal rationality (which may or may not coincide with logical rationality) as well as unscientific instrumentalist thinking. It has been argued that law has teleology and is both 'natural, in the sense that it has to be found out and is not made by any arbitrary act of will and rational because it is not solely a fact of observation'.[23]

The laws of thought and the so-called canons of reasoning[24] operate in accordance with a *natural* mind process, which is independent from social institutions. Whether such laws of thought can be applied in

> truth and falsity are properties of a statement, whereas validity is not the property of a norm, but is its existence, its specific ideal existence. That a norm is valid means that it is present. That a norm is not valid means that it is absent . . . the validity of a norm, which is the meaning of an act of will, is conditioned by the act which posits it.

H Kelsen, *Essays in Legal and Moral Philosophy* (D Reidel 1973) 230–31, 251. On the contrary, Kelsen argues, logical inference can be applied to descriptive statements, that is 'theoretical statements' about the validity of norms, see ibid 245; all this redirects to Hume's is-ought, fact-value distinction.

[23] Ritchie (n 3) 12.

[24] The three primary laws of thought are for Jevons the Law of Identity (whatever is, is), the Law of Contradiction (nothing can both be and not be) and the Law of the Excluded Middle (everything must either be, or not be). SW Jevons, *Elementary Lessons in Logic: Deductive and Inductive* (Macmillan 1948) 117.

social settings in the same way that they are applied in natural sciences has been the object of a heated debate, famously initiated by Hume with his fact-value/is-ought distinction. Although the purpose of the chapter is not to get into the details of the debate, it should be nonetheless noted that, even for traditional logicians like John Stuart Mill, the 'mathematical inexactness' of the humanities and the social sciences is not a conviction to unscientificity. For Mill 'whenever it is sufficient to know how the great majority of the human race or of some nation or class of persons will think, feel, and act, these propositions are equivalent to universal ones. For the purposes of political and social science this *is* sufficient'.[25] Likewise, in his *Novum Organum*, Francis Bacon insisted that his method is applicable to both normative and factual issues alike.[26]

3 Methods and Techniques for the Interpretation of Silence in ICL by the ICJ: Errors and Inconsistencies

International law does not provide any clear guidance as regards the legal effects that follow from state silence. This produces further difficulties with the interpretation of the polysemous nature of silence, which may have several meanings, from tacit agreement to absence of view or simple lack of interest.

Two scholarly debates are of particular relevance here. The first debate is a systemic one, relating to the nature of international law as a normative system and the question whether it is an open or a closed system of norms. Should we follow the hypothesis that international law is an open system, then one could then fathom the possibility of an absence of law, which could then open up the possibility for a *non liquet* declaration. For Jörg Kammerhofer the question is whether silence is simply a gap or a gap in law.[27] Kammerhofer argues that, since normative systems consist of positive norms, it is unthinkable to have a situation where there is an absence of norms within the legal system.[28] Accordingly, when we face a situation of non-regulation in international law, then the Lotus principle, that is, the presumption in

[25] JS Mill, *Philosophy of Scientific Method* (Hafner Publishing 1950) 313.
[26] J Cohen, *An Introduction to the Philosophy of Induction and Probability* (Clarendon Press 1989) 8.
[27] J Kammerhofer, 'Gaps, the Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument between Theory and Practice' (2009) 80 BYBIL 333, 340.
[28] ibid 339, 358.

favour of state liberty to act, cannot be sustained because this liberty is essentially a factual state of affairs that falls completely outside the normative order.

The second debate relates to the epistemological tools that the international judge has at hand for the adjudication of a case: the inductive and the deductive methods of reasoning. For the purposes of law ascertainment, induction may be defined as empirical generalisation, 'as inference of a general rule from a pattern of empirically observable individual instances of State practice and *opinio juris*'.[29] The deductive method, on the other hand, is defined as inference of a specific rule from an existing and generally accepted rule or principle, that is, the process of deriving the specific from the general. With the exception of the common law tradition, legal academic reasoning is mostly based on deductive syllogisms, namely the application of general laws and principles to concrete cases. Indeed, both Kelsen's *Grundnorm* system and HLA Hart's model of the Rule of Recognition portray a stringently hierarchical arrangement of axiomatic concepts, which presumably produce a series of safe, deductive inferences. Interestingly, this is not the view of Georg Schwarzenberger who, in his *Inductive Approach to International Law*, famously praises the application of the inductive method and attacks the, as he says, eclectic and unreliable results of the deductive method of legal reasoning.[30] The rationale behind this paradoxical – from the logical point of view – thesis may be summarised as thus: the derivation of lesser axioms, the process of legal interpretation and the application of general principles to concrete cases can all end up being extremely subjectivist and logically misleading for they are unverifiable and often based on speculation and an arbitrary 'picking up and choosing' from both natural and positive law.[31] The speculative and eclectic nature of international legal deduction is, according to Schwarzenberger, underpinned by the obscure positivist borderline between *lex lata* and *lex ferenda*.[32] With respect to the naturalist approaches to law, Schwarzenberger is equally suspicious and notes that the 'law-finding' process of naturalist deduction is often a 'law-making' process in disguise.[33] He defends the

[29] S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) EJIL 417, 420.
[30] G Schwarzenberger, *The Inductive Approach to International Law* (Oceana Publications 1965) 74.
[31] ibid 13.
[32] ibid 47, 65.
[33] ibid 12.

inductive method of international legal reasoning on grounds that it is an empirical device that secures international legal theory from 'the subjectivism of deductive speculation and eclectic caprice, and the vested interests prone to use – and abuse – both'.[34] He therefore treats all 'deduction, speculation, or intuition' as mere hypotheses until they are all inductively verified by reference to the 'law-creating processes' and the 'law-determining agencies' which are enumerated in Article 38 of the Statute of the ICJ.[35] Despite his extensive eulogy to inductive reasoning Schwarzenberger's formalism does not embrace an unrestricted use of induction in international legal theory. Instead, he submits all logical methods, the inductive method included, to the requirement of consistency and systemic coherence, as well as the standard verification process of 'the three law-creating processes of international law' which all come down to the principle of consent.[36]

Although, in practice, both the inductive and deductive methods are employed in judicial syllogistics, the ICJ rarely states explicitly the methodology that it uses for the determination of CIL, and, as we will see in Section 5, it is often the case that it applies the two methods of reasoning erroneously. In fact, it appears that there is a lot of confusion among jurists and legal theorists vis-à-vis the proper definition and application of the two logical methods of reasoning. It has been argued, for instance, that induction is employed in the application rather than the determination of the applicable law, which is a deviation from the typical definition of induction from the scope of informal logic.[37] A justification for this deviation is that logical reasoning should not be equated with legal reasoning, which is governed from an internal logic, a logic of its own. In the same vein, judicial deduction is regarded as not being the same as logical deduction.

There is widespread agreement that CIL is, as a rule of thumb, ascertained by means of induction, since according to the mainstream, or traditional, legal doctrine the two elements of CIL are gathered in an empirical and inductive way. Because this is not a mathematical exercise – and against Schwarzenberger's theory on the merits of the inductive method in international law – it has been suggested that the application of the inductive method for customary law ascertainment is prone to subjectivity, selectivity and law creation.[38] Since it is practically

[34] ibid 6.
[35] ibid 129.
[36] ibid 19, 50.
[37] Jevons (n 24) 202.
[38] Talmon (n 29) 432.

impossible to gather and assess the practice and *opinio juris* of states, the ascertainment of any customary rule entails a selection that is often 'supportive of a preconceived rule of customary law'.[39] Besides, it is for the ICJ to assess what counts as state practice, what counts as *opinio juris*, whether the state practice is consistent and uniform etc.

The two above-mentioned debates, that is, the question whether international law is an open or a closed system of norms, as well as the application of induction as the prominent tool for the ascertainment of CIL, intertwine in a new theoretical trend that involves deduction and assertion as alternative, or additional, methods for customary law ascertainment. In this new and ongoing debate there is a distinction between traditional and the so-called modern deductive CIL – a distinction between customary law that results from the traditional, inductive method of reasoning, and customary law that arises in instances where the inductive method is considered 'impossible to use' because state practice is non-existent, the legal question is too new and has not been dealt with etc.[40] In the latter case, it has been assumed that, because international law is a closed system of norms and *non liquet* is simply not a possibility for the ICJ, international legal theorists and judges are left either with deduction of customary law from other international legal norms and principles or, even, simple assertion of CIL, that is, statements regarding the existence of customary rules that are ungrounded or not properly explained. Both deduction and assertion emphasize *opinio juris* rather than state practice, and often reveal value judgements.[41]

Deduction and assertion are not only limited to 'positive' customary rules, but also the negation or absence of custom, where the ICJ simply denies the existence of customary law due to the, presumably, lack of (uniform) state practice and/or *opinio juris*. This is particularly true for cases of omission, abstention and absence of either state practice or *opinio juris*. One could recall, for instance, the *Gulf of Maine* case, where it was held that the lack of state practice precludes the formation of a customary rule.[42] In the *North Continental Shelf* cases, Judge Sørensen argued that '[i]n view of the manner in which international relations are conducted, there may be numerous cases in which it is practically impossible for one government to produce conclusive evidence of the motives which have prompted the action

[39] ibid 432.
[40] ibid 422.
[41] A Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757, 758.
[42] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/USA)* (Judgment) [1984] ICJ Rep 246, 290.

and policy of other governments'.[43] In other words, whereas the absence of state practice and/or *opinio juris* 'discourages' the effective application of the inductive method of reasoning as a tool for the ascertainment of CIL, the new category of the so-called deductive CIL allows for state silence to be interpreted on the basis of rules that are deduced from general principles such as the sovereign equality of states etc. Inevitably, the deductive or assertive character of this new CIL implies value judgements or even the personal preferences of the adjudicating judge, exposing the type of subjectivism and eclecticism that Schwarzenberger so viciously criticised.

From the above, it follows that there is no straightforward answer or at least an interpretative formula as regards the reading of absence of state practice or the silence of states in the process of CIL ascertainment. In relations among sovereign states, the lack of explicit protest often equals recognition, or at least formal non-objection to a certain legal state of affairs that is under law-creation. There is, for instance, the notion of acquiescence in custom formation and change, such as with territorial claims. Acquiescence is a negative concept related to state inaction or silence, whereby a state is faced with a situation constituting an infringement or threat to its rights. It could be the case that acquiescence be inferred from states' failure to react to certain claims or acts that call for a positive reaction from their part. Such failure to react thus signifies a non-objection to these claims or acts. In this context, passivity or state silence is tantamount to absence of opposition. The concept has particularly arisen in ICJ proceedings relating to border disputes, asylum, maritime claims and consular rights. For instance, in the process of annexing a new territory, the exercise of formal protest means that the objecting state does not acquiesce in the situation, and that it has no intention of abandoning its territorial rights over the region. Conversely, when a state does not raise an objection, such silence may often be considered as acquiescence.

A question that obviously arises is whether passivity or non-denouncement equals implicit approval. In the *Pedra Branca/Pulau Batu Puteh* case, the ICJ found, by means of induction, that the absence of reaction conveys acquiescence provided that the conduct of the other state calls for reaction.[44] This is part of the condition *si loqui debuisset ac potuisset*

[43] *North Sea Continental Shelf Cases (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)* (Judgment) [1969] ICJ Rep 3, Dissenting Opinion of Judge Sørensen 246.

[44] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Judgment) [2008] ICJ Rep 12 [121].

(if one can and must act) that was previously articulated in the *Temple of Preah Vihear* case.[45] In the same vein, states whose rights are directly affected by a certain act are naturally expected to react. On the contrary, the ICJ ruled in the *Asylum* case that, as far as regional customary law is concerned, silence on the part of a state vis-à-vis an emerging regional practice equals objection or protest.[46] This goes against the general presumption implied in acquiescence and the persistent objector doctrine that states should be explicit if they wish not to be bound by an emerging international legal norm.

One could therefore conclude that, when interpreting state silence or inaction for the determination of rules of CIL, the case law of the ICJ is characterised by inconsistencies and an improper, that is non-technical, use of the inductive and deductive methods of reasoning. These disparities are hardly coincidental. Whereas there is, arguably, unfamiliarity among international jurists with the two methods of reasoning, both the interpreter of CIL and the CIL enforcer are often driven by a certain legal purposefulness: governments are naturally tempted to interpret state inaction and silence in a self-serving way, while the ICJ is driven by a combination of systemic considerations, such as the *non liquet* principle, and legal expediency, such as the preservation of the legal *status quo* or the management and dealing with international crises. This has been, for instance, the case with the Kosovo advisory opinion and the *Asylum* case, where the ICJ changed the normal calculus and opted for *ad hoc* solutions.

4 Lack of Formal Rationality and Recourse to Persuasive Argumentation

From the scope of informal logic, acquiescence is, in principle, quite problematic a concept since the absence of opposition to a state of affairs does not necessarily equal tacit approval. In fact it could be precisely that: absence of opposition. Although the ICJ aimed at addressing the deficiencies of the principle by construing a theory of intentional silence connected to the (natural law) idea that states are willing Leviathans, no robust methodology has been so far produced due to the inevitable subjectivism ensuing from the abstract psychologism pertaining to the will theory. Moreover, the mainstream opting for a closed system of norms precludes

[45] *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Preliminary Objections) [1962] ICJ Reports 17.

[46] *Colombian-Peruvian Asylum Case (Colombia v Peru)* (Judgment) [1950] ICJ Reports 266 (*Asylum Case*).

the proper application to international legal reasoning of informal logic thus undermining the external rationality of international legal syllogisms.

The lack in international legal reasoning of external rationality and even internal consistency has paved the way to persuasive-teleological argumentation. Argumentation is teleological, in the sense that the person or agency producing the argument aims at a certain end and is thus characterised by a certain 'argumentative orientation' towards the preferred conclusion. In this spirit, the ICJ has developed several techniques of superficial, persuasive argumentation, teleologically governed by the *non liquet* principle, the containment of international crises and the effective resolution of international disputes. For instance, in the *Burkina Faso/Mali Frontier Dispute*, and without any substantive justification, the ICJ made a leap and asserted the general scope of the *uti possideti juris* although at that time the principle had only been applied in the context of Latin America and Africa: '[i]t is a *general principle*, which is logically connected with the phenomenon of the obtaining of independence, *wherever it occurs*'.[47] In the *Land, Island and Maritime Dispute* the *uti possideti juris* was extended to offshore islands and historic bays and in the *Territorial and Maritime Dispute in the Caribbean Sea*, to the territorial sea.[48] No substantive justification was sought in the *Construction of a Wall* case, where the ICJ asserted that the right of peoples to self-determination is a right *erga omnes*.[49] At no stage did the court examine the practice and *opinio juris* of states. Indeed, it is quite often the case that the court simply 'asserts' the rules of CIL.

The semantic abstractness of absence and silence constitutes the perfect ground for 'magic' argumentative tricks. A characteristic example of this is the *Asylum* case,[50] where the ICJ aimed at containing the global expanse of a regional custom in Latin America, namely a regional customary rule requiring a host state to grant safe passage from the embassy where a political refugee has sought diplomatic asylum to the asylum state. In order to suppress the international distillation of the regional custom, the ICJ reversed, without any substantive justification, its settled jurisprudence and ruled that, where a regional custom was concerned, state silence in the face of an emerging regional practice meant that states' *opinio juris*

[47] *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* (Judgment) [1986] ICJ Rep 554.

[48] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* [2007] ICJ Rep 659.

[49] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.

[50] *Asylum Case*.

was to object/protest to the emerging rule. This assertion, however, ran counter to the general, customary law presumption that states have to raise objections if they wish to avoid being bound by an emerging custom. A year later, in the *Fisheries* case,[51] Norway had attempted to claim ocean areas by mapping them through 'straight baselines', drawn from points along its coastline, and asserted that the enclosed areas were exclusively Norwegian. Norway's argument was also based on Britain's lack of protests, which according to Norway meant that Britain had waived its rights by not objecting. However, the ICJ asserted that Norway's straight baselines were not against international law, for the additional reason that '[t]he general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it'.[52]

It seems that the ICJ rulings regarding the formation of CIL are particularly troublesome, and, with the exception of regional CIL, they favour aggression and proactiveness in staking claims, while other states' absence or silence is, as a rule, taken as acquiescence or implicit approval. However, the ICJ's argumentation techniques often lead to irrational or even absurd results. A typical example is the Kosovo advisory opinion, where the ICJ committed, among others, typical informal fallacies due to *argumenta e silentio*, as well as *argumenta ad ignorantiam.*

5 Logical Fallacies in the Kosovo Advisory Opinion: An 'Open-System' Approach

Absence and silence are not monosemic. They may signify a variety of things, from acceptance to opposition, or they may have no significance at all. I also need to clarify the following: by referring to absence, I distinguish – yet I mean both – (a) silence qua non-expressed *opinio juris* and (b) absence proper, qua the lack of (positive) state practice/action. The debate falls into the broader discourse relating to arguments from silence, or *argumenta e silentio*, as well as arguments from ignorance, or *argumenta ad ignorantiam*. These are normally classified as informal logical fallacies or weak arguments (weak types of induction) that are somewhat strengthened when evidence is produced at a later stage. Arguments from silence occur when someone interprets someone's silence as meaning anything other than silence, basically arguing

[51] *Fisheries Case (UK v Norway)* [1951] ICJ Rep 116.
[52] ibid 138.

that silence is either communicating implicit approval or disapproval. On the other hand, the fallacy *ad ignorantiam* occurs when someone argues in favour or against something, in our case state practice, because the opposite has not been proven to be the case.[53] In other words, something is said to be true because we do not know whether it is not true. The issue typically has to do with the so-called burden of proof or *onus probandi*: the ignorance fallacy is a dialectical manoeuvre aiming at unfairly shifting the burden of proof. Normally, in a legal debate between two parties, when one makes a claim that the other party disputes, then the party who makes the claim or assertion has the burden of proof, that is, needs to prove, justify or substantiate the claim.

The fallacy of ignorance occurs when the burden of proof is arbitrarily and unjustifiably reversed, that is, shifted towards the party who disputes the claim. The fallacy of ignorance assumes that something is the case because it has not yet proved to be false or vice versa. This is essentially a false dichotomy providing for forced options, inasmuch as it excludes the possibility that the truth is simply unknowable – not necessarily true or false – or that there has been insufficient investigation of the matter. A typical example in most legal traditions is the presumption of innocence: there is a benefit of assumption, that is, the accused is presumed to be innocent until, and if, evidence is produced to the contrary. Those who are accused of committing a crime are not burdened with proving themselves innocent. One can never shift the burden of proof, which generally rests on the one who sets forth a claim. In criminal proceedings, it is the prosecutor who must show, beyond reasonable doubt, that the accused person is guilty. Not providing adequate evidence of innocence is irrelevant to the verdict. Therefore, an *ad ignorantiam* fallacy of the type 'the defendant is guilty because he could not prove his innocence' would never stand in a criminal court. As we will see later on, in CIL the fallacy *ad ignorantiam* occurs when there is a judicial misinterpretation of the absence of evidence, that is, instances of state practice, and is normally tightly connected to the fallacy of silence.

From the above it follows that the lack of evidence, in our case, state practice, is not necessarily neutral. There are times when the absence of evidence may prove or disprove a claim. In that case, however, one needs to take into account the context of the case: suppose that John needs to rent an apartment in Groningen, Netherlands, but he needs to make sure that the house has no cockroaches. He hires a specialist who,

[53] B McCraw, 'Appeal to Ignorance' in R Arp, S Barbone & M Bruce (eds), *Bad Arguments: 100 of the Most Important Fallacies in Western Philosophy* (Wiley Blackwell 2019) 106.

after investigating the apartment, reaches the conclusion that it does not have any swarms or cockroaches or other insects. The lack of evidence in this case is not neutral. In the evaluation of evidence, the authority that makes a certain claim is taken into account. Moreover, although it appears as though we have a typical case of argument *ad ignorantiam*, the truth is that the negative inference (absence of cockroaches) is based on a positive evaluation of evidence. A fallacy *ad ignorantiam* occurs when there is no evidence and no proof whatsoever is offered for the claim, that is, when one argues that there are no cockroaches in the apartment simply because they have not seen any. The argument that there is no God simply because one cannot see Him, and vice versa, the argument that there is God because the atheists cannot disprove His existence, are both arguments from ignorance, and thus informal fallacies.

To bring this back to the Kosovo advisory opinion, the ICJ implicitly applied the Lotus principle and reformulated the legal question. Instead of examining whether unilateral declarations of independence are in accordance with international law, the court, without providing any substantive justification for this choice, decided to examine whether international declarations of independence are forbidden under international law, thus substantially changing the question, while at the same time committing the fallacy of false alternatives. Moreover, the judicial argument did not entail any substantial evaluation of evidence of state practice, *opinio juris*, or any substantial evaluation of absence or silence, but merely took note of the historical fact that:

> In no case . . . does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice . . . points clearly to the conclusion that international law contained no prohibition of declarations of independence. During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation . . . A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. **The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases** . . . For the reasons already given, the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of

> independence of 17 February 2008 did not violate general international law.[54]

The ICJ examined the general law applicable to the case before it and asserted that there is no general rule of international law – either treaty law or customary law – that prohibits declarations of independence and that '[i]n no case . . . does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law'.[55] Judges Yusuf and Simma criticised the court's conclusion on the ground that the Lotus principle is an outdated doctrine and the silence in international law should be understood and interpreted more broadly. Judge Simma asserted that according to the Lotus principle 'restrictions on the independence of States cannot be presumed because of the consensual nature of the international legal order'.[56] He criticised the court for being too formalistic in equating 'the absence of a prohibition with the existence of a permissive rule' and drew the attention to 'the possibility that international law can be neutral or deliberately silent on the international lawfulness of certain acts'.[57] The advisory opinion on Kosovo received robust criticisms and extensive commentaries from both the judiciary and the international legal scholarship.

We have seen that arguments from silence occur when someone automatically interprets someone's silence as meaning anything other than silence, basically arguing that silence is either communicating implicit approval or disapproval. Generally, when we are dealing with a silent authority (i.e. a state) we should ask ourselves: would the silent authority have known about the claim and consciously chose to remain silent? Is the silent authority definitely aware of the claim? Is the silent authority most likely to be honest about the claim? Do we have a complete record of everything written/done by the authority? Is this record true and reliable record, and not just a presumption based on lack of evidence? If the answer to any of the above questions is negative, it is quite possible that we are dealing with a fallacious argument from silence. However, even if we answer in the affirmative, even a good argument from silence is a weak argument that should be treated as inconclusive or uncertain when no other evidence is provided.

[54] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 (*Kosovo Opinion*) [79].
[55] ibid.
[56] ibid, Declaration of Judge Simma [2].
[57] ibid [3].

From the perspective of informal logic, the argument from silence is also tightly connected to the relation between negation and belief. Let us assume that someone does hold a certain belief or *opinio juris*. Is it monosemic or could it express various modalities? Indeed, there are various modalities governing the belief-universe, a misunderstanding/misapplication of which could generate logical fallacies and lead to distortions. For instance, there are the so-called internal and external negations of belief, and thus, *opinio juris*. Let us diagnose the fallacy:

1. John believes that God does not exist. (Internal negation)
2. John does not believe that God exists. (External negation)
3. John believes that God exists.

These three examples depict the so-called withhold/deny fallacy.[58] The fallacy is to read 1 and 2 as meaning the same, whereas according to informal logic 1 entails 2, but not vice versa. Accordingly, the denial of 3 is sometimes wrongly taken to be 1 (case of false alternatives), whereas the contradictory/true denial of 3 is 2. In other words, one's denial to hold a belief does not affirm that one holds the opposite belief. Not believing does not amount to disbelieving. This is what distinguishes agnosticism from atheism: the choice between belief and disbelief is not a forced choice: there is a third way, the way of withhold or non-belief. In everyday argumentation, it is quite often the case that we commit the withhold/deny fallacy for the sole reason that the practical consequences are seemingly indistinguishable. However, that would only make sense if the object of belief was entirely factual/practical rather than conceptual. Generally, the occurrence of the withhold/deny fallacy also produces the fallacy of false alternatives: that is, a state either accepts a regional custom or not.[59] There is no in-between. The fallacy of false alternatives in CIL has been formally incorporated in legal doctrine via the Lotus principle, as it manifests itself in the Kosovo advisory opinion, among others. Let us assume that the assertion 'Anna believes in ghosts' is 'Ag'. The variations of negation can be further symbolised as those contained in Figure 4.1.

The richness of belief. There is also the problem of belief itself. Let us also take as a given that a state is an entity that can be conceptualised as a Leviathan who thinks and reasons, which is of course not the case, so the induction is already arbitrary so to speak. The state is an enormous political-bureaucratic machine, and so one may naturally wonder how

[58] J Adler, 'Belief and Negation' (2000) 20(3) Informal Logic 207, 222.
[59] ibid 212.

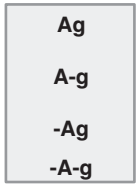

Figure 4.1

many beliefs by state-agents, legal advisors and high-ranking officials need to coordinate towards a certain belief or idea. Whose belief is of greater value, if so? How many views are considered enough to formulate the so-called *opinio juris* as a belief-reservoir? Or, even more profoundly, how will these individual beliefs be measured, attested and evaluated? Should we resort to official archives? Either official or unofficial communications? General Assembly Resolutions? How intense or strong should the negation or affirmation be in order to qualify as a positive or negative belief regarding the perceived bindingness of a norm? And what about plain indifference? What type of formality should be attached to this set of beliefs? Moreover, we cannot simply assume that a certain belief – *opinio juris* – is always in full awareness.

The richness of silence. Accordingly, we, as international lawyers, may indeed have to deal with either conscious silence or unconscious silence: intended or unintended silence. Should we assume that there are no variations in silence itself? What if silence qua the consciously or unconsciously omissive passage of time is not semantically homogenous throughout (the silent) time, that is, transforms into something semantically different at some point, given new circumstances? Judge Sørensen in the *North Sea Continental Shelf* noted '[i]n view of the manner in which international relations are conducted, there may be numerous cases in which it is practically impossible for one government to produce conclusive evidence of the motives which have prompted the action and policy of other governments'.[60]

Some of these questions have been addressed by the ICJ but most of them have not. For instance, in the 1951 *Fisheries* case, the ICJ seems to have taken into deeper consideration the context of British silence and ruled that '[t]he notoriety of the facts, . . . Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her (straight

[60] See Judge Sørensen's dissenting opinion in *North Sea Continental Shelf Cases*.

https://doi.org/10.1017/9781009025416.005 Published online by Cambridge University Press

baseline) system against the United Kingdom'.[61] Accordingly, in the *North Sea Continental Shelf Cases*, the court stated:

> [w]ith respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, *provided it included that of States whose interests were specially affected*.[62]

Normally, however, the evaluation of silence is much more superficial and narrow. In the *Military and Paramilitary Activities in and Against Nicaragua*, the court ruled that *opinio juris* may also be deduced from the attitude of states towards certain General Assembly resolutions.[63] This was confirmed in the *Nuclear Weapons* advisory opinion.[64] In the *Lotus* case, the Permanent Court of International Justice deduced from the freedom of the seas' principle that 'vessels on the high seas are subject to no authority except that of the State whose flag they fly'.[65]

We have seen that arguments from silence occur when someone interprets someone's silence as meaning anything other than silence, basically arguing that silence is either communicating implicit approval or disapproval. Again, when we are dealing with a silent authority, such as a state, we should ask ourselves: would the silent authority have known about the claim and consciously chose to remain silent? Is the silent authority fully aware of the claim? Do we have a complete record of everything written/done by the authority? Is this record true and reliable, and not just a presumption based on lack of evidence? If the answer is 'no' to any of the above, it is quite possible that we are dealing with a fallacious argument from silence. On the other hand, the fallacy *ad ignorantiam* occurs when someone argues in favour or against something, in our case state practice, simply because of lack of evidence, and not because of a positive evaluation of the absence of evidence.

In the Kosovo advisory opinion, the ICJ committed both fallacies. Without any substantial argumentation and with the ultimate goal to solve the Kosovo puzzle, the ICJ erroneously interpreted the absence of state practice as also implying a neutral *opinio juris* by the vast majority of

[61] *Fisheries Case (United Kingdom v Norway)* 139.
[62] *North Sea Continental Shelf Cases* (emphasis added).
[63] *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States of America)* [1986] ICJ Reports 14.
[64] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 241.
[65] *SS 'Lotus' (France v Turkey)* (Judgment) [1927] PCIJ Series A No 10.

states vis-à-vis unilateral declarations of independence. The question that obviously arises here is this: how is it even possible for states to concur in a situation that would put their very existence in danger? One therefore notices a typical example of persuasive-teleological argumentation, oriented towards the effective resolution of an international dispute. The ICJ also construed the controversial perceived intent argument, that is, the argument that the authors of the declaration of independence did not seek to act within the constitutional framework of the interim administration for Kosovo (i.e., as the Assembly of Kosovo), but instead 'acted together in their capacity as representatives of the people of Kosovo'.[66] In particular, the ICJ held that 'the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order but, rather, set out to adopt a measure the significance and effects of which would lie outside that order'.[67] Regarding the Serbian constitutional order, the ICJ concluded that the constitutional laws of Serbia were not applicable insofar as the object and purpose of the 1244 Security Council Resolution was to establish a temporary legal regime that would supersede the Serbian Constitution. In other words, the ICJ opted for the mainstream, closed-system approach, that is, departed from the premise that international law is a closed normative system, and treated the unilateral declaration of independence as a factuality lying outside that system. It also 'extended' the will theory to a non-state actor. By doing so, the ICJ also reached another paradoxical conclusion: one can act outside a normative order and thus avoid liability, simply by saying so.

Apart from the erroneous interpretation of silence and absence, the ICJ also committed an important syllogistic fallacy. Inference, or formal inference, is the logical process of understanding what is implied in a certain proposition; the process of deriving general or particular propositions, on the basis of something previously assented to, namely the 'derivation of one proposition, called the Conclusion, from one or more given, admitted, or assumed propositions, called the Premise or Premises'.[68] The objective of inference is the objective of reasoning: the examination of the validity of a statement by reason of certain facts or statements from which it is said to follow. Syllogism is the narrow concept of mediate inference, namely the inference for the completion of which we necessarily employ a medium or middle term.

[66] *Kosovo Opinion* [109].
[67] ibid [105] (emphasis added).
[68] W Minto, *Logic Inductive and Deductive* (John Murray 1915) 146.

The term 'syllogism' derives from the Greek words *σύν* (together) and *λόγος* (thought) and means the bringing together in thought of two Propositions in order to compose a third proposition, commonly referred to as Conclusion. For logician William Minto, '[t]he main use of the syllogism is in dealing with incompletely expressed or elliptical arguments from general principles'.[69] It is often the case where elliptical arguments are put forward, also known as enthymemes, whereby one premise is explicit and the other suppressed, namely held in the mind.[70] In this case, the purpose of the syllogism is practical: to expose the implications of the hidden premises in the most explicit, convincing and undeniable way possible, and challenge what is otherwise considered to be self-evident. There is such a fundamental, *hidden* syllogism in the Kosovo advisory opinion.[71] The syllogism goes as thus:

Premise 1 (P1): All what is not forbidden (to states) is allowable.
Premise 2 (P2): All declarations of independence (by non-state actors) are not forbidden.
Conclusion (C): All declarations of independence are allowable (for non-state actors).

From the above scheme one immediately notices that the problem with the judicial syllogism does not only rest with the fallacious interpretation of absence and silence in international law according to the Lotus principle but also with a serious syllogistic fallacy. The conclusion of the deductive judicial syllogism is logically unsound because it does not follow from the premises. The syllogism suffers from the logical fallacy of equivocation. Equivocation is not a formal fallacy but a verbal or material fallacy, which implies that the same word or phrase is used in two different ways. The predicate term 'what is allowable' has a dual meaning: in P1 it means 'allowable for states' whereas in C it means 'allowable for non-state actors'. This is a typical sophist fallacy: 'an elephant has a trunk; a car has a trunk; therefore, an elephant must be a car'. This is equivocation. The rationality crisis is camouflaged because the judicial critique (i.e., the declarations, separate and dissenting opinions) focuses on the interpretation of silence.

[69] ibid 209.
[70] ibid.
[71] This is generally acknowledged by international legal scholars. See for instance H Quane, 'Silence in International Law' (2014) 84(1) BYBIL 240.

Considering that the judicial syllogism does not have any external rationality, let us now turn to its internal consistency. As mentioned above, silence was attributed to the authors of the unilateral declaration of independence, it is therefore important to examine whether, from the scope of international law, silence could concern the conduct of non-State actors as well. In other words, the crucial question from an internal point of view is whether the Lotus principle applies to states and non-state actors alike. This particular question was neither posed nor addressed by the ICJ. At a first glance, it is debatable whether the principle applies to non-state actors at all due to their limited and derivative legal personality. In fact, in the same advisory opinion the ICJ concluded that the principle of territorial integrity is not applicable to, and thus does not bind, non-state actors. However, from an internal perspective and based on Kammerhofer's interpretation of Kelsen, that is, that a normative order can only be composed of positive norms, one can also go as far as to regard silence by states as well as non-state actors as merely factual, that is, as lying outside the normative order. From this perspective, what the ICJ then did was simply to acknowledge a factual state of affairs, namely a freedom that is normatively indifferent. However, it is difficult to argue in favour of such an interpretation, given that the ICJ did not simply acknowledge a freedom that is factual, but actually a freedom that is normative, insofar as it is accorded concrete legal consequences. Indeed, according to the ICJ, in the absence of a prohibitive rule, states (and non-state actors alike) are *legally* free to do as they wish. One can hardly argue that such an assertion is normatively indifferent, given that it clearly entails a positive legal permission as well as a corresponding legal entitlement.

6 Conclusion

It has been demonstrated that international law does not provide any clear guidance as regards the legal effects that follow from state silence. The prominent closed-system approach goes against the rules of logic and the canons of reasoning, according to which absence may correspond to multiple values, a variety of propositions and modalities. It has been argued that, in international jurisprudence, these modalities have been either equated or largely ignored. In the same spirit, the mainstream interpretation of CIL overlooks the quantifications and varieties of meaning in non-appearances. It has been suggested that an open-system perspective could shed light on inconsistencies and/or erroneous interpretations.

The modalities of absence affect the rationality and soundness of international legal doctrine and even have a real impact on international relations when overlooked. Due to the scarcity of proper inductive arguments in the process of CIL ascertainment, the striving for discursive truth and reason has been limited to an examination of superficial rationality, that is, a mere analytical and superficial testing of consistency. Even this internal consistency, though, is not a given. There is, for instance, a new distinction between the traditional and the so-called modern deductive CIL, that is, a distinction between customary law that results from the traditional, inductive method of reasoning, and customary law that arises in instances where the inductive method is considered impossible to use because state practice is non-existent, the legal question is too new and has not been dealt with etc. In those instances, deduction and assertion are often used. Both the absence of state practice and state silence are thus often interpreted on the basis of rules that are either deduced from general principles, or expressing simple assertions. Inevitably, the deductive or assertive character of this new CIL implies value judgements and/or the personal, political preferences of the adjudicating judge.

The lack in international legal reasoning of external rationality and even internal consistency has paved the way to persuasive-teleological argumentation. The ICJ has developed several techniques of superficial, persuasive argumentation, teleologically governed by the *non liquet* principle, the containment of international crises and the effective resolution of international disputes, thus producing and reproducing serious rationality deficits in the judicial treatment of silence in the framework of CIL. The existence of external and internal rationality deficits as well as the corresponding rhetorical manoeuvring increase the need for the legal system to appeal to a concrete legitimizing basis for the explanation of derogations, exemptions, ad hoc solutions or whatever argumentation games and gaps cannot be justified by virtue of the normative structure of the system itself or some generalised imperative of system maintenance, such as a state of emergency. This has been, for instance, the case with the Kosovo advisory opinion and the *Asylum* case, where the ICJ changed the normal calculus in the interpretation of silence and opted for ad hoc solutions. The anomaly in the Kosovo advisory opinion was pointed out by Judge Tomka, who in his Declaration argued that:

> [t]he legal régime governing the international territorial administration of Kosovo by the United Nations remained, on 17 February 2008, unchanged. What certainly evolved were the political situation and

> realities in Kosovo. The majority deemed preferable to take into account these political developments and realities, rather than the strict requirement of respect for such rules, thus trespassing the limits of judicial restraint.[72]

However, unless either an open-system approach is applied or robust coherence and consistency is systematically and methodologically pursued within a closed system, ad hoc and arbitrary judicial responses to non-appearances will persist.

[72] *Kosovo Opinion*, Declaration of Judge Tomka [35] (emphasis added).