

A MISSED OPPORTUNITY TO EXERCISE “PASSIVE VIRTUE”:¹
APPLYING THE POLITICAL QUESTION DOCTRINE TO *BOSNIA V. SERBIA*

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In February 2007, the International Court of Justice (ICJ) issued a Judgment on the merits in the case Bosnia and Herzegovina brought against Serbia and Montenegro for violations of the Genocide Convention (*Bosnia v. Serbia*).² Before reaching the merits, however, the ICJ addressed at length the question of its jurisdiction *ratione personae* over Serbia.³ Serbia contended that the ICJ lacked such jurisdiction because Serbia was a new state, not a successor state, to the Socialist Federal Republic of Yugoslavia (Yugoslavia) and thus was not properly considered a “state party” to the ICJ statute upon which jurisdiction was premised.⁴ Bosnia countered that the

¹ Alexander M. Bickel coined the phrase “passive virtues” in 1961 to describe a set of U.S. Supreme Court doctrines “on the timing and limits of the judicial function,” including standing, the “case and controversy” requirement, ripeness, and the political question doctrine. Bickel argued that the proper exercise of these doctrines enhanced the prestige of the Court: by allowing them to “withhold[] ultimate constitutional adjudication” until they could ascertain and apply “impersonal and durable principles” worthy of the highest court in the country, the “passive virtues” ensured that the Court would speak only where its last word would be useful. Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40-42 (1961).

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² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007) [hereafter 2007 Judgment], available at <http://www.icj-cij.org/docket/files/91/13685.pdf> (last visited May 1, 2009). On the merits, the Court held that Serbia had not committed, incited or conspired to commit, or been complicit in genocide, but found that Serbia had violated its obligations under the Genocide Convention by failing to prevent the massacre at Srebrenica in 1995 and failing to cooperate with the International Criminal Tribunal for the former Yugoslavia. The ICJ also held that its judgment constituted sufficient satisfaction for Bosnia such that payment of compensation by Serbia would not be appropriate. See also Richard Graving, Case Note, *The International Court of Justice Muddles Jurisdiction in Yugoslav Genocide Case*, 15 TULSA J. COMP. & INT’L L. 29 (2007).

³ 2007 Judgment, *supra* note 2, ¶¶ 80-140.

⁴ *Id.* ¶ 80. Article 35(1) of the Statute of the International Court of Justice extends the ICJ’s jurisdiction *ratione personae* to the “states parties to the present Statute.” Statute of the International Court of Justice art. 35, Oct. 24, 1945, 59 Stat. 1031. Article 93 of the U.N. Charter provides that “[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.” U.N. Charter art. 93. The question of Serbia’s membership in the U.N. therefore controlled the question of the ICJ’s jurisdiction *ratione personae* over Serbia.

ICJ's 1996 Judgment on the preliminary objections of the case had determined that jurisdiction was proper and this decision had the effect of *res judicata*.⁵ The ICJ held in favor of Bosnia. Even though the ICJ had not addressed the question of Serbia's status in its 1996 Judgment, it did resolve other jurisdictional issues that "by necessary implication" resolved the status question.⁶ Therefore, the ICJ concluded that the principle of *res judicata* precluded it from re-opening the question of whether Serbia was a "state party" to the ICJ statute in 1993 such that exercise of jurisdiction *ratione personae* was proper.⁷

Regardless of their positions on the wisdom of the ultimate outcome, both advocates and critics of the ICJ's 2007 Judgment agree that the ICJ's approach to the jurisdictional issue "does not perhaps represent the zenith of legal reasoning."⁸ Thus, most of the advocates and critics offer alternative approaches to the problem. Most of these suggested alternatives place the question of Serbia's actual status between 1992 and 2000 at the heart of their jurisdictional analyses. In other words, the focus is on whether Serbia was a "state party" to the ICJ statute, and the goal is to extract a clean "yes" or "no" answer to this question from the morass of overlapping international pronouncements between 1992 and 2000.⁹

In this essay, I present an approach to the jurisdictional issue that focuses on the legal framework. The key question is: what legal framework should the ICJ have used to make sense of the "confused and complex"¹⁰ status of the former Yugoslavia between 1992 and 2000? This focus serves to recognize two important realities earlier analyses fail to confront. First,

⁵ *Id.* ¶ 100. The ICJ's judgment on the preliminary objections — Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Preliminary Objections, 1996 I.C.J. 95 (July 11) [hereafter 1996 Judgment].

⁶ 2007 Judgment, *supra* note 2, ¶ 132.

⁷ *Id.* ¶ 140.

⁸ Yehuda Blum, *Was Yugoslavia a Member of the United Nations in the Years 1992-2000?*, 101 AM. J. INT'L L. 800, 817 (2007) (quoting Vice-President Al-Khasawneh's dissent to the 2007 Judgment). Other commentators have gone further. *See, e.g.*, Graving, *supra* note 2, at 57 (condemning ICJ's "strained resort to *res judicata*" as "unnecessary embarrassment"); Stephan Wittich, *Permissible Derogation from Mandatory Rules? The Problem of Party Status in the Genocide Case*, 18 EUR. J. INT'L L. 591, 617-18 (2007) (concluding that although under circumstances "there [was] hardly any other way the Court could have decided the problem of Yugoslavia's status," ICJ's "approach and decision taken" were "highly unsatisfactory").

⁹ *See, e.g.*, Graving, *supra* note 2, at 57 (arguing that "strictly 'legal' approach" to jurisdiction — which would lead ICJ to conclude that Serbia "had always been a U.N. member . . . either as a continuator or as an immediate successor" and affirm jurisdiction — was preferable).

¹⁰ 2007 Judgment, *supra* note 2, ¶ 97 (quoting Legality of Use of Force (Serb. & Mont. v. Belg.), Preliminary Objections (Judgment of Dec. 15, 2004), ¶73, available at <http://www.icj-cij.org/docket/files/105/8440.pdf> (last visited May 1, 2009)).

the status of the former Yugoslavia between 1992 and 2000 was in fact, as the ICJ observed, *sui generis*.¹¹ On the one hand, the United Nations "unequivocally" rejected Serbia's claim to inherit the former Yugoslavia's international rights and responsibilities.¹² On the other, the U.N. General Counsel insisted that Yugoslavia's membership in the U.N. was neither "terminate[d] nor suspend[ed]."¹³ Given these circumstances, neither the ICJ nor any other body could arrive at a firm conclusion regarding Yugoslavia's international status.

Rather than hope to provide a firm conclusion or clean answer, a satisfactory legal framework for analysis of this situation must recognize and deal with the ambiguities as ambiguities. One such framework is the "political question doctrine." In this essay, I will first provide a brief overview of this doctrine. I will then explain how it applies to the jurisdictional question in *Bosnia v. Serbia*, paying particular attention to the way in which it helps a court deal with Serbia's ambiguous situation in a principled way. Finally, I will argue that because the "political question" at issue in this case was one of jurisdiction, rather than of substantive law, there was a particularly strong case for the ICJ to exercise its "passive virtue" and dismiss the question.

I. THE POLITICAL QUESTION DOCTRINE

In U.S. jurisprudence, the political question doctrine defines a category of "political questions" that U.S. courts lack the power to answer. Courts are constitutionally required to dismiss such political questions as nonjusticiable even if all parties consent to adjudication.

Constitutional scholar Laurence Tribe has observed that the appeal of the political question doctrine is twofold. First, it serves a prudential function because it is a "means to avoid passing on the merits of a question when reaching the merits would force the [Supreme] Court to compromise an important principle or would undermine the Court's authority."¹⁴ Second, it protects the integrity of the separate branches of government by allowing courts to defer judgment on issues that, in light of institutional roles

¹¹ *Id.*

¹² *Id.* ¶ 95 (quoting a letter dated Sept. 29, 1992, from the Under-Secretary-General and Legal Counsel of the United Nations to the Permanent Representatives of Bosnia and Herzegovina and Croatia, purporting to explain General Assembly Resolution 47/1).

¹³ *Id.* For an excellent concise explanation of Serbia's "patently absurd" situation between 1992 and 2000, see Blum, *supra* note 8. The ICJ explains the situation at length in the 2007 Judgment, *supra* note 2, ¶¶ 88-99.

¹⁴ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 96 (2d ed. 1988), quoted in Marcella David, *Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court*, 40 HARV. INT'L L.J. 81, 129 (1999).

and practical capabilities, another branch is better suited to resolve.¹⁵ Political questions, therefore, are either incapable of principled judicial analysis or better addressed by another branch of government.¹⁶

In *Baker v. Carr*, the U.S. Supreme Court detailed the specific contours of the political question doctrine by identifying six prominent characteristics that mark questions as “political.”¹⁷ Three will be discussed here.¹⁸ First, courts should defer to the political branches of government when the text of the Constitution makes a “demonstrable” commitment of the issue to one or both of those branches. The Court held that a question in *Baker* was nonjusticiable because its resolution required determining which of two purported governments of Rhode Island was the lawful one, a task the Constitution delegates to Congress.¹⁹ Second, political questions exist when there is “a lack of judicially discernible and manageable standards” to resolve the issue. For example, a plurality of the Justices recently agreed that no “discernible and manageable” standards exist in cases of political

¹⁵ David, *supra* note 14, at 129. See also *Baker v. Carr*, 369 U.S. 186, 210 (1962) (holding that whether question is political or not is “primarily a function of the separation of powers”).

¹⁶ It is possible to understand the political question doctrine as a back door to the merits, that is, to understand a holding that something is a “political question” to mean that it is “not illegal” (or, in this case, to mean that Serbia was “not a party”). See, e.g., Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 444 (2004) (“the doctrine does no work not already done by substantive provisions of constitutional law.”). Louis Henkin, however, has made a compelling case that a non-justiciability finding does not preclude a court from later holding the same action unconstitutional (or, in this case, from later finding that Serbia was a party): it is simply a statement that the court presently lacks the wherewithal to make a principled determination. Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 599 (1976) (arguing that political question doctrine “implies . . . that some issues which prima facie and by usual criteria would seem to be for the courts, will not be decided by them but, extraordinarily, left for political decision.”). While acknowledging the tension between the two positions, I adopt Henkin’s understanding in this paper.

¹⁷ *Baker*, 369 U.S. at 217. Although the *Baker* Court concluded that the question before it was *not* political, it examined the doctrine at length and provided a framework for analyzing future cases. The particular question at issue in *Baker* dealt with state districting statutes. Baker, on behalf of Tennessee voters, sued the state of Tennessee pursuant to federal civil rights statutes, claiming that a Tennessee law divided the state into election districts in such a way as to create unequal voting power in violation of the Fourteenth Amendment.

¹⁸ I have chosen not to discuss the other three characteristics here because they are less strictly “legal,” and therefore demand a level of familiarity with the political machinations of the U.N. that I lack at present. Briefly, these factors suggest that simple prudence requires a court to abstain from adjudication where: it would be “impossibl[e]” to resolve the question “without expressing lack of respect” due to the other branches of government; where there is “an unusual need for unquestioning adherence to a political decision already made”; and/or where there is great potential for “embarrassment” from “multifarious pronouncements by various departments on one question.” *Baker*, 369 U.S. at 217-18.

¹⁹ *Baker*, 369 U.S. at 218 (citing *Luther v. Borden*, 48 U.S. 1, 1 (1849)).

gerrymandering.²⁰ Third, courts should abstain from adjudication when it is "impossibl[e]" for them to decide an issue "without an initial policy determination of a kind clearly for nonjudicial discretion."²¹ An example of an issue requiring a policy determination beyond the scope of the courts is "whether power remains in a foreign state to carry out its treaty obligations."²²

The *Baker* Court noted that many potential political questions involve foreign relations, but emphasized that it would be "error" to jump to the conclusion that all such cases were "beyond judicial cognizance."²³ Rather, each specific question must be subjected to "discriminating analysis" on a case-by-case basis.²⁴ Even ambiguous or difficult situations involving foreign relations are not "political" if the underlying questions are capable of judicial resolution. Situations are only deemed nonjusticiable when executive or legislative action is of "controlling importance."²⁵

II. THE POLITICAL QUESTION DOCTRINE AND *BOSNIA V. SERBIA*

As an initial matter, it is true that the political structure of the United States varies significantly from the political structure of the United Nations.²⁶ Thus, as noted by American scholar Marcella David, "it [is] inappropriate to attempt to adopt the political question doctrine into [ICJ] jurisprudence without considerable translation."²⁷ The spirit of the doctrine, however, translates even where the letter may not: the prudential and institutional principles it embodies are as relevant to U.N. jurisprudence as they are to U.S. jurisprudence.²⁸ The ICJ's deference to the political organs

²⁰ *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004).

²¹ *Baker*, 369 U.S. at 217.

²² *Terlinden v. Ames*, 184 U.S. 270, 288 (1902).

²³ *Baker*, 369 U.S. at 211.

²⁴ As the Court put it, each question involving foreign relations deserved "a discriminating analysis . . . of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Id.* at 211-12. For a brief history of Serbia's management by the political branches of the U.N., see *infra* pp. 10-11.

²⁵ *Baker*, 369 U.S. at 211-12 (giving the example of *Terlinden v. Ames*, 184 U.S. 270 (1902)).

²⁶ In the political question context, Marcella David has identified three of the key differences to be: (1) the U.N. Charter more frequently provides for responsibility to be shared across the organs of government than does the U.S. Constitution, which often delegates responsibility to a particular branch; (2) the scope of Security Council authority in general is much narrower than that of the U.S. Executive (and, specifically, unlike the U.S. it is not permitted to intervene in cases raising constitutional questions); and (3) the ICJ does not recognize the traditional principle of *stare decisis*. David, *supra* note 14, at 133-34.

²⁷ David, *supra* note 14, at 132.

²⁸ *Id.* at 129. By way of a specific example, David notes that the prudential and

of the U.N. — the General Assembly and the Security Council — acknowledges the importance of cooperative decisions of the states represented in those bodies and enhances the credibility of the ICJ by removing issues beyond the ICJ's competence to resolve from the docket.²⁹

The question of whether Serbia inherited Yugoslavia's membership to the United Nations in 1992 such that it became a "state party" to the Statute of the International Court of Justice in 1993 merits this deference. Its resolution required both the cooperative decision of U.N. member states (to vote up or down on Serbia's membership), and exceeded the scope of the ICJ's institutional competence. Applying three of the *Baker v. Carr* characteristics of a political question confirms this conclusion. First, the text of Article 4(2) of the U.N. Charter assigns the power to determine membership in the U.N. to the General Assembly and the Security Council, not to the ICJ. Second, in this specific case, the inconsistency of General Assembly and Security Council resolutions on Serbia's status provides no judicially manageable standards by which the ICJ could have made a neutral evaluation of the question presented. Third, the U.N. practice of determining new state membership after the dissolution of a former member state — as illustrated by the cases of India, Pakistan, and the former Soviet Republics — demonstrates that questions of this type demand "policy determination[s] of a kind clearly for nonjudicial discretion."³⁰

A. *Textual Commitment to Political Bodies*

Chapter II, Article 4(2) of the U.N. Charter assigns the power to determine U.N. membership to "the General Assembly upon the recommendation of the Security Council."³¹ Article 5 of Chapter II assigns the power to suspend rights and privileges of membership to the same bodies, and accords restoration power of such rights and privileges to the Security Council.³² Together, the Articles strongly suggest that the founding members of the U.N. intended the General Assembly and the Security

institutional factors are the same ones that led Judge Schwebel to conclude, in the context of examining the *Lockerbie* cases, that it is improper for the World Court to review an issue under contemporaneous Security Council review.

²⁹ *Id.* at 145-46. David also distinguishes the political question doctrine as described here from the "doctrine" of the same name that states have historically invoked when attempting to avoid state accountability by claiming sovereign privilege. Properly understood, the political question doctrine in the international context is a principle of deference by the ICJ to another U.N. organ — *not* to the political actions by one of its sovereign members. The latter is obviously incompatible with the principles of the United Nations and I make no case in its defense. *Id.*

³⁰ *Baker*, 369 U.S. at 217.

³¹ U.N. Charter art. 4, para. 2.

³² U.N. Charter art. 5.

Council, not the ICJ, to have final authority over questions related to state membership.³³

Under the *Baker* framework, this textual commitment still allows the ICJ adjudicatory power over membership questions that require construction of treaties or statutes. However, even framing the question of Serbia’s status as one within the scope of Article 35 of the Statute of the International Court of Justice, the fact that the question concerns Serbia *in particular* suggests that Article 4(2) commits it to the political bodies rather than to the ICJ.

In its 1948 Advisory Opinion on the *Conditions of Admission of a State to Membership in the United Nations (Conditions)*, the ICJ itself recognized the distinction between general (justiciable) and specific (nonjusticiable) membership questions.³⁴ The certified question in *Conditions* was whether the General Assembly could impose additional conditions for state membership beyond those set forth in Article 4(1) of the U.N. Charter.³⁵ In rejecting the argument that this was a nonjusticiable political question, the ICJ distinguished “purely legal” questions from “political character” questions:

The Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision. It is not concerned with... the considerations which, in the concrete cases submitted for examination to the Security Council, formed the subject of the exchange of views which took place in that body. It is the duty of the Court to envisage the question submitted to it only in the abstract form which has been given to it; nothing which is said in the present opinion

³³ The question is complicated somewhat by the fact that the U.N. Charter does not specifically provide rules for membership *succession*, and because the traditional rules of treaty succession do not control with respect to international organizations. See Vienna Convention on Succession of States in Respect of Treaties art. 17, Aug. 23, 1978, U.N. Doc. A/CONF.80/31; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 210 (1987). See also Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT’L L.J. 29, 33 n.19 (1995). However, as discussed *infra* p. 13, the actual practice of the U.N. confirms that it understands the Charter’s broad delegation of authority over membership questions to the political bodies to extend to succession questions. Because no other convention controls, U.N. practice arguably has the force of international law.

³⁴ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, 1948 I.C.J. 57 (May 28) [hereafter 1948 Advisory Opinion].

³⁵ *Id.* at 60-61. It was clear from the timing of the certification — November 17, 1947 — that the General Assembly considered this question relevant to Pakistan’s application for U.N. membership, submitted in August 1947. See Scharf, *supra* note 33, at 34. However, the ICJ neither discussed the specifics of Pakistan’s case nor explicitly connected its analysis to the General Assembly’s concurrent membership debate. 1948 Advisory Opinion, *supra* note 34.

refers, either directly or indirectly, to concrete cases or to particular circumstances.³⁶

Applying the *Conditions* criteria to this case, it becomes clear that the question of Serbia's status is nonjusticiable. Whether Serbia inherited the international rights and obligations of the former Yugoslavia is not an abstract question; instead, it explicitly presents the "concrete case" of a single country that was the subject of a lengthy "exchange of views" in the Security Council as well as in the General Assembly.

B. *Lack of Judicially Manageable Standards*

The "exchange of views" over Serbia in both political bodies of the U.N. also illustrates the second *Baker* characteristic: the lack of judicially manageable standards against which the ICJ could measure Serbia's status.³⁷ In contrast to *Baker*, resolution of the jurisdictional question in *Bosnia v. Serbia* did not require the ICJ to evaluate the consistency of Serbia's actions with established international standards.³⁸ Rather, the relevant U.N. resolutions on Serbia between 1992 and 2000 created a "patently absurd" situation from which the ICJ could not draw a reasoned, independent conclusion.³⁹

The United Nations first addressed the question of Serbian state membership in 1992, when Serbia and Montenegro informed the Secretary-General of the U.N. that it intended to continue the rights and obligations of the former Yugoslavia, "including its membership in all international organizations and participation in international treaties."⁴⁰ Both political bodies of the U.N. immediately rejected this claim. In Resolution 47/1 (1992), the General Assembly, upon the recommendation of the Security Council, concluded that Serbia and Montenegro did "not continue automatically the membership" of the former Yugoslavia in the U.N. It also directed Serbia and Montenegro to apply for new membership and declared

³⁶ 1948 Advisory Opinion, *supra* note 34, at 61.

³⁷ Such lack of judicially manageable standards is not unusual for U.N. resolutions on membership. As Richard Graving observed, "[t]he U.N. makes its own rules as it goes along. There is no pattern; it depends very much on political 'context.'" Graving, *supra* note 2, at 36 (citing JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 175-76, 189-90, 714 (2d ed. 2006); 1 OPPENHEIM'S *INTERNATIONAL LAW* 209, 223 (Robert Jennings and Arthur Watts eds., 9th ed. 1992)). See also Scharf, *supra* note 33, at 67-69.

³⁸ In *Baker*, the Court observed that the question dealt with "the consistency of state action with the Federal Constitution" and was therefore justiciable. *Baker v. Carr*, 369 U.S. 186, 226 (1962). The ICJ does not mention international standards in its decision. 2007 Judgment, *supra* note 2, ¶¶ 88-99.

³⁹ Blum, *supra* note 8, at 802.

⁴⁰ 2007 Judgment, *supra* note 2, ¶ 90 (quoting U.N. Doc. A/46/915, Ann. I).

that until such membership was approved, the state was not allowed to "participate in the work of the General Assembly."⁴¹

Bosnia, understanding Resolution 47/1 to mean that Yugoslavia was no longer a member of the United Nations, formally requested that the U.N. cease flying the Yugoslav flag.⁴² The U.N. declined. The Under-Secretary-General and Legal Counsel explained that Yugoslavia's "membership" in the U.N. continued, even though its representatives could not "*participate* in the work of the General Assembly."⁴³ This political limbo ended after the democratic election of Vojislav Kostunica as the president of the Republic of Serbia and Montenegro in 2000⁴⁴ and "the admission to the United Nations of a new Yugoslavia under Article 4."⁴⁵

Taken together, these international pronouncements placed Serbia in a legal position that the ICJ itself characterized as "rather confused and complex."⁴⁶ Moreover, because the Security Council and the General Assembly affirmatively created this confused legal position through resolutions that only they had the power to enact, their actions were of "controlling importance."⁴⁷ The ICJ could only have resolved the ambiguity by deciding for itself whether Serbia was a member, yet it had no "judicially manageable standards" by which to make this assessment because the Security Council and the General Assembly had not left them any.⁴⁸

⁴¹ 2007 Judgment, *supra* note 2, ¶¶ 90-95 (emphasis in original) (quoting Letter from the Under Secretary General, the Legal Counsel, addressed to the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations, U.N. Doc. A/47/485 (Sept. 30, 1992)). The Security Council had earlier noted that Serbia and Montenegro's claim was not "generally accepted" and resolved that Serbia and Montenegro could "not continue automatically the membership" of the former Yugoslavia. *Id.* (quoting S.C. Res. 757, U.N. Doc. S/RES/757 (May 30, 1992) and S.C. Res. 777, U.N. Doc. S/RES/777 (Sept. 19, 1992)). It also recommended that the General Assembly act pursuant to these resolutions. The General Assembly did so in Resolution 47/1 (1992). *Id.* (directing Serbia and Montenegro to apply for new membership and prohibiting it from participating in work of General Assembly in interim).

⁴² 2007 Judgment, *supra* note 2, ¶ 94.

⁴³ *Id.* ¶ 95 (emphasis in original) (quoting U.N. Doc. A/47/485).

⁴⁴ *Id.* ¶ 99.

⁴⁵ *Id.*

⁴⁶ *Id.* ¶ 97 (quoting Legality of Use of Force (Serb. & Mont. v. Belg.), Preliminary Objections (Judgment of Dec. 15, 2004), ¶73, available at <http://www.icj-cij.org/docket/files/105/8440.pdf> (last visited May 1, 2009)).

⁴⁷ The *Baker* court illustrated the difference by contrasting the assessment of whether a treaty applied to a recognized sovereign (justiciable) with the act of recognizing a foreign government ("strongly defies judicial treatment"). *Baker v. Carr*, 369 U.S. 186, 212 (1962) (comparing *United States v. Klinton*, 5 Wheat. 144 (1820), with *Foster & Elam v. Neilson*, 2 Pet. 253 (1829)).

⁴⁸ See 2007 Judgment, *supra* note 2, ¶¶ 88-99. It is possible that the lack of clarity may have been oversight, but I would argue that the U.N. imposed the ambiguity intentionally to

This situation is analogous to that in *Terlinden v. Ames*, a case the Supreme Court dismissed as nonjusticiable in part because the Court lacked useful standards to assess the question presented.⁴⁹ In *Terlinden*, Germany demanded extradition of a German criminal from the U.S. pursuant to a treaty executed between the United States and Prussia prior to German unification. After considering the political history of the region and principles of treaty interpretation, the Court ultimately agreed with the State Department that it “[could] not be said that any fixed rules have been established” by which it could assess whether treaties between the U.S. and pre-unification German states remained in force.⁵⁰ Power to resolve such situations therefore “devolved on the Executive authority.”⁵¹ The question was “in its nature political and not judicial” such that “the courts ought not to interfere with [its] conclusions.”⁵² As there is a comparable “lack of fixed rules” for assessing whether Serbia inherited Yugoslavia’s international responsibilities, the ICJ should have adopted the rule in *Terlinden* and dismissed the question as nonjusticiable.

C. Need for a Nonjudicial Policy Determination

In addition to the absence of judicially manageable standards, the *Terlinden* Court also reasoned that the question of state succession was nonjusticiable because its resolution depended on a determination of public policy.⁵³ This is the third hallmark of political questions identified in *Baker*: the need for an “initial policy determination of a kind clearly for nonjudicial discretion.”⁵⁴ Both the U.N.’s handling of prior questions of state succession and the implications this particular question has for the scope of its jurisdiction demonstrate that resolution of the question in *Bosnia v. Serbia* also depends on such an initial policy determination.

The U.N. has addressed serious questions related to membership succession on a number of occasions.⁵⁵ On each occasion, international political circumstances surrounding the dissolution of each “parent” state and U.N. member states’ interests in the outcomes significantly shaped the

provide Serbia with an incentive to oust Milosevic and initiate democratic reform. *See infra* pp. 17-18.

⁴⁹ *Terlinden v. Ames*, 184 U.S. 270, 288 (1902).

⁵⁰ *Id.* at 287.

⁵¹ *Id.* at 289.

⁵² *Id.* at 288.

⁵³ *Id.* at 289.

⁵⁴ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

⁵⁵ *See generally* Scharf, *supra* note 33 (examining U.N. membership succession issues following Pakistan’s secession from India, breakup of Soviet Union, dissolution of Yugoslavia, and “Velvet Divorce” in Czechoslovakia).

U.N.'s decision.⁵⁶ For example, the U.N. permitted India to succeed to the U.N. seat held by British India, but required Pakistan to apply as a new state, because of India's strategic importance as a member of the Western Cold War alliance and the desire of U.N. member states to limit U.N. membership.⁵⁷ In the case of the former Soviet Union, the U.N. quickly admitted Russia (rather than the Commonwealth of Independent States) to succeed the U.S.S.R. because of concerns that seating a non-traditional Commonwealth would force reconsideration of Security Council arrangements (thereby threatening the cherished permanent member veto) and fuel proposals to replace individual European states with a single delegation from the European Economic Community.⁵⁸

Even if one disagrees with the view that "the disposition of [these] seats [was] a function of politics," history nevertheless makes clear that the political organs of the U.N., not the ICJ, debated and then made each operative decision.⁵⁹ The full extent of the ICJ's participation was to pass a single advisory decision on a legal question pertinent to state membership but framed in abstract terms.⁶⁰ It follows that on the U.N.'s own view, as established in practice, the question of Serbia's succession requires a policy determination of a kind clearly for the discretion of the political organs. To hold otherwise threatens the consent principle by replacing bargained-for decisions about membership by the member states of the U.N. with judicial assumptions about when such membership is proper.

Historical considerations aside, the question of Serbia's status demands a nonjudicial policy determination because of the direct implications on the scope of the ICJ's jurisdiction: if Serbia was a member of the U.N. in 1993, jurisdiction is proper; if not, it is not. The situation therefore presents the classic bootstrapping problem that results when a court is permitted to define the scope of its own power. To an extent, of course, a court makes a jurisdictional determination whenever it dismisses a question as nonjusticiable.⁶¹ However, within the U.N. structure, the power to

⁵⁶ *Id.* at 31.

⁵⁷ *Id.* at 40-41.

⁵⁸ *Id.* at 48.

⁵⁹ *Id.* at 68. Scharf recognizes that "political and administrative convenience" may have been the driving force, but takes the position that "legal theory and precedent in the context of succession to membership" were more important in the situations he analyzed. *Id.* at 31.

⁶⁰ See 1948 Advisory Opinion, *supra* note 34, at 61-63 (holding that question of whether, when evaluating membership application, U.N. was limited to considerations enumerated in Article 4 was not "political question"). The Court's opinion was prompted by the potential admission of five former Axis powers — Italy, Finland, Bulgaria, Hungary, and Romania — to the U.N. See *id.* at 114 (dissenting opinion of Judge Krylov).

⁶¹ See, e.g., James W. Doggett, "Trickle-Down" *Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing Be Imported Into State Constitutional*

determine states' statutory susceptibility to suit must be distinguished from the power to determine, say, whether states are parties to a substantive international treaty. Although both questions may arise from "confused and complex" situations lacking judicially manageable standards, the latter question requires the ICJ to determine states' responsibilities vis-à-vis other *states* whereas the former requires it to determine states' responsibilities vis-à-vis the ICJ *itself*.

Basic separation of powers analysis suggests that the ICJ should be more hesitant to exercise judgment in the latter situation because doing so allows the ICJ to (and, in this case, did) define the scope of its own authority.⁶² Two structural features of the international legal system reinforce this analysis. First, although the U.N. Charter generally anticipates that all the U.N. organs share responsibility for formulating and advancing the organization's substantive goals,⁶³ as noted above, it specifically delegates membership questions to the political branches.⁶⁴ This suggests that the states parties intended to remove from the ICJ the authority to determine which states were competent to appear before it. Second, because substantive international law is traditionally understood to be the product of state consent, a court could justify extending its substantive jurisdiction to disputes before consenting states.⁶⁵ By contrast, whether a state is a member of the U.N. is the product of *other* states' consent. The consent principle, therefore, does not justify extending the ICJ's jurisdiction *ratione personae* beyond states recognized as members by the Security Council and General Assembly.⁶⁶ Rather, it reinforces the conclusion that resolution of Serbia's jurisdictional position requires a policy determination of the type not for the ICJ's discretion.

Law?, 108 COLUM. L. REV. 839, 877 (2008). See also Bickel, *supra* note 1, at 42 ("[t]he jurisprudence of the [Supreme] Court has developed certain doctrines whose chief content is a generalization on the timing and limits of the judicial function. They are loosely referred to as jurisdictional.").

⁶² See also BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 277 (Cambridge Univ. Press 1953) (citing cases counseling courts to interpret narrowly ambiguous questions of scope of their jurisdiction).

⁶³ David, *supra* note 14, at 133.

⁶⁴ See *infra* pp. 8-9.

⁶⁵ Because the domestic legal system is not premised on consent, this justification obviously has no analog in U.S. jurisprudence.

⁶⁶ As the ICJ put it, "[state] acquiescence . . . might be relevant to questions of consensual jurisdiction, and in particular jurisdiction *ratione materiae* under Article IX of the Genocide Convention, but not to the question whether a State has the capacity under the Statute to be a party to proceedings before the Court." 2007 Judgment, *supra* note 2, ¶ 102.

CONCLUSION

Through its 2007 holding that the principle of *res judicata* "by necessary implication" precluded it from addressing the question of whether Serbia was a "state party" to the ICJ statute in 1993, the ICJ did a disservice to both the doctrine of jurisdiction and the doctrine of *res judicata*. The ICJ declared its jurisdiction to be proper without answering the key legal question on which the determination turned: whether Serbia was a "state party" to the U.N. (and therefore the ICJ statute) in 1993. Furthermore, the ICJ's concept of *res judicata* "by necessary implication" created a contradiction in terms that violated the very principles the doctrine sought to protect.⁶⁷

The American political question doctrine presents a legally coherent alternative to this "confused and complex" approach. As American case law demonstrates, the doctrine is particularly useful to courts seeking a structured, principled way to analyze politically ambiguous situations. The ICJ in *Bosnia v. Serbia* fits this description. Upon analysis, moreover, it becomes clear that the jurisdictional question in *Bosnia v. Serbia* possesses many of the specific characteristics the U.S. Supreme Court identified as hallmarks of political questions in *Baker*. Membership in the U.N. is one of the few responsibilities the U.N. Charter textually commits to the political bodies. This simultaneously demonstrates U.N. intent to commit decisions in that arena to the discretion of the General Assembly and the Security Council, and recognizes that such questions are better suited to political, rather than judicial, resolution. Even if the ICJ wished to clarify Serbia's status, the political bodies left it no judicially manageable standards by which to do so. Finally, the U.N.'s history of leaving membership decisions to the General Assembly and the Security Council and the explicit jurisdictional nature of the question here both suggest that it would be

⁶⁷ Because *res judicata* is a procedural safeguard to stop parties from re-litigating issues that a court has already decided, *res judicata* by "necessary implication" is a contradiction in terms that violates the very principles the doctrine seeks to protect. The "triple identity" test provides that *res judicata* "applies where there is an identity of parties, identity of cause, and identity of subject-matter in between the earlier and subsequent proceedings in the same case." 2007 Judgment, *supra* note 2, ¶ 4 (dissenting opinion), available at http://www.genocide-watch.org/images/ICJ-26-Feb-07-Joint_dissenting_opinion_of_Judges_Ranjeva,_Shi_and_Koroma.pdf (last visited May 1, 2009). See also Interpretation of Judgments Nos. 7 & 8 (Chorzow Factory) (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 13, at 23 (Sept. 13) (dissenting opinion of Judge Anzilotti). The ICJ traditionally refuses to apply *res judicata* unless all elements of the "triple identity" test have been met. See, e.g., Haya de la Torre Case (Colom. v. Peru), 1951 I.C.J. 71 (June 13) (holding that ICJ's binding judgment that Peruvian political refugee was not entitled to diplomatic asylum at Colombian Embassy in Lima had no *res judicata* effect on question of whether Colombian embassy was bound to surrender refugee, because although cases had identity of parties and of subject-matter, legal question presented was distinct).

impossible for the ICJ to clarify Serbia's status absent a policy determination of a kind clearly for nonjudicial discretion.

Had the ICJ applied the political question doctrine to this case, it would have considered Serbia's status to be a "political question" and therefore dismissed the case on grounds of nonjusticiability. Such dismissal would have furthered both the prudential and institutional purposes of the political question doctrine, according the respect due to the judgment of the General Assembly and Security Council that Serbia's status was *sui generis*. This action would also enhance the credibility of the ICJ by allowing it to refrain from making policy decisions beyond its capacity. Notably, these purposes are not inapt American transplants. Respect for collaborative compromises produced by U.N. member states and for efforts to cabin judicial discretion are both thoroughly compatible with the mission and structure of the U.N.

Most importantly, however, dismissal on political question grounds would not have precluded further debate about Serbia's status in the international community. In fact, by endowing the ICJ with the power to abstain from rendering a firm decision, the political question doctrine would have *encouraged* a proactive and productive resolution by other entities in at least two ways. First, a "political question" holding in *Bosnia v. Serbia* would have encouraged political actors to work out effective, compromise-oriented solutions — both to the smaller problem of jurisdiction and to the bigger problem of how best to hold Serbia accountable for genocide. The ICJ is poorly equipped to facilitate such compromises, which are logistically difficult and logically incompatible with principled legal judgments.⁶⁸ The General Assembly and the Security Council, by contrast, could have retroactively clarified the status of Serbia both in the ICJ and on the world stage after weighing the need to punish genocide against the desire to reward democratic political reform.⁶⁹

⁶⁸ See Bickel, *supra* note 1, at 50 (noting that when U.S. Supreme Court dismisses question as nonjusticiable, result is to encourage broader dialogue "concerning the necessity for this or that measure, for this or that compromise," and arguing that if Court were to "work out" or "approve" such compromises it would create role for itself that would be "incompatible with the function of principled judgment").

⁶⁹ In analogous judicial contexts, the Supreme Court has held that just this type of policy balancing is an activity that properly belongs with the political bodies. Not only should courts dismiss them as nonjusticiable, but administrative agencies also lack the capacity to assess them. Attempts by the political bodies to shunt this difficult decision-making to other bodies should be resisted. See, e.g., *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 682-87 (1980) (Rehnquist, J., concurring) (finding that question "whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths" was an "obvious example of [a situation in which] Congress simply avoid[ed] a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge," and concluding that "[w]hen fundamental

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Second, even if the General Assembly and Security Council declined to take action, a “political question” holding would have encouraged effective resolution by another set of actors: other independent states. Serbia’s limbo position may have been legally absurd, but it effectively created a space in which the international community successfully pressured Serbia to overthrow Slobodan Milosevic and overhaul its political structure.⁷⁰ Retroactively destroying this limbo — at least absent explicit reconsideration of the problem — not only ignored the probable intent of the U.N. political branches to *create* such limbo, but also devalued the potency of limbo as a tool to encourage reform in future situations of crisis.

policy decisions underlying important legislation . . . are to be made, the buck stops with Congress and the President.”).

⁷⁰ See, e.g., Jane Perlez, *Serb Stands Firm in Face of U.S. Effort to Oust Karadzic*, N.Y. TIMES, July 18, 1996, at A10.