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Book section

Original citation:

Ker-Lindsay, James (2015) Explaining Serbia's decision to go to the ICJ. In: Milanovic, Marko and Wood, Michael, (eds.) The Law and Politics of the Kosovo Advisory Opinion. Oxford University Press, Oxford, UK. ISBN 9780198717515

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Available in LSE Research Online: April 2015

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Explaining Serbia's Decision to go to the ICJ

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1. Introduction

Following Kosovo's unilateral declaration of independence, in February 2008, the Serbian Government initiated a range of steps to discourage international recognition of the new state. Perhaps the most controversial of these was the decision to seek an advisory opinion from the International Court of Justice (ICJ). As will be seen, the move served both internal and external goals. Internally, it provided further evidence that firm measures were being taken to challenge Kosovo's secession. Internationally, it was understood that even if the process did not result in an eventual legal victory that would force countries that had recognised Kosovo to reverse their decision, it would nevertheless serve to slow the pace of recognitions as many countries would wait for the Court's decision. However, the decision to refer the matter to the Court also posed risks for Serbia. Most notably, it had the potential to disrupt relations with both the United States and key members of the European Union. As a result, Belgrade adopted a rather cautious approach when deciding on how to frame the question to be put before the Court. Despite this effort not to antagonise key states, there was initially strong opposition to the move by a number of EU members. But this proved to be short-lived after it became apparent that efforts to pressure Serbia to drop the case were sending out the wrong message to the wider international community. As a result, on 9 October 2008, the United Nations General Assembly passed a resolution referring the question of the legality of Kosovo's declaration of independence to the ICJ.

2. The Declaration of Independence and Serbia's response

By the middle of 2007 it was clear that Kosovo was preparing to declare independence. Although the Security Council had failed to reach an agreement on the Ahtisaari proposals, and a new process had been convened under the auspices of the Troika, few observers were left with any real doubts that the authorities in Pristina were determined to secede, with or without UN approval.¹ This perception was further reinforced by the strong statements of support coming from key Western countries, such as the United States, in particular,² as well as Britain, France, and, to a lesser extent at this stage, Germany. As a result, the Serbian Government was left with little choice but to begin to plan its strategy for the moment when the declaration of independence occurred.

Although Belgrade was adamant from the outset that it would not resort to the threat or use of armed force to pursue its sovereignty over Kosovo,³ it nevertheless reserved the right to take all necessary legal, political and economic steps required to defend its claim to the province. All ministries were therefore asked to prepare proposals outlining the steps they could take to manage the situation.⁴ Within the Foreign Ministry a diplomatic campaign was designed to

¹ For more on the status talks see the chapter by James Gow in this volume. See also Marc Weller, 'The Vienna Negotiations on the Final Status of Kosovo', *International Affairs*, Volume 84, Number 4, 2008; and James Ker-Lindsay, *Kosovo: The Path to Contested Statehood in the Balkans* (London: I.B.Tauris, 2009).

² 'Bush says Kosovo to be independent, delights Albania', *Reuters*, 10 June 2007.

³ 'Serbs to take West to International Court on Kosovo', *Reuters*, 10 December 2007; 'Kosovo Declares Its Independence from Serbia', *New York Times*, 18 February 2008.

⁴ 'Serbs, Albanians totally opposed on Kosovo', *Reuters*, 26 November 2007.

prevent the recognition of Kosovo by other states and prevent it from joining various international organisations; an effort that would be overseen by the foreign minister, Vuk Jeremic.⁵ As part of this wider external effort to prevent Kosovo from being recognised and legitimised, in December 2007 President Boris Tadic raised the possibility that Serbia would even consider referring the question of Kosovo's unilateral secession to the International Court of Justice (ICJ).⁶

Serbia was therefore well prepared for the unilateral declaration of independence when it finally came, on 18 February 2008. Days beforehand, the Serbian Parliament passed a resolution annulling the decision.⁷ This was followed by a decision to pursue treason charges against the president, prime minister and speaker of the parliament in Kosovo.⁸ Meanwhile, the campaign to prevent the international recognition of the new 'Republic of Kosovo' began in earnest.⁹ From the outset, it was obvious that in many cases such efforts were pointless. There was never any doubt that the United States and many EU members would quickly recognise the new state, and that they would strongly encourage others to do so. As a result, within the first six weeks after the declaration of independence, 35 countries had explicitly accepted the new state of affairs.¹⁰ However, Serbia was also able to claim some important victories. Most importantly, Russia issued a strongly worded statement condemning the declaration of independence, which it claimed violated, 'the sovereignty of the Republic of Serbia, the Charter of the United Nations, UNSCR 1244, the principles of the Helsinki Final Act, Kosovo's Constitutional Framework and the high-level Contact Group accords.'¹¹ The Chinese Government also noted its grave concern over the move.¹² The positions of Moscow and Beijing were crucial inasmuch as they signalled that Kosovo would be unable to join the United Nations; a key step in the overall process of legitimising Kosovo on the world stage. Meanwhile, many other countries also announced that they would not recognise Kosovo under the current circumstances. As well as emerging regional leaders, such as India and Brazil, the list of the stated 'non-recognisers' included several European Union members, notably Cyprus, Greece, Romania, Slovakia and Spain.¹³

In between the two opposing poles of opinion lay the majority of UN members. These were to become the 'battleground states'.¹⁴ In some cases, resistance to recognizing Kosovo was

⁵ In the two years after Kosovo declared independence it is estimated that Jeremic travelled to over 90 countries. 'Recasting Serbia's Image, Starting with a Fresh Face', *New York Times*, 15 January 2010.

⁶ 'Serbs to take West to International Court on Kosovo', *Reuters*, 10 December 2007.

⁷ 'Serbian government decides to 'annul' Kosovo independence', *AFP*, 14 February 2008. 'Decision on the annulment of the illegitimate acts of the provisional institutions of self-government in Kosovo and Metohija on their declaration of unilateral independence', Serbian Ministry of Foreign Affairs (Last accessed, 24 October 2011).

⁸ 'Serbia charges Kosovo leaders with treason', *Reuters*, 18 February 2008.

⁹ For an analysis of Serbia's diplomatic efforts to prevent the recognition of Kosovo see James Ker-Lindsay, *The Foreign Policy of Counter Secession: Preventing the Recognition of Contested States* (Oxford: Oxford University Press, 2012).

¹⁰ In addition to the United States, Britain, France, Germany and Italy, the Western members of the Contact Group overseeing Kosovo's status process, it was recognised by 14 other EU members as well as by, inter alia, Japan, Australia, South Korea, Turkey, Switzerland, Canada and Norway.

¹¹ 'Statement by Russia's Ministry of Foreign Affairs on Kosovo', 216-17-02-2008, The Ministry of Foreign Affairs of the Russian Federation, 17 February 2008.

¹² 'Foreign Ministry Spokesperson Liu Jianchao's Remarks on Kosovo's Unilateral Declaration of Independence', Ministry of Foreign Affairs of the People's Republic of China, 18 February 2008.

¹³ See, for example, 'Romania will not recognize Kosovo independence', *Reuters*, 19 February 2008; "'Cyprus doesn't recognize Kosovo independence'", *B92*, 26 March 2008. A few other EU members, such as Malta and Portugal, did not recognise Kosovo in the immediate weeks that followed the declaration of independence, but had done so by the end of 2008.

¹⁴ For more on the view of various states see James Ker-Lindsay, 'Sovereignty and the Subversion of UN Authority', in Aidan Hehir (editor), *Kosovo, Intervention and Statebuilding: The International Community and the Transition to Independence* (Abingdon: Routledge, 2010).

relatively strong, but far from insurmountable. While not wishing to antagonise any side, many countries harboured deep concerns about the implications of legitimising a unilateral act of secession. They might relent, but would have to be persuaded. In contrast, a number of other states appeared to be rather more willing to recognise, but did not want to be seen to rush into a decision for whatever reason. Without a good reason to resist, it seemed likely that many of these ‘undeclared’ states would eventually relent under the growing pressure being brought to bear on them by the United States, Britain and France – the three countries leading international efforts to secure recognitions.¹⁵ At the heart of their tactics to win over wavering states lay the argument that Kosovo was a unique case (‘sui generis’) in international politics. This was significant as it seemingly offered reassurance that the decision to recognise Kosovo would not have any spill over effects elsewhere.¹⁶ This in turn made the situation all the more difficult for Serbia as it provided a seemingly plausible cover for states if they did wish to join the ranks of the recognisers; even though many countries appeared to understand that the assertion that Kosovo was sui generis was essentially a political, and not a legal, claim.¹⁷

Given this combination of strong diplomatic pressure and the ‘unique case’ argument, Serbia had little choice but to formulate a strategy that would challenge this argument head on before the ICJ. The difficulty facing the Serbian Government was that this was fraught with danger. While a decision by the Court in its favour could have a major positive effect, and might even result in some countries reversing their initial decision to recognise Kosovo,¹⁸ there was always the possibility that the ICJ could come down in favour of Kosovo. This would almost certainly open the flood gates to further recognitions. Ultimately, though, Belgrade had little choice but to pursue the ICJ option. By failing to act at all, it would not only allow the pressure on countries to recognise Kosovo to go unchecked, it could also send out the message that Serbia had either decided that it did not have a strong case, or that it was effectively signalling that it had given up on Kosovo. Balanced against this risk, however, Belgrade also realised that, regardless of the eventual outcome of the case, a referral to the Court would almost certainly deprive Kosovo of a lot of the recognition momentum it had established in the initial weeks after the declaration of independence. For as long as the question of Kosovo’s independence was before the Court, it would be perfectly reasonable for Serbia to ask states to defer their decision on recognition, despite the pressure that they were facing – a tactic that would in fact prove to be broadly successful.¹⁹ Regardless of the eventual outcome, the decision to refer the matter to the International Court of Justice therefore came to be seen as a cornerstone of Belgrade’s wider diplomatic strategy to prevent recognition.

Simultaneously, the decision to pursue a case before the ICJ also played an important role in domestic Serbian politics. The declaration of independence had led to major demonstrations

¹⁵ Both the United Kingdom and the United States launched a major diplomatic initiative following the declaration of independence to persuade countries to recognise Kosovo. For example, the Foreign and Commonwealth Office even had an official dedicated to co-ordinating recognition efforts. FCO official, comments to the author, 2011.

¹⁶ The ‘unique case argument’ became the centrepiece of efforts to encourage states to recognise Kosovo. See, inter alia, ‘Kosovo case unique, says Miliband’, *BBC News*, 19 February 2008; ‘The Case for Kosovo’, US State Department (Last accessed 11 January 2010). For an analysis of this argument, see James Ker-Lindsay, ‘Preventing the Emergence of Self-Determination as a Norm of Secession: An Assessment of the Kosovo ‘Unique Case’ Argument’, *Europe-Asia Studies*, Volume 65, Number 5, 2013.

¹⁷ Even a number of officials from recognising states have admitted that there is very little justification to the ‘unique case’ argument. It was essentially put together when it became clear that there was no alternative to granting Kosovo independence, but that such a move could have wider spill over effects.

¹⁸ For example, Costa Rica, just prior to the UN General Assembly vote reportedly told Serbia that it would rescind its recognition if the Court decided the declaration of independence was contrary to international law. ‘Kosovo Recognitions ‘Will be Retracted’’, *Balkan Insight*, 2 October 2008.

¹⁹ “‘ICJ case delays recognition process’”, *B92*, 23 April 2010.

in Serbia and there was still considerable public unhappiness at the way in which Serbia had been treated by the United States and the main EU members. By referring the matter to the Court, the government would buy valuable time at home to allow popular feeling to subside while still being able to claim that it had taken a decisive step to protect the country's national interests. To this extent, the element of delay would prove to be a crucial factor underlying the decision from both a domestic and foreign policy angle.

3. The decision to question recognition or secession

Having decided on the importance of pursuing a case before the ICJ, Serbia now had to decide on the specific approach it wished to take. It faced several choices. One option was, however, always off the table. There was never any possibility of bringing a case against Kosovo directly. In part, this was because Kosovo was not a state party to the Statute of the Court. However, it was also understood that, 'such action would represent a tacit acknowledgment of Kosovo's statehood.'²⁰ This left two other main options. On the one hand, Belgrade could challenge the legality of the decision by one or more states to recognise Kosovo in contentious proceedings. On the other, they could seek an advisory opinion on the legality of the declaration of independence itself.

Assuming the Court eventually came down in Serbia's favour, the first option was widely viewed as being much the better route. As far as Belgrade was concerned, the decision of states to recognise Kosovo amounted to a clear breach of international obligations to respect the territorial integrity of the Republic of Serbia. Moreover, it was the best choice in terms of achieving the specific goal of forcing states that had recognised to reverse their decision and preventing further recognitions. But it also presented several major drawbacks. In the first instance, it was hardly practical to go against every state that had recognised Kosovo.²¹ Of course, Serbia could instead pursue a case against a small number of states. Here again, the options were limited. While the most obvious targets were the United States or the key EU members, a decision to focus on them would almost certainly have grave implications. While Belgrade may have been extremely unhappy at the way in which Washington had supported Kosovo's secession, Serbian officials were nevertheless keen to ensure that the diplomatic fallout with Washington and the EU was minimised. The United States was seen as a crucial strategic and economic partner for Serbia. Any attempt to bring a case against the US would have seriously harmed bilateral relations. As for the EU members, there was a real possibility that the state in question would retaliate by blocking Serbia's EU integration process. This would run counter to the explicitly stated policy of the Serbian Government to pursue the twin goals of 'Kosovo and EU membership'. Certainly within the Democratic Party (DS) elements of the government, there was never any question of relinquishing EU accession for Kosovo (but, then again, neither vice versa).²²

Another option would have been to bring a case against a small non-EU country in the hope that if Serbia won it would then force the other countries to change their positions. But this too was impractical. For a start, such an approach would still have posed a challenge to the decisions taken by the US and the EU recognisers, inasmuch as a successful outcome for Serbia would have had an impact on their recognition decisions. It would also have damaged Serbia's credibility more widely. There was a real chance that Belgrade would be seen as

²⁰ Vidan Hadzi-Vidanovic, 'Conflict Settlement by the International Court of Justice', paper was presented at the international symposium "Problems and Procedures of National and International Conflict Settlement: South Eastern Europe as Conflict Area and Other Examples", Inter-University Centre Berlin/Split, Free University of Berlin, 9-10 July 2010. Available at SSRN: <http://ssrn.com/abstract=1988922> or <http://dx.doi.org/10.2139/ssrn.1988922>

²¹ 'Serbia to go to ICJ over Kosovo', *B92*, 26 March 2008.

²² 'Tadić: Serbia wants both Kosovo and EU', *B92*, 10 January 2008.

being too cowardly to face the big powers and so had decided to bully a smaller state. This would be especially damaging for Serbia given that much of its counter recognition activity was now aimed at trying to win support from various African, Asian and Latin American states. It could not afford to alienate this group.

Therefore, while the option of challenging the decision of one or more countries to recognise Kosovo was favoured by many in Serbia, most notably the caretaker prime minister, Vojislav Koštunica,²³ it was deemed to be too politically costly by both the president and the foreign minister; who were ultimately the key decision makers on this issue.²⁴ As a result, Serbia decided against any direct challenge to the decision of states to recognise Kosovo. This in turn meant that Serbia now had only one other route. If Belgrade was not going to pursue a contentious case against a state directly, it had no alternative but to seek an advisory opinion on some aspect of the legality of Kosovo's secession.

4. International opposition to the case

On 26 March 2008, the Serbian Government announced that it would pursue an advisory opinion on the legality of Kosovo's declaration of independence.²⁵ As the ICJ could only issue an advisory opinion if asked to do so by the Security Council or the General Assembly,²⁶ or by an organ authorised to do so by the General Assembly,²⁷ attention now turned to securing a General Assembly resolution referring the matter to the Court.²⁸

Despite the fact that Belgrade had chosen to pursue a less confrontational route, the announcement by the Serbian Government that it intended to secure a General Assembly resolution bringing matter before the International Court of Justice nevertheless brought about a strongly negative reaction from a number of countries. The United States immediately made it clear that it felt that the move was not only unhelpful, but would have little practical effect. Washington insisted that even if the case were to be brought to the Court, and the judges issued an opinion against Kosovo, it would have no effect on its decision to recognize Kosovo. As far as the US government was concerned, and in line with its long held policy, recognition remained a sovereign political decision. Within the European Union, the position was a little less certain. For a start, there was a much greater reluctance to dismiss any outcome of the Court. When pressed on the point, British officials, for example, refused to be drawn on whether they would be as willing as the United States to disregard an advisory opinion of the ICJ. To this extent, several of the key EU members that had recognised Kosovo, most notably Britain and France, decided that a more worthwhile approach to the matter would be to try to persuade Serbia to change its mind. To this extent, several senior officials made it clear that Belgrade's decision to proceed with the application for an advisory opinion could have a very harmful effect on its quest for EU accession. Indeed, it was even suggested that it could bring the process to a halt entirely.²⁹

The problem for the European Union was that its attempts to dissuade Serbia from pursuing the case had the potential to put it in a very difficult position on the international stage. For a start, and most obviously, by trying to stop Serbia from going to the ICJ it would rather

²³ 'Koštunica favors lawsuits over Kosovo', *Beta*, 27 October 2008.

²⁴ Serbian official, comments to the author, August 2013.

²⁵ 'Serbia to go to ICJ over Kosovo', *B92*, 26 March 2008.

²⁶ Chapter XIV, Article 96, paragraph 1, Charter of the United Nations.

²⁷ Chapter XIV, Article 96, paragraph 2, Charter of the United Nations.

²⁸ A Security Council resolution referring the matter to the Court would not have been a feasible option as it would have been vetoed by the United States, and possibly by France and Britain as well.

²⁹ 'A June Tide', *The Economist*, 19 June 2008; 'Kouchner calls on Serbia to drop ICJ plans', *B92*, 23 July 2008; "'ICJ move direct challenge to EU'", *B92*, 3 August 2008.

suggest that members actually harboured real doubts over the legality of their decision to recognise Kosovo. If they were so sure about the validity of their decision, as many states were publicly insisting, then surely they would have little to fear if it went before the ICJ. Of course, it was not as simple as this. A decision could turn against either side, no matter how watertight they felt their arguments were. Nevertheless, by being seen to be opposing an advisory opinion, there was a real danger that this would inevitably be read as a sign of the intrinsic weakness of their case, which might well have deterred some of those countries from sitting on the fence from recognising Kosovo. Secondly, when looked at from a wider perspective, at a time when EU members were attempting to emphasise the importance of international law in global politics, and were seeking to strengthen the institutions of international justice, it would have sent out the message that they are unwilling to subject their own actions to legal oversight. They would run the risk of being accused of double standards. This accusation of double standards would have been especially strong in the case of Serbia. Having taken an uncompromising stand on Belgrade's full cooperation with the International Criminal Tribunal for the Former Yugoslavia (ICTY) as a precondition for membership of the Union, it would not look good for EU members to demand that their own actions be exempt from legal scrutiny on the grounds of political expediency. Finally, it would have had possibly unwelcome implications for the EU's ability to handle peace and security in South East Europe. After insisting that the states of the Western Balkans must not resort to armed force in managing their disputes, and having explicitly warned Serbia not to do so in the case of Kosovo, it would have been illogical, if not fundamentally wrong, to try to close off the most peaceful and legitimate methods of conflict resolution.

Therefore, while the United States remained adamantly opposed to any effort to bring the matter before the ICJ, for the reasons stated above, the European Union soon realised that it would be counter-productive to issue any further threats against Serbia or otherwise try to pressure Belgrade to desist from seeking an advisory opinion.

5. The UN General Assembly Resolution

Once Serbia had opted to pursue the advisory opinion route, it needed to decide the exact question to be put to the Court. Once again, there were several options available. These essentially broke down into two categories. Belgrade could either question the legality of the declaration of independence or it could ask whether the declaration of Kosovo had brought into effect a new state. The latter question was perhaps the more risky inasmuch as it would force the Court to take a very clear stand on the actual status of Kosovo as a political entity. If the Court found in Kosovo's favour, then the way would be open for widespread recognition to follow. The former question, on the legality of the declaration of independence, therefore seemed less risky. But even then, there were further decisions to be made about the exact question to be asked. On the one hand, a very specific question could be formulated that closely matched the one put to the Canadian Supreme Court over Quebec.³⁰ Again, this would offer a much greater chance of a clear outcome. The problem is that this outcome could go against Serbia, in which case Belgrade's room for manoeuvre would be severely curtailed. In contrast, a far more ambiguous question would offer plenty of room for the judges to offer a less precise answer, thereby making it less likely that Serbia would find itself trapped by a wholly unfavourable decision. In the end, the Serbian Government decided against a highly specific question. On 15 August 2008, the Serbian Government unveiled the text of the proposed resolution. The exact question to be addressed to the Court was as follows: 'Is the

³⁰ 'Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?', Supreme Court of Canada, 20 July 1998, Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?’

In the weeks that followed, a vigorous diplomatic campaign took place as the various parties tried to lobby countries to vote in their favour. In an attempt to build support for its position, Serbian officials held over 50 bilateral meetings with foreign officials.³¹ In doing so, it sought to emphasise the dangers of the Kosovo precedent and allowing it to go unchallenged. For example, following a meeting with the UN Secretary-General, Tadić stated, ‘to vote against means to accept that nothing could be done when secessionists in whichever part of the world proclaim the uniqueness of their cause, and claim exception to the universal scope of international law.’³² Meanwhile, the United States actively encouraged countries to vote against the draft resolution. However, the European Union decided not to follow the US position. Having so openly supported the ICJ, and international law, as a mechanism for resolving conflict, the EU could not be seen to be voting against an effort to bring a matter that they were closely involved with before the Court. Nor could EU members be seen to be trying to persuade others to vote against the resolution. For this reason, it was agreed that those EU members that did not plan to vote in favour of the resolution, notably the members that had not recognised Kosovo, should instead abstain.

In the weeks that followed, many other states also chose to take the same position as the European Union. As a result, by the day of the vote, 8 October 2008, it was widely understood that there was likely to be few votes cast against the resolution. Along with the EU members, most of the other recognising states, which by this point lay at 47 countries, approximately a quarter of the UN, had also opted either to abstain or not to participate at all. Meanwhile, Serbia had managed to muster up considerable support for its case. In addition to Russia and China and the EU states that had chosen not to recognise Kosovo, it also managed to gather support from a number of other countries, including at least one recognising state – Norway.³³ Nevertheless, the vote was preceded by a strong debate. For example, the US deputy permanent representative to the UN insisted that Kosovo’s independence was in accordance with international law and that the resolution was ‘unnecessary and unhelpful’.³⁴ Meanwhile, the British Permanent Representative to the UN, Sir John Sawers, accused Serbia of pursuing the case, ‘primarily for political rather than legal reasons.’³⁵

In the end, 77 countries voted in favour of the resolution.³⁶ As well as Russia, China and the remaining 5 non-recognising EU members,³⁷ the resolution was supported by Brazil, India, Indonesia, Nigeria and South Africa. In contrast, just six countries voted against the resolution: the United States, Albania and four Pacific island states. 74 states, including all the members of the European Union that had by this point recognised Kosovo, abstained. The

³¹ ‘Serbia receives UN backing on Kosovo in trial vote’, *Euractiv*, 28 September 2008.

³² ‘Kosovo issue could undermine international system, Serbian leader tells UN’, *UN News Centre*, 23 September 2008.

³³ As Hakon Blankenborg, the Norwegian Ambassador in Belgrade, later explained, ‘Norway has voted for Kosovo’s independence, but realizing how complicated the issue is we voted in the UN General Assembly in favor of taking the case before the International Court of Justice in The Hague’ ‘Norway awaits court decision’, *B92*, 21 December 2008.

³⁴ ‘Backing Request by Serbia, General Assembly Decides to Seek International Court of Justice Ruling on Legality of Kosovo’s Independence’, Department of Public Information, News and Media Division, New York, 8 October 2008.

³⁵ ‘UN General Assembly backs Serbia’s initiative on Kosovo’, *Southeast European Times*, 9 October 2008.

³⁶ General Assembly Resolution NRES/63/3 (A/63/L.2), 8 October 2008.

³⁷ The most recent EU members to recognise Kosovo had been Malta, in August, and Portugal, which recognised Kosovo the day before the UN General Assembly vote.

remaining 34 members – including Turkey and Bosnia-Herzegovina – decided not to participate in the vote at all.³⁸

In Serbia, there was jubilation at the decision. The result was hailed by Serbian Prime Minister Mirko Cvetković as ‘a big success’.³⁹ The next day, the Secretary General, Ban Ki-Moon, officially conveyed the request of the General Assembly to the International Court of Justice confirming that under Article 65, Paragraph 2, of the Statute of the Court the UN Secretariat was preparing a dossier for the Court containing all relevant documents and that this would be transmitted ‘as soon as possible.’⁴⁰

Conclusion

In examining Serbia’s decision to refer the matter to the ICJ, it is evident that this had always been viewed as a potential element of a wider counter-secession strategy. This was openly stated even before Kosovo declared independence. Nevertheless, relatively quickly it also became an act of necessity. Quite apart from the fact that Belgrade had to show that it was doing everything in its power to maintain a claim to Kosovo, it was obvious that it did not have the political and diplomatic strength to counter a concerted campaign by a number of major international states, most notably the United States and key members of the European Union, to press for Kosovo’s recognition on the international stage. Faced with a strong campaign to persuade countries that Kosovo was a unique case in international politics, Serbia had little choice but use international law to challenge this argument. Meanwhile, the decision to pursue a case before the ICJ was also crucial as a delaying tactic. It was important that Serbia slow down the pace of recognitions after the initial flurry that occurred in the immediate weeks following the declaration of independence. By taking the matter before the Court, regardless of the eventual outcome, Serbia gave countries a legitimate reason to resist external pressure to recognise Kosovo. Simultaneously, at the domestic level, the decision to take the matter before the ICJ was not only tangible proof that the government was fighting the Kosovo cause as best it could, it also provided a very welcome way of letting the significant tensions that had emerged from within society over Kosovo’s declaration of independence, and Western support for the move, subside. Bearing this in mind, and regardless of the eventual outcome of the case, the strategy of pursuing a case before the ICJ should be broadly regarded as having been successful in at least two senses. The pace of recognitions did slow, as acknowledged by Kosovo itself, and public anger did diminish.

Having opted to pursue the ICJ route, Belgrade proved to be exceedingly cautious in how it pursued the matter from there. It avoided steps that could be seen to be overtly confrontational towards either the United States or the key sponsors of Kosovo’s independence within the European Union. In line with Belgrade’s openly stated policy of ‘both Kosovo and the European Union’, the Serbian Government ensured that in taking a course of action that was unpopular amongst the main EU members, it did not unduly antagonise them. This explains why it avoided the route that many thought offered the greatest potential for victory: questioning the decision of states to recognise Kosovo. Instead chose to call into question the legality of Kosovo’s declaration of independence in advisory

³⁸ While Turkey strongly supported Kosovo’s independence, and had been one of the first countries to recognise it, by this point Ankara was working closely with Serbia on addressing political problems in Bosnia. As a result, Turkey had agreed not to lobby for Kosovo’s independence any further. As for Bosnia, the decision not to vote at all was driven by deep differences between the tripartite presidency over the issue.

³⁹ ‘UN General Assembly backs Serbia’s initiative on Kosovo’, *Southeast European Times*, 9 October 2008.

⁴⁰ Request for an Advisory Opinion transmitted to the Court pursuant to General Assembly resolution NRES/63/3 (A/63/L.2) of 8 October 2008

proceedings. While this is understandable, what is less easy to explain is the reasoning behind the decision to ask a question that focused on the legality of the declaration of independence, rather than focus on another legal aspect of the situation, such as Kosovo's claim to statehood. In part, it could perhaps be explained as part of a policy of potential loss minimisation. If a very precise question had been asked that gave the Court little room more manoeuvre, it is possible that it would have come down against Belgrade. Serbia would have faced an all or nothing outcome. But even if it won, it would be a Pyrrhic victory. It would still be left in a situation whereby its close allies in the EU would have been painted into a corner. Told that Kosovo's secession was illegal, they would have faced the uncomfortable and potential destabilising prospect of having to reopen status talks. In such a situation, EU members may have taken an even more uncompromising position regarding Serbia; effectively demanding that either Belgrade accept Kosovo's independence or accept the end of its EU accession prospects. To this end, and somewhat paradoxically, a victory before the ICJ would almost certainly have forced Serbia into a situation where it would have to accept Kosovo's independence. In contrast, a question that allowed for a more ambiguous result could, and indeed eventually did, provide for a result that would allow everyone to claim victory, or at least avoid being seen as having lost.⁴¹

This leads to a final question: why did Serbia not cave in to the pressure from lead members of the European Union to drop the case altogether? In part, this is perhaps tied to the relative speed with which the calls for it to do so subsided. One can only guess whether Belgrade would have eventually relented had the European Union members maintained their threats to block Serbia's EU course if it pursued the case. As a counterfactual it is an interesting question, and one that is hard to answer. On the one hand, the way in which Serbia eventually relented on a further resolution calling for more status talks at the end of the ICJ opinion, in 2010, would suggest that it may have done so. However, given that this took place at a very early stage, when Serbia was fighting particularly hard to prevent recognition, and public emotions were still riding high, suggests that it might not have been willing, or politically able, to reverse course; even if key members demanded it. In the event, Serbia was saved from having to make this decision by the fact that the European Union had no choice but to relent and allow the vote for fear of undermining its credibility as a key voice on the international stage for the international rule of law and respect for international institutions. Having set in motion a process that the leading members of the European Union evidently opposed, Serbia was eventually saved by the fact that the decision to pursue a case before the ICJ was in fact in accordance with certain key principles that the EU has sought to encourage others to follow. Even though this may have been more by accident than design, Belgrade put the EU in the uncomfortable position of being open to claims of double standards. In doing so, it was able to win a major victory by securing a General Assembly resolution referring Kosovo's declaration of independence to the International Court of Justice.

⁴¹ The outcome of the case will be explored later in this volume. However, for other works that examine elements, particularly the political aspects, of the case, see James Ker-Lindsay, 'Not such a 'sui generis' case after all: assessing the ICJ opinion on Kosovo', *Nationalities Papers*, Volume 39, Number 1, 2011; Etain Tannam, 'The EU's Response to the ICJ's Judgement on Kosovo', *Europe-Asia Studies*, Volume 65, Number 5, 2013.