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The Practicalities of Representing a Client in Complex Multiparty Proceedings

The Example of Kosovo

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The present chapter deals in turn with certain practical aspects of the *Kosovo* advisory proceedings: (1) the lead-up to the request for an advisory opinion, especially at the United Nations; (2) certain practical considerations that may arise when advising a government in relation to such a case, particularly one with no experience of international litigation; (3) the key matter of securing Kosovo's participation in the proceedings on an equal footing with Serbia; and (4) special features of a multiparty international litigation, including the exchanges among the supporters of Kosovo's independence.

1. The Lead-Up to the Request

Before turning to the handling of the case and the process of coordination that took place among those participants supporting Kosovo, it is worth recalling how the request for an advisory opinion came about.[1] The positions of some states on the legal as well as the policy aspects of the request for an advisory opinion became apparent during the debate in the UN General Assembly in October 2008.

On 17 February 2008 the 'democratically-elected leaders' of the people of Kosovo declared independence.[2] This was the final step in the culmination of a series of events dating as far back, at least for some, as the Battle of Kosovo in 1389.[3] However, rather than just being the final act completing a process towards independence, the declaration of independence itself was the spark which gave rise to a new series of

[1] See also Ker-Lindsay in this volume.

[2] The operative part of the Declaration begins, 'We, the democratically-elected leaders of our people…'.

[3] The mythical significance of this battle can hardly be overstated. It is exemplified in the epic nineteenth century verses transcribed by Vuk Karadžić, concerning the Emperor Lazar who 'chose the

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events, including a request by the General Assembly of the United Nations to the International Court of Justice (ICJ), the principal judicial organ of the United Nations.

In order fully to understand the declaration of independence, it is essential to recognize its place in the wider historical context, in particular the recent history of the region, flowing from the disintegration of Yugoslavia and the conflicts in the former Yugoslavia of the early 1990s. Whilst, as a province of Serbia, Kosovo itself was not, as such, a direct participant in the Balkans War, it was this context that provided the backdrop to the Rambouillet negotiations and the NATO military intervention of 1999, and Security Council resolution (SCR) 1244 (1999) of 10 June 1999.

Much has been written about these matters, in particular in relation to the NATO intervention and SCR 1244. Here is not the place to attempt to describe or analyse those developments. Suffice it to note three key aspects of SCR 1244 which are crucial to understanding the declaration of independence itself and seeing it in its appropriate context, rather than in a political or legal vacuum: the establishment of the Provisional Institutions of Self-Government of Kosovo (PISG); international supervision by UNMIK; and the resolution's silence on future status.

The declaration of independence was adopted on 17 February 2008. Who exactly adopted it, while seemingly a simple and neutral question of fact, took on its own story of controversy and became a significant legal question, which is discussed in other chapters in this book. Suffice to say at this stage that the declaration was adopted at a meeting of the Assembly of Kosovo—a provisional institution established by the regime created under the auspices of the United Nations and SCR 1244.

On 18 February 2008, the day after Kosovo's declaration of independence, the National Assembly of the Republic of Serbia declared the declaration invalid in light of the decision of the Constitutional Court of Serbia finding that the declaration was unlawful, being contrary to the UN Charter, the Constitution of Serbia, the Helsinki Final Act, SCR 1244, and the Badinter Commission's opinions.[4]

Eight UN member states recognized Kosovo as a new state immediately, on 18 February 2008, with a further 13 states recognizing Kosovo by the end of February 2008, and another 14 states recognizing it during March 2008.

Whilst a number of states expressly recognized Kosovo following the declaration of independence, some expressly rejected the declaration. China, Russia, and India, for example, issued a joint statement on 15 May 2008 stating that 'the unilateral declaration of independence by Kosovo contradicts resolution 1244. Russia, India and China encourage Belgrade and Pristina to resume talks within the framework

empire of the heaven above the empire of the earth'. For an Albanian poetic view, see A. Di Lellio, *The Battle of Kosovo 1389. An Albanian Epic* (L.B.Tauris, 2009).

[4] Decision of the National Assembly of the Republic of Serbia on the endorsement of the Decision of the Government of the Republic of Serbia on the annulment of the illegal act of the provisional institutions of self-government in Kosovo and Metohija regarding the unilateral declaration of independence, *Official Gazette of the Republic of Serbia*, No. 19/2008 (Annex 4 to Serbia's Written Statement).

of international law and hope they reach an agreement on all problems of that Serbian territory'.

It was evident that the declaration was polarizing the international community, with many of the views taken by states being couched in legal terminology and arguments. The first mention of the declaration being considered and potentially resolved by the International Court of Justice was an announcement made by Serbia on 26 March 2008, in which it called upon the ICJ to rule on the issue.[5]

Given the absence of a clear steer from the UN Security Council, the UN Secretary-General took what came to be referred to as a 'status-neutral' position in the immediate aftermath of the declaration. This was all the more significant given the central place of SCR 1244 and the role of UNMIK in the administration of Kosovo. On 15 July 2008, the Secretary-General stated: 'In the light of the fact that the Security Council is unable to provide guidance, I have instructed my Special Representative to move forward with the reconfiguration of UNMIK … in order to adapt UNMIK to a changed reality' and that the 'United Nations has maintained a position of strict neutrality on the question of Kosovo's status'.[6]

The first formal step towards bringing the Kosovo issue to the ICJ was Serbia's letter of 15 August 2008 to the Secretary-General,[7] requesting the inclusion of a supplementary item in the agenda of the sixty-third session of the General Assembly entitled 'Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law'. The letter was accompanied by an explanatory memorandum indicating the Serbian intentions behind the inclusion of this item in the General Assembly's agenda:

> We hold that the most principled, sensible way to overcome the potentially destabilizing consequences of Kosovo's unilateral declaration of independence is to transfer the issue from the political to the juridical arena. Aside from reducing the diplomatic tensions that have arisen since the unilateral declaration of independence, such an approach would contribute to strengthening the rule of law in international relations. With this in mind, Serbia considers that the United Nations General Assembly, in view of the powers and functions conferred on it by the Charter of the United Nations, in particular by Articles 10, 13 and 96, has a crucial role to play in this regard.
>
> The Republic of Serbia believes that an advisory opinion of the principal judicial organ of the United Nations—the International Court of Justice—would be particularly appropriate in the specific case of determining whether Kosovo's unilateral declaration of independence is in accordance with international law.
>
> The international community considers the Court's impartial advisory opinions to be the most authoritative interpretations of the principles of the international legal order. Member States share a deep commitment to the safeguarding of these principles, yet some

[5] Joint Communiqué on the outcome of the Meeting of the foreign ministers of the Russian Federation, the People's Republic of China and the Republic of India (15 May 2008) (Annex 74 to Serbia's Written Statement).

[6] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 15 July 2008 (S/2008/458).

[7] A/63/195.

are uncertain as to which arguments involving these principles they can rely on in this particular case.

Many Member States would benefit from the legal guidance an advisory opinion of the International Court of Justice would confer. It would enable them to make a more thorough judgement on the issue.

Finally, an advisory opinion of the International Court of Justice, rendered in a non-contestable, non-adversarial manner, would go a long way towards calming tensions created by Kosovo's unilateral declaration of independence, avoiding further negative developments in the region and beyond and facilitating efforts at reconciliation among all parties involved. By having recourse to the International Court of Justice, the General Assembly would ensure that the Kosovo issue becomes a symbol of renewed resolve concerning adherence to the rule of law by the international community.

On 17 September 2018, the General Committee of the General Assembly recommended the inclusion of the supplementary item proposed by Serbia.[8] On 19 September 2008, the recommendation was accepted by the General Assembly, with only the United States speaking on the item.[9]

On 23 September 2008, Serbia circulated a draft resolution containing the question to be asked of the ICJ:

'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?'[10]

On 1 October 2008, the United Kingdom wrote to the President of the General Assembly, with a 'note of issues',[11] setting out the importance of the context in which the declaration of independence was made, including the events between 1999 and 2008. In addition, the letter made the first reference to the potential future participation of Kosovo in any contemplated ICJ proceedings stating:

Should the General Assembly decide to request an advisory opinion, we would expect that, as a matter of basic fairness, Kosovo will be permitted to participate in the proceedings and present arguments to the Court. In our view it would be entirely appropriate and would assist the Court if the General Assembly made this clear in the text of the resolution.

In its 'note of issues', the United Kingdom raised the discrepancy between the terms of the agenda item proposed by Serbia and the question in the draft resolution, in particular, the reference to the Provisional Institutions of Self-Government in the latter. The UK's note stated:

The United Kingdom would also welcome consideration of the formulation of the question in the draft resolution. The agenda item proposed by Serbia requests an advisory opinion on the question of whether 'the unilateral declaration of independence of Kosovo is in accordance with international law'. In contrast, the question formulated in the draft resolution is cast in terms of whether 'the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo [is] in accordance with international law'. It would be useful to know whether Serbia is seeking to focus on a narrower question

[8] Report of the General Committee, para. 61 (A/63/250). [9] A/63/PV.2, p. 4
[10] A/63/L.2. [11] A/63/461.

about the competence of the Provisional Institutions of Self-Government of Kosovo, and, if so, precisely how that question relates to Kosovo's status at the present time.

This early focus on the mention of the PISG is interesting, given that this was to become central to the ICJ's ultimate reasoning in its Opinion.

The United Kingdom also set out its view that the question was only concerned with the issue of the declaration itself and not any consequences of the declaration, whether recognition or status:

'An advisory opinion addressing the emergence to independence of Kosovo could not therefore by itself be determinative of Kosovo's present or future status or the effect or recognition of that independence by other States.'

The General Assembly considered Serbia's draft resolution on 8 October 2008 in a two-hour plenary session,[12] which began with the presentation of the draft resolution by the Serbian Foreign Minister. Jeremić explained that Serbia had chosen to seek an advisory opinion as a 'non-confrontational approach', and in order to 'prevent the Kosovo crisis from serving as a deeply problematic precedent in any part of the globe where secessionist ambitions are harboured'. He stated that the ICJ would be able to provide 'politically neutral, yet judicially authoritative, guidance to many countries still deliberating how to approach unilateral declarations of independence in line with international law'. He noted that the question posed in the draft resolution was 'amply clear' and refrained from taking political positions on the Kosovo issue, that the resolution was 'entirely non-controversial' and 'represents the lowest common denominator of the positions of the Member States on the question, and hence there is no need for any changes or additions'.[13]

Speaking next, the United Kingdom raised its concerns about the Serbian request, in particular that the request was being made 'primarily for political rather than legal reasons … designed to slow down Kosovo's emergence' as a state. Sir John Sawers highlighted that '[m]any members of the United Nations emerged into independence during what, at the time, were controversial circumstances' which 'normalize over time and the clock of history is rarely turned back'. In addition, the UK noted its regret at the 'minimal debate about the issues'. The United Kingdom reasserted its view that Kosovo 'should be able to present arguments [to the ICJ] on an equal footing'.[14]

Albania, Turkey, USA, and Mexico also spoke in the debate.[15] In addition, a considerable number of states explained their position before or after the vote.[16]

A number of distinct themes may be seen in the interventions in the plenary debate, foreshadowing arguments later put to the Court. First, there was plainly a difference of views between states on whether the declaration of independence was unique in its nature, given the historical, political, and legal context or alternatively whether there was a risk of it setting a precedent. The so-called *sui generis* position, that is, that Kosovo was special, indeed unique, and therefore not a precedent, was

[12] UN Doc., A/63/PV.22, 8 October 2008. [13] Ibid., pp. 1–2.
[14] Ibid., pp. 2–3 and 11. [15] Ibid., pp. 3–6. [16] Ibid., pp. 6–15.

on the whole taken by states that were favourably inclined towards Kosovo's independence, whereas those opposed to *Kosovo's* independence, including those who had what they saw as similar territorial disputes or secessionist movements in their own countries, tended to regard it as potentially precedent-setting.

Second, a number of states were opposed or at least unfavourably inclined towards the request for an advisory opinion as they saw the issue as a political not a legal one, and therefore inappropriate for resolution in the ICJ. Conversely, a range of states saw the issue as a distinctively legal one, which could be helpfully considered by the ICJ. A strange point made by a number of states was the alleged 'right' of any state to have the question addressed by the ICJ.

A third theme was the view taken by a number of states that their voting position on the resolution did not relate necessarily to their attitude to the recognition of Kosovo's independence. Indeed, a number of states who voted for the resolution had already recognized Kosovo.

Finally, a significant number of states were clear in their view that Kosovo should be entitled to take part in the ICJ proceedings.

When the draft resolution was put to a vote in the General Assembly, 77 states voted in favour of the resolution, 6 states voted against, and 74 states abstained. The supporters of Kosovo independence were spread among those voting 'no' and those abstaining, with some even voting in favour. The question referred to the ICJ pursuant to General Assembly resolution 63/3 was in exactly the terms proposed by Serbia in its draft resolution. There had been no negotiation over the text.

2. Practical Arrangements for Handling the Case

Five practical matters concerning the arrangements for handling any inter-state case may be illustrated by the Kosovo case.[17] First, very early decisions about handling are often important. There is no need to rush to form a full legal team, but legal advice, given right from the outset, can be crucial. That was certainly so with the *Kosovo* advisory proceedings, where a decision had to be taken on participation within a couple of days of the General Assembly's request. That is not easy for a small and newly independent state, with a recent history of conflict, a coalition government, and no experience of international litigation.

Second, care is needed in the selection of a legal team. As soon as the request was made, the Government of Kosovo moved to put its legal team in place. Kosovo could not afford to pay a great deal, so the team was lean: three foreign lawyers and an assistant. In addition one, later two, excellent international lawyers working for the Kosovo Government were closely involved. Many others offered their services, usually *pro bono.* This was quite moving, at least in the case of the many young Kosovo lawyers who were very anxious to be involved. But it was essential to keep

[17] See also M. Wood, 'The Role of Public International Lawyers in Government', in D. Feldman (ed), *Law in Politics, Politics in Law* (Hart, 2013), 109 at 112–13.

the team small and coherent, and all such offers of assistance were declined. The relatively small number of lawyers involved was a good thing. And at no time did the team feel the need for additional assistance. It might have been otherwise had the case involved a heavy factual element.[18]

Third, a key decision—perhaps the key decision—was to write to the Court requesting to participate, and to do so very quickly, before the Court took the decisions reflected in its first procedural Order. Kosovo's Foreign Minister transmitted such a letter to the Court on 15 October 2008, just seven days after the General Assembly had voted to request the opinion (see Section 3 below). The Court's procedural Order inviting Kosovo ('the authors of the unilateral declaration of independence') to take part was made just two days later, on 17 October 2008.[19]

Fourth, it is very important to have clear lines of instruction from a client. Kosovo had a coalition government. The President of the Republic, President Sedjiu, was from Rugova's party, while Prime Minister Thaçi was from the party that had emerged from the Kosovo Liberation Army (*UÇK*). There was talk, briefly, of setting up some sort of a commission to oversee the handling of the case. But it was made clear that the legal team had to be able to take instructions from one person, who most naturally would be the designated representative of Kosovo before the Court (Foreign Minister Hyseni). That was swiftly agreed. A key coordinating role within the Kosovo administration was played by a senior adviser to the President of the Republic, Ms Vjosa Osmani, herself an international lawyer. In the event, everyone worked well together on the case, and there was no difficulty in securing clear instructions.

There was a quite exceptional degree of interest and commitment on the part of the highest state officials (perhaps not that surprising given the existential nature of the proceedings for the new state). At all key moments, the approach (in general and in detail) was considered and agreed by all key political figures, including in addition to the Foreign Minister, the President of the Republic, the Prime Minister, the Deputy Prime Minister and the President of the Assembly. This involved reading aloud, through an interpreter, large parts of the written pleadings to the assembled senior officials.

And fifth, relations with the media are important, not so much for the court proceedings themselves, but for the client. They need to be carefully handled. This is particularly so given the confidentiality of the written pleadings until otherwise decided by the Court at the opening of the oral hearing. In addition, it is important not to appear to be seeking to influence the Court indirectly through the media, and to avoid 'trial by media'. Contacts with the media are usually best not handled directly by the lawyers, and the Kosovo authorities came to accept their

[18] There is a tendency in international litigation for governments, perhaps out of a misguided abundance of caution, to take on teams that are too large. If the matter is not done entirely in house, it is often better to start with a couple of outside lawyers and only add names if it becomes apparent that it is necessary to do so.

[19] *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Order of 17 October 2008,* ICJ Reports *2008*, p. 409.

lawyers' reticence in that regard. As it turned out, the Kosovo media were highly responsible, readily accepting that not much could be said publicly over the period of almost two years between the General Assembly's request of 8 October 2008 and the International Court's Opinion of 22 July 2010.

3. Kosovo's Participation in the Proceedings

Returning to the key question of Kosovo's participation in the proceedings, the Kosovo Foreign Minister's letter of 15 October 2008 stated that '[t]he question submitted to the Court is one in which Kosovo self-evidently has a profound and direct interest'. It recalled that 'the importance of Kosovo being able to present its views to the Court . . . was stressed by a considerable number of representatives who spoke in the General Assembly debate on 8 October 2008'. A key passage then read:

> It is respectfully submitted that, if the Court is to consider the request submitted by the General Assembly, and at the same time remain true to its judicial character, it is important that Kosovo be invited to participate on an equal footing with others, including Serbia, in the interests of the proper administration of justice. As the Court said in *Eastern Carelia*, '[t]he Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court' (*P.C.I.J. Ser. B*, *No. 5*, p. 29).

The letter went on to refer to the Court's 'considerable discretion in the organization of advisory proceedings', and mentioned in this connection the *Wall* Advisory Opinion, as well as to the fundamental principles of equality of the parties and *audi alteram partem*, including in advisory opinion proceedings.[20] Finally, the letter stressed that Kosovo would 'be able to furnish the Court with relevant information essential to any consideration of the request'. The letter concluded by requesting

> the Court to invite the Republic of Kosovo, as a party that is directly interested and able to furnish relevant information, to participate in the proceedings, on a footing of equality with others, including the Republic of Serbia, both in the written stage and at any oral hearing.[21]

In its Order of 17 October 2008,[22] made without dissent, the Court effectively acceded to this request, in carefully worded language:

> 4. *Decides* further that, taking account of the fact that the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo of 17 February

[20] For a later strong reaffirmation of these principles in an advisory opinion, albeit in a very different context, see *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development,* Advisory Opinion, *ICJ Reports 2012*, p. 10, at pp. 24–31, paras. 33–48; and Judge Greenwood's Declaration, at pp. 94–7.

[21] The full text of the letter is reproduced in Ministry of Foreign Affairs of the Republic of Kosovo (2010), *Kosovo in the International Court of Justice/Kosova në Gjykatën Ndërkombëtare të Drejtësisë*, pp. 17–20. This volume includes other correspondence between the Representative of the Republic of Kosovo before the International Court of Justice, H.E. Mr. Skender Hyseni, and the Registrar of the Court.

[22] *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Order of 17 October 2008, I.C.J. Reports 2008*, p. 409.

> 2008 is the subject of the question submitted to the Court for an advisory opinion, the authors of the above declaration are considered likely to be able to furnish information on the question; and decides therefore to invite them to make written contributions to the Court within the above time-limits'.

It will be seen that Kosovo was referred to as 'the authors of the unilateral declaration of independence', not 'Republic of Kosovo', thus leaving open its precise status. The written pleadings of Kosovo were referred to as 'written contributions', not 'written statements' or 'written comments', and the oral pleading was also referred to as a 'contribution'.[23] These were differences of nomenclature, not substance. It is noteworthy that Serbia and 'the authors of the unilateral declaration of independence' spoke at the beginning of the oral hearing, and each did so for a full half-day (whereas other participants were allocated 45 minutes).

Thus the Court did indeed allow the representatives of Kosovo 'to participate in the proceedings, on a footing of equality with others, including the Republic of Serbia', as requested by Kosovo in its letter of 15 October 2008. The basis on which it did so was not made explicit: Paulus probably gets as close as one can when he suggests (in respect of both Kosovo and Palestine) that 'the participations were based on a limited extension of Art. 66, para. 2 justified by procedural fairness in the fulfilment of the Court's advisory function'.[24] The Court's emphasis in paragraph 4 of its Order on the furnishing of information is entirely in line with the main object of any participation in advisory proceedings.

4. Exchanges Among Like-Minded States

The idea of interest groups or groups of like-minded states is well-known in the context of multilateral negotiations, such as at the Third United Nations Conference on the Law of the Sea. The same may occur in connection with 'multiparty' inter-state litigation, but is less known.

By 'multiparty' litigation we mean proceedings before an international court or tribunal involving more than two states.[25] This is routinely the case with advisory proceedings. It is less common, though by no means unusual, in contentious cases, where there may be more than one applicant or respondent, and where cases may

[23] According to Andreas Paulus, '[t]he relevance of this terminology remains unclear, but distinguishes the authors from the official "statements" by states provided for by Art. 66, para. 2', in A. Zimmermann et al (eds), *The Statute of the International Court of Justice. A Commentary* (2nd ed, OUP, 2012), p. 1646 (Art. 66, MN 13).

[24] Ibid., p. 1648 (Art. 66, MN 15).

[25] The term 'multiparty' litigation, used for convenience, it is not entirely accurate. Properly speaking, there are no 'parties' in advisory proceedings, though often the dynamics may seem otherwise. For example, '[w]here an advisory opinion is requested upon a legal question actually pending between two or more States', judges ad hoc may be appointed (Rules of Court, Art. 102.3; *Western Sahara* Advisory Opinion; Zimmermann et al, *The Statute of the International Court of Justice. A Commentary*

be joined. Even without formal joinder, two or more cases may raise the same or similar issues, and may therefore be dealt with in parallel, for example at a joint hearing. And where a state intervenes or seeks to intervene (though an intervening state is usually not a party to the case) a number of states will be directly concerned in a single case.

States participating in multiparty litigation may well have at least some shared legal and policy interests. This may lead to varying degrees of cooperation, or at least an exchange of views, more or less detailed, at various stages of the proceedings. But there is a wider problem. States may well have a profound interest in the outcome of a case in which they are not in any way involved, an interest either in the particular dispute which is the subject of the proceedings, or more generally and perhaps more often—given the potential precedential significance of decisions of international courts and tribunals—an interest in some of the legal points at issue.[26] An example of the former is the arbitration between Mauritius and the United Kingdom concerning the British Indian Ocean Territory/Chagos Archipelago, in the outcome of which the USA no doubt has a keen interest.[27] Examples of the latter include many of the decisions of the European Court of Human Rights, which affect all parties to the European Convention.[28]

Current or recent examples of multiparty litigation include, in addition to the *Kosovo* case, the *Nuclear Weapons*[29] and *Wall*[30] advisory proceedings, the two requests for advisory proceedings that have been addressed to the International Tribunal for the Law of the Sea,[31] the two *Lockerbie* cases,[32] the three (potentially nine) *Nuclear Disarmament* cases brought by the Republic of the Marshall Islands,[33]

(2nd ed, OUP, 2012), Cot, 'Article 68', MN 23–30). That did not happen in the *Kosov*o case, though one may assume that Kosovo and possibly Serbia considered the matter.

[26] See D. Bethlehem, 'The Secret Life of International Law', (2012) 1 *Cambridge Journal of International and Comparative Law* 23, at 31–3.

[27] <http://www.pca-cpa.org/showpage.asp?pag_id=1429>.

[28] One response, limited to the field of public international law, to the precedential effect of ECtHR decisions is that the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI) has on its regular agenda an item entitled *Cases before the European Court of Human Rights involving issues of public international law.*

[29] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, ICJ Reports 1996, p. 226; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, p. 66.

[30] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136.

[31] *Responsibilities and obligations of States with respect to activities in the Area,* Advisory Opinion, 1 February 2011, *ITLOS Reports* 2011, p. 10; *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC).*

[32] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America).*

[33] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India); Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan); Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom).* Applications were also made by the Republic of the Marshall Islands against China, Democratic People's Republic of Korea, France, Israel, Russia, and the USA, but because there

and the *Legality of Use of Force* cases brought by the Federal Republic of Yugoslavia against ten NATO states in 1999.[34]

The *Kosovo* case was particularly apt for a degree of coordination.[35] The case itself was but one link in a chain of an intense international crisis over Kosovo (itself part of the wider Yugoslav crisis) that lasted from the early 1990s and which is still not completely resolved.[36] By the early 2000s, there were two broad camps in relation to Kosovo: those supporting Kosovo against the claims of Serbia, on the one hand, and Serbia and its allies, principal among whom was Russia, on the other. When efforts to bridge the gap, through bodies such as the Contact Group, failed, states divided broadly into those which supported the statehood of Kosovo (25 of which formed the International Steering Group—ISG), those which opposed it, and those which avoided taking a position. States were divided along political lines, but the strongest opponents of Kosovo's statehood were those which feared secessions at home. The European Union, for example, was and is divided, with 22 (now 23) Member States recognizing Kosovo and five (Cyprus, Greece, Romania, Slovakia, Spain) refusing to do so. So too were the permanent members of the UN Security Council.

The number of states that participated in the advisory proceedings was high: more than in *Nuclear Weapons* but less than in *Wall*. In addition to Kosovo ('the authors of the unilateral declaration of independence'), 43 states participated at one or both stages. Thirty-six states filed written statements[37] (14 of whom also filed written comments in reply), and 28 took part in the oral phase,[38] which lasted from 1 to 11 December 2009. For the first time, all five permanent members of the Security Council took part in proceedings at the International Court, and did so in both the written and the oral phases.

Regular and detailed exchanges of views between legal teams representing states which have essentially common views may be of great value. The sooner such exchanges begin the better. Someone has to take the initiative in proposing and

is no basis for jurisdiction have not been entered in the Court's List: see Press Release No. 2014/18 of 25 April 2014 (<http://www.icj-cij.org/presscom/files/0/18300.pdf>).

[34] *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, and nine others.

[35] See also the contribution of Marko Milanović in this volume.

[36] The issue of Kosovo within the Yugoslav federation goes back well beyond the 1990s: amongst the extensive literature, see N. Malcolm, *Kosovo. A Short History* (New York University Press, 1998); T. Judah, *Kosovo. What Everyone Needs to Know* (OUP, 2008). For the period between 1989 and 2008, see M. Weller, *Contested Statehood: Kosovo's Struggle for Independence* (OUP, 2009).

[37] In order of receipt: *Czech Republic*; France; Cyprus; China; *Switzerland*; Romania; Albania; Austria; *Egypt*; Germany; *Slovakia*; Russia; Finland; *Poland; Luxembourg; Libya*; UK; USA; Serbia; Spain; *Iran; Estonia*; Norway; Netherlands; *Slovenia; Latvia; Japan*; Brazil; *Ireland;* Denmark; Argentina; Azerbaijan; *Maldives; Sierra Leone*; Bolivia; Venezuela; as well as Kosovo. The following submitted written comments: France; Norway; Cyprus; Serbia; Argentina; Germany; Netherlands; Albania; *Slovenia; Switzerland*; Bolivia; UK; USA; Spain; as well as Kosovo. (These in italics did not participate at the oral phase.)

[38] In order of speaking, the participants were: Serbia; Kosovo; (thereafter in French alphabetical order) Albania; Germany; *Saudi Arabia*; Argentina; Austria; Azerbaijan; *Belarus*; Bolivia; Brazil; *Bulgaria; Burundi*; China; Cyprus; *Croatia*; Denmark; Spain; USA; Russia; Finland; France; *Jordan*; Norway; Netherlands; Romania; UK; Venezuela; *Viet Nam*. (Those in italics had not participated at the written phase.)

hosting such exchanges. And it may only gradually become apparent which states are going to participate. It was not clear how many of those in the Kosovo camp would in fact participate in the court proceedings. A large number of states had shown their support, including by recognizing Kosovo's statehood, in the General Assembly debate of 8 October 2008, in the Security Council, or as members of the International Steering Group. There were unexpected participants in the proceedings on Kosovo's side, and even more unexpected absences (such as Turkey, Canada, and Sweden). Of particular note were Slovenia's absence from the oral hearing, and Croatia's presence at the oral stage. No doubt domestic political considerations and other pressures played their part in some of the absences, as did particular issues with possible secession even among one or two of Kosovo's supporters. One important activity was to persuade states to take part, which was done with some success on Kosovo's part, either bilaterally or though forums such as the IGS. On the other hand, at no time did Kosovo seek to put pressure on states not to participate.

While the earliest possible exchange of views amongst like-minded states would seem desirable, in practice it is likely to evolve and become more intense as the case proceeds. Interest in, and attitudes towards, the litigation may well only become apparent gradually. At the earliest stages, such as at the pre-litigation phase, there may be little awareness of the significance of the case, and it may take some time to decide whether or not to participate. During the preparation of the written pleadings cooperation may be easier and seen as particularly useful, and this is even more so at the intensive oral phase, when the legal teams will be gathered in The Hague for a week or more. That is certainly how things looked during the *Kosovo* proceedings.

Lawyers from a group of about ten states which supported Kosovo, and which indicated to each other early on that they expected to participate in the case, met regularly and from quite an early stage, with one or other taking the initiative to arrange and host meetings to exchange views on all aspects of the case, including on tactics, and the main legal arguments to be deployed. As others indicated an interest, rather than enlarging the group which could have made it unwieldy, it fell to one or other participant in the main group, often lawyers representing Kosovo, to discuss matters bilaterally with them.

Marko Milanović's chapter has examined in some detail the substantive issues on which each 'camp' appears to have coordinated, showing in particular how the views expressed became clearer and closer with each stage of the proceedings. There is no need to repeat what he has said. One might only add that presenting the Court with a range of views and arguments is often no bad thing.

On the Kosovo side, a major tactical question was how far to treat the question as a narrow one, without getting into such controversial matters as remedial secession (which it was thought the Court would wish to avoid if it could). Another was whether, and if so how far, to argue that the Court was without jurisdiction or should exercise its discretion not to answer the request. Lack of jurisdiction seemed an obvious non-starter, but this did not deter Albania and France from so arguing, both in writing and orally. That may have been good tactics, on the

basis that it may well be good to give the Court some ground on which to find for the other side in the hope that it will find for your side on the points that really matter.

On the issue of discretion, five judges voted against the decision to reply to the request, giving cogent reasons.[39] It might, therefore, be regarded as having been a tactical mistake on the part of some states (and the authors of the declaration) not to have majored on this. On the other hand, there is nothing to indicate that had they done so this would have changed the eventual vote on this matter. It would have required two further judges to have joined the five.[40]

In the end, even within the core group, tactics varied, no doubt for reasons good and bad, including domestic reasons.[41] But even when tactics varied it was important to avoid, so far as possible, direct contradiction of substantive positions being taken, for example on the identity of the authors of the declaration of independence. In this states on Kosovo's side were largely successful. That required careful liaison and a detailed exchange of views. Above all, such exchanges of views can enrich the contributions of the participating states, all of whom learn from each other.

5. Conclusion

It can be said with some certainty that for all involved, no matter which side they were on and no matter whom they represented, the *Kosovo* proceedings held important lessons on how to conduct multiparty international litigation. The legal issues were, potentially, of great significance (even if in the end the Court managed to sidestep most of them), the political stakes were high (or seemed so at the time), and the result was hard to predict. The proceedings themselves were *sui generis*, even if the circumstances of Kosovo's status were not properly so described. Nevertheless, the experience of cooperation in court proceedings could be put to good use, as some of us recently found in the very different context of the latest request for an advisory opinion from the International Tribunal for the Law of the Sea.[42]

[39] See, in particular, the Separate Opinion of Judge Keith, *ICJ Reports 2010*, pp. 482–90.

[40] On the assumption that the President's casting vote would then have decided the matter against answering the request.

[41] Some states, such as Switzerland, had justified domestically their recognition of Kosovo on the basis of remedial secession, and so may have felt a political necessity to argue that matter in The Hague.

[42] *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC).*