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THE ADVISORY OPINION ON KOSOVO'S DECLARATION OF INDEPENDENCE: HOPES, DISAPPOINTMENTS AND ITS RELEVANCE TO CRIMEA

Abstract:
The international community anxiously awaited delivery of the advisory opinion of the International Court of Justice (ICJ) on Kosovo's declaration of independence, hoping it would clarify the controversial right of self-determination and the right of secession. Although it was hailed by many as a confirmation of both rights, the advisory opinion was disappointing regarding that part of the analysis which was based on general international law. The ICJ interpreted the question posed in a very narrow and formalistic way. It concluded that declarations of independence (not their consequences) are not in violation of international law, but it did not rule that they are in accordance with international law, as was requested in the posed question. The ICJ refused to examine whether there is a positive entitlement to secession under international law. Although Kosovo and its supporters claimed that the case of Kosovo is unique and will not set a precedent, Russia used the case of Kosovo and the advisory opinion to justify the so-called referendum in Crimea and the subsequent incorporation of Crimea into Russia. However, the situation in Crimea is only superficially comparable to Kosovo and the advisory opinion gives little or no support in the case of Crimea.

Keywords: annexation, Crimea, declaration of independence, ICJ, International Court of Justice, Kosovo, Russian Federation, Ukraine

INTRODUCTION

The political status of Kosovo has been the subject of political and territorial disputes for a long time. During the Socialist Yugoslav period (1945–1992), Kosovo was not a republic, but an autonomous province within Serbia. However, the Yugoslav Constitution of 1974 granted Kosovo various powers associated with a full-fledged republic.

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Kosovo's favourable status was possible to a large extent because of Josip Broz Tito, and it caused considerable discontent among Serbs. In the 1980s, after the death of Tito, moderate Serbian politicians tried to convince other republics to reduce the powers of autonomous provinces. The moderates were ousted by hardliners, and in 1989 Slobodan Milošević began to decisively and forcefully dismantle the autonomy of Kosovo. Almost a decade of oppressive measures led to the Kosovo War, which lasted from February 1998 to June 1999 and ended due to the intervention of NATO. The Security Council placed Kosovo under international administration, and although Serbia retained sovereignty over Kosovo, the interim regime rendered Kosovo effectively independent from Serbia. Over the next few years, little progress was made in finding a mutually acceptable political solution, and eventually Kosovo declared its independence, on 17 February 2008. There were major disagreements within the international community regarding the legality of such a unilateral act. It was finally decided to ask the International Court of Justice (ICJ) to clarify the situation. The latter found, in its advisory opinion of July 2010, that Kosovo's unilateral declaration of independence was not in violation of international law.

The advisory opinion was received with mixed feelings and has since attained a "mythical" status. It was hailed by secessionist movements as a confirmation of the people's right of self-determination and even of their right to secede from a parent state.[1] The advisory opinion was equally welcomed by states which supported Kosovo, but was denounced by states which have secessionist movements at home or are engaged in territorial disputes associated with self-determination. In actuality it offers little support to the ambitions of secessionist movements, although some conclusions in the advisory opinion are based on dangerous assumptions. In addition Russia, which opposed Kosovo's independence, paradoxically relied recently on the advisory opinion to justify the so-called referendum in Crimea and the subsequent incorporation of Crimea into Russia.

The present article aims to clarify what exactly was stated in the advisory opinion and to assess whether the advisory opinion is applicable to the case of Crimea and provides any support to Russia's claims. Because the advisory opinion "operates" in the context of self-determination, the first section gives a brief overview of the nature of self-determination. The second section examines what question was posed to the ICJ and how the ICJ understood it. The third section analyses the effect of the ICJ's conclusions under general international law. The fourth section is comprised of the author's conclusions and examines the relevance of the ICJ's ruling to the Crimean situation.

1. THE NATURE OF SELF-DETERMINATION

The "people" who seek independence turn to the right of self-determination, a right first made famous by President Woodrow Wilson in his Fourteen Points speech (1918)

[1] A state from which a secessionist movement wishes to break away.

and later enshrined in the Charter of the United Nations.[2] The Charter proclaims that one of the purposes of the United Nations is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace" (Art. 1.3). It was considered to be a political guideline rather than a legal subjective right providing a basis for specific claims by specific peoples.[3] Although self-determination is mentioned several times in the United Nations Charter,[4] it fails to clarify its nature.

In the post-World War Two era, it is generally claimed that self-determination is one of the fundamental pillars of international law and relations, but at the same time there are considerable disagreements when it comes to its meaning, scope and relationship with other norms and principles of international law, in particular respect for territorial integrity. For the sake of brevity, a useful and common starting point for understanding self-determination is the Friendly Relations Declaration adopted by the General Assembly of the United Nations[5] (not a legally binding document, but still an authoritative one[6]). According to the Declaration self-determination means that "all peoples have the right to determine freely, without external interference, their political status and to pursue their economic, social and cultural development" and that "every State has the duty to respect this right in accordance with the provisions of the [United Nations] Charter". The exercise of self-determination results in the establishment of "a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people." All states have the duty to promote realisation of the principle of self-determination and to refrain from any forcible action which deprives peoples of their right to self-determination and freedom and independence. In a few cases, the Security Council has expressed support to certain peoples seeking independence, if such course of action helps to achieve international peace and security, e.g. South Sudan[7] and Western Sahara.[8]

The documents addressing the nature of self-determination in the 1960s and the 1970s saw the principle as a means to dismantle colonial empires and free peoples from

[2] Charter of the United Nations, adopted 26 June 1945, entered into force 24 October 1945, 1 UNTS XVI.

[3] S. Oeter, *Self-Determination*, [in:] B. Simma, D.-E. Khan, G. Nolte, A. Paulus and N. Wessendorf (eds.), *The Charter of the United Nations: A Commentary* (3rd ed.), Oxford University Press, Oxford: 2012, pp. 315-16.

[4] *E.g.* Art. 55 of the Charter of the United Nations (direct reference in the context of peaceful and friendly relations among nations) and Art. 73 (indirect reference in the context of colonial and non-self-governing territories).

[5] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV), 24 October 1970 (the Friendly Relations Declaration).

[6] *See e.g.* I. Sinclair, *The Significance of the Friendly Relations Declaration*, [in:] V. Lowe, C. Warbrick (eds.), *The United Nations and the Principles of International Law*, Routledge, London: 1994, pp. 1-32.

[7] Security Council Resolution 1919 (2010).

[8] Security Council Resolution 2152 (2014).

alien domination.[9] As a result, there are nowadays good reasons to doubt whether the right of self-determination has a place in the post-colonial world.[10] Outside of colonial domination or foreign occupation, self-determination means first and foremost that the "people" have a right to meaningful political participation as well as to the pursuit of economic, social and cultural development within the existing state. Such *internal self-determination* is therefore closely related to the protection of minority rights and favours solutions where a certain level of autonomy is given to minorities. If these rights are protected in practice (one may certainly discuss the requisite degree of autonomy), there is no reason and legal justification for *external self-determination* in the form of secession and thus the breaking up of an existing state. This approach finds support in the Friendly Relations Declaration, which includes a clause emphasising that self-determination should not be construed as authorising or encouraging any action which would dismember or impair the territorial integrity or political unity of sovereign and independent states who conduct themselves in compliance with the principle of equal rights of peoples and who have a government representing, without discrimination, the whole people belonging to the territory. This approach was also adopted by the Canadian Supreme Court in its advisory opinion regarding the secession of Quebec.[11] However, this does not mean that external self-determination is completely ruled out. External self-determination is available as a last resort when the people are denied the ability to exercise internally their right to self-determination (sometimes called *remedial secession*), e.g. the central government pursues restrictive and repressive policies against the people.

2. THE REQUEST FOR AN ADVISORY OPINION

Kosovo declared independence on 17 February 2008.[12] Serbia did not accept the independence of Kosovo and undertook various efforts to reverse the process. Among other things, it proposed to the General Assembly to request an advisory opinion from the ICJ. The General Assembly agreed and asked the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"[13] In less than two

[9] More than a hundred states were born in the course of decolonisation process after 1945. E. A. Laing, *The Norm of Self-Determination, 1941-1991*, 22 California Western International Law Journal 209 (1991), pp. 216-25.

[10] S. Wheatley, *Democracy, Minorities and International Law*, Cambridge University Press, Cambridge: 2005, pp. 77-85.

[11] *Reference re Secession of Quebec*, Supreme Court of Canada, 20 August 1998, 2 Canada Supreme Court Reports 217.

[12] Kosovo Declaration of Independence, Assembly of Kosovo, 17 February 2008, available at: http://www.assembly-kosova.org/?cid=2,128,1635 (accessed 30 March 2015).

[13] General Assembly Resolution 63/3, 8 October 2008.

years, the ICJ gave its opinion,[14] which was mainly based on two sources: general international law[15] and the Security Council Resolution 1244 (1999) that established the international administration in Kosovo.[16] The present article focuses on the Court's analysis of general international law, due to its potential applicability to other similar situations.

At the outset it should be stressed that the question was badly formulated by Serbia[17] (the General Assembly simply forwarded the prepared question) and gave the ICJ the possibility to take a narrow approach and answer the question in a way which was not favourable to Serbia. Before answering the question, the ICJ examined its meaning and scope. The ICJ recalled that it had previously departed from a posed question if it was not adequately formulated or did not reflect the real legal issues. Similarly, the ICJ has clarified a posed question if it was unclear or vague.[18] But in this case, the ICJ found that the posed question was "clearly formulated" and was "narrow and specific".[19] The ICJ noted that the General Assembly did not ask whether there was a right to secession, i.e. a positive entitlement under international law to break away from a parent state, but whether the declaration of independence was in accordance with international law. The ICJ continued by saying that the answer depends on whether international law prohibits the declaration of independence. In other words, the ICJ concluded its task was "to determine whether or not the declaration of independence was adopted in violation of international law."[20]

The ICJ clearly took a convenient approach. The outcome would obviously differ depending on whether one is asked to assess if certain conduct is *in violation of* international law or if such conduct is *in accordance with* international law. Furthermore, the ICJ limited itself to declarations of independence and refused to examine the more interesting and essential issues. The ICJ emphasised that it was not asked to decide the legal consequences of such declarations, i.e. whether Kosovo had achieved statehood; about the validity or legal effects of the recognition of Kosovo by other states; whether the right of self-determination exists outside the colonial context; or whether there is a positive entitlement to secession under international law, etc.[21]

In a nutshell, the ICJ concluded that the adoption of the declaration of independence did not violate general international law, the Security Council resolution 1244 (1999) or the Constitutional Framework for Provisional Self-Government.[22] The ICJ's conclusion is thus not a surprise when one considers how narrowly and formalistically it approached

[14] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Rep. (2010) 403 (the Kosovo advisory opinion).

[15] *Ibidem*, paras. 79-84.

[16] *Ibidem*, paras. 85-121.

[17] *See* UN Doc A/63/L.2 (2008).

[18] Kosovo advisory opinion, para. 50.

[19] *Ibidem*, para. 51.

[20] *Ibidem*, para. 56.

[21] *Ibidem*, paras. 51, 56 and 83.

[22] *Ibidem*, para. 122.

the posed question. Indeed, international law does not prohibit civil war or aspirations for independence (national law may well have a different attitude). It seems that the ICJ followed the *Lotus* principle, i.e. that international law governs relations between independent states, which means that legally binding rules emanate from the free will of states and that restrictions upon the independence of states cannot be presumed.[23] In other words, what is not prohibited is therefore permitted.[24] Such an approach is certainly dangerous. The *Lotus* principle is closely associated with sovereignty, but sovereignty is not a constant, absolute concept which does not or cannot change over time. Today, sovereignty is not understood in the rigid manner as it was perceived in 1927 by the Permanent Court of International Justice when it formulated the *Lotus* principle. Nowadays, sovereignty not only gives rise to privileges, but also imposes obligations and limitations – the *Lotus maximus* era is over.[25] It might also be noted that if the principle in question is supposed to protect the sovereignty of states, it is strange to use it against the sovereignty of states, i.e. in ways which favour separatist movements or endangers territorial integrity (if secession is not prohibited, it is logically permitted).

3. DEDUCTIONS FROM THE ADVISORY OPINION

As the ICJ dedicated only six paragraphs to general international law, one cannot expect them to contain a broad discussion and deep analysis. As a result, different interested parties have adopted opposite interpretations based on these six paragraphs. The Kosovo advisory opinion is sometimes viewed like a sacred text, which can be interpreted differently depending on what one wants to believe. While the advisory opinion contains statements which are not favourable to sovereignty and territorial integrity, nevertheless it does not support the right to secede from a parent state. So, what do these six paragraphs tell us (either directly or indirectly)?

3.1. Declarations of independence are not prohibited

The ICJ stated that "general international law contains no applicable prohibition of declarations of independence".[26] There are three reasons for this. First, during the 18th, 19th and 20th centuries there were numerous declarations of independence, which were often strenuously opposed by the parent state, but general state practice does not suggest that the act of promulgating the declaration was itself regarded as contrary to international law.[27]

[23] PCIJ, *The Case of the SS Lotus (France v. Turkey)*, Judgment, PCIJ Series A, No. 10 (1927) 4, p. 18.

[24] *See also* Kosovo advisory opinion, Declaration of Judge Simma, paras. 2, 3 and 8.

[25] The nature of sovereignty is certainly a complex issue and open to debate. However it is not discussed here for reasons of feasibility.

[26] Kosovo advisory opinion, para. 84.

[27] *Ibidem,* para. 79.

Second, the principle of territorial integrity does not prohibit declarations of independence because this principle is confined to inter-state relations. During the proceedings, several states argued that the principle of territorial integrity indirectly prohibits declarations of independence, because when effected such declarations violate the territorial integrity of the parent state. They added that this principle has also been applied to intra-state conflicts.[28] Strangely, the ICJ analysed the principle of territorial integrity in light of three documents: (a) Art. 2(4) of the United Nations Charter, which contains the prohibition on the use and threat of force in international relations, including against the territorial integrity of any state; (b) the Friendly Relations Declaration, which repeats the above-mentioned provision; and (c) the Final Act of the Conference on Security and Co-operation in Europe,[29] where states promised to respect each others' territorial integrity. These documents address inter-state relations, therefore the principle of territorial integrity is also confined to inter-state relations.[30] As a result, non-state actors are not bound to respect this principle and declarations of independence do not violate this principle. The ICJ's position reflects the traditional position[31] and does not take into account the actual practice, where the principle of territorial integrity has been applied in relation to non-state actors.[32] Furthermore, such a position may encourage separatist movements in other regions, inasmuch as they may conclude, upon reading the advisory opinion, that they have the right to secede since territorial integrity is not an obstacle for them to declare their independence.

Third, the ICJ concluded that no general prohibition against declarations of independence is inferred from the practice of the Security Council. During the proceedings, several states pointed out that the Security Council has condemned declarations of independence, e.g. in South Rhodesia,[33] Northern Cyprus[34] and Republika Srpska.[35] But the ICJ noted that in all such cases, the Security Council made a determination based on a specific situation prevailing at the time these declarations of independence were made. The illegality of these declarations of independence did not stem from their unilateral character, "but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law,

[28] *See e.g.* Written Statement of Argentina, paras. 75-82; Written Statement of Azerbaijan, paras. 26-27; Written Statement of Cyprus, para. 80; Written Statement of Serbia, paras. 412-91; Written Statement of Spain, paras. 29-55.

[29] Final Act, Conference on Security and Co-operation in Europe, 1 August 1975, available at: http://www.osce.org/mc/39501?download=true (accessed 30 March 2015), Article IV.

[30] Kosovo advisory opinion, para. 80.

[31] *See also* Written Statement of Estonia, p 4; Written Statement of the United Kingdom, paras. 5.8-5.11; Written Statement of the United States, p. 69.

[32] *See* Th. Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation*, La Documentation Française, Paris: 1999, pp. 177-236.

[33] Security Council Resolution 216 (1965).

[34] Security Council Resolution 541 (1983).

[35] Security Council Resolution 787 (1992).

in particular those of a peremptory character (*jus cogens*)."[36] In the context of Kosovo, the Security Council has never taken this position.

The ICJ was probably right when it concluded that international law does not contain a norm which prohibits the promulgation of declarations of independence. However, it should be stressed that the ICJ was talking only about their promulgation, and did not assess the actual or potential consequences of such a declaration or how other states should react to them. The ICJ disregarded the fact that international law and state practice generally disfavours secessions, e.g. the Turkish Republic of Northern Cyprus (Cyprus), Nagorno-Karabakh (Azerbaijan), Transnistria (Moldova), Abkhazia and South Ossetia (Georgia), Somaliland (Somalia), Tamil Elam (Sri Lanka) and Chechnya (Russia). Nonetheless, while secession is not a right, nor is it necessarily a breach under international law. It is treated as a fact, i.e. secession is either successful or fails. Its success depends on political recognition by states – if the seceding state gains enough international recognition, it gradually gains legitimacy and eventually statehood.

3.2. The creation of a state is not simply a matter of fact

The ICJ did not follow the line that the creation of a state is just a matter of fact, the legality of which cannot be assessed.[37] The above-discussed analysis of the practice of the Security Council showed that it is possible to assess the legality of declarations of independence in light of international law and even pronounce them illegal. Several states also found that the creation of state can be in violation of international law,[38] for example if the achievement of independence was "connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)." Hence military intervention by other states into intra-state conflicts or military support by other states to secessionist movements renders their 'independence' unlawful.

In case of illegality, one has to turn to the question of state responsibility to assess the consequences. The Draft Articles on State Responsibility[39] demand that no state may recognise as lawful a situation created by a breach of *jus cogens* norms nor render aid or assistance in maintaining such a situation.[40] Hence if one argues that Kosovo gained independence as a result of the NATO military intervention in 1999,[41] then the

[36] Kosovo advisory opinion, para. 81.

[37] *See e.g.* Oral Statement of Kosovo, CD 2009/25, p. 41; Oral Statement of Burundi, CR 2009/28, pp. 32-34.

[38] *See e.g.* Written Statement of Germany, p. 29; Written Statement of Estonia, p. 4; Written Statement of France, para. 2.14; Written Statement of Switzerland, para. 28.

[39] Even though these articles are not a treaty, they reflect adequately customary international law on state responsibility, according to the International Court of Justice (ICJ, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Rep. (1997) 7, paras. 47, 50-53, 58, 79, 83 and 123.

[40] Art. 41(2) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001).

[41] As the operation lacked a clear legal basis, it is widely argued that it was a violation of the prohibition to use force under the United Nations Charter. *See e.g.* A. Cassese, *Ex Iniuria Ius Oritur: Are We Moving*

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recognition of Kosovo may qualify as a breach of the territorial integrity of Serbia and lead to international responsibility.[42] Thus viewed, the question becomes: Did Kosovo become independent in 2008 because of the NATO operation? The link between the two events is not direct enough to invoke state responsibility. At least no state claimed that during the proceedings.

The issue of recognition is connected with the constitutive theory of state recognition, according to which the recognition by existing states has a decisive effect on the creation of a new state.[43] In other words, a political entity may satisfy the traditional criteria of statehood and consider itself a state, but for the purpose of international law a new state is born when it is "admitted" to the international community. It is widely advocated that this traditional (conservative) approach is nowadays substituted by the declaratory theory, according which the recognition of a new state is merely a political act showing the attitude of the existing state to a new state, but has no effect on the existence of the new state as a subject of international law.[44] Combining the declaratory theory with the ICJ's position that declarations of independence are not in violation of international law, secessionist movements can easily conclude that if they are able to create a state as a fact (provided that it sufficiently resembles a functioning state) and to gather a critical number of existing states who are willing to recognise its statehood and engage in inter-state relations, then such a state is properly created. However we should not entertain an illusion that separatist movements engage in a comprehensive analysis of international law and practice, giving due regard to all nuances. They will choose those parts of the advisory opinion which support their objective, and this is not in the interests of nor does it respect the territorial integrity of the parent state.

3.3. Kosovo is not a sui generis case

The ICJ refused to treat Kosovo as a *sui generis* case, not subject to legal regulation and review in the regular manner. Kosovo and its supporters have persistently claimed that the situation of Kosovo is so unique that general international law is not suitable for its legal assessment and that it is not a precedent for others.[45] This uniqueness was mentioned already in the declaration of independence, where the preamble observes that "Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation."[46]

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towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?, 10 European Journal of International Law 23 (1999).

[42] *See e.g.* M. Jovanović, *Recognition of Kosovo Independence as a Violation of International Law*, 3 Annals: Belgrade Law Review 108 (2008), pp 133-36.

[43] H. Lauterpacht, *Recognition in International Law*, Cambridge University Press, Cambridge: 1947, p. 55.

[44] J. Crawford, *The Creation of States in International Law* (2nd ed.), Oxford University Press, Oxford: 2006, pp. 22-26.

[45] *See e.g.* Written Statement of Estonia, pp. 11-12; Written Statement of Germany, pp. 26-27; Written Statement of the United Kingdom, paras. 0.17-0.23.

[46] Kosovo Declaration of Independence, *supra* nota 15, Preamble.

The United States summarised the arguments in support of Kosovo's independence and emphasised three aspects: the disintegration of Yugoslavia (and Kosovo's loss of autonomous status due to rising Serbian nationalism), the human rights crisis within Kosovo (massive human rights violations committed over the years), and the international response (the interim regime established by the Security Council, which led to a point whereby Kosovo's return to Serbia was not a viable option anymore).[47] In a way, every conflict is unique. But there is a difference whether the uniqueness is used as a political or a legal argument. Kosovo and its supporters attempted to persuade the Court to adopt the latter approach and tried to place Kosovo outside the realm of international law. Cyprus claimed explicitly that as Kosovo is a *sui generis* case and that "the general rules of international law do not apply to Kosovo."[48]

While the ICJ did not directly analyse such arguments, it indirectly refuted them. The advisory opinion nowhere mentions the uniqueness of Kosovo. Most importantly, the ICJ actually assessed the declaration of independence under international legal norms and principles, i.e. general international law and the Security Council Resolution 1244 (1999), thus logically confirming that Kosovo is not outside the law. Furthermore, because the ICJ applied general international law, it is possible to apply the ICJ's position by analogy to other similar situations, which debunks the argument that the case of Kosovo does not create a "precedent". In reality it would be very difficult to explain to other peoples who have aspirations for independence, e.g. Kurds, Tibetans, and Western Saharans, that they are not special and therefore they cannot use the case of Kosovo as an example. Nonetheless the claims of uniqueness did not disappear after publication of the advisory opinion.

3.4. No confirmation for external self-determination or remedial secession

The Kosovo advisory opinion is often taken as a confirmation that external self-determination is also applicable outside the colonial context and that remedial secession is permissible under certain circumstances. Actually, the ICJ did not confirm these claims. While it may be reasonable to assume that if a declaration of independence is not in violation of international law, then such act is based on a positive entitlement under international law, in fact the ICJ posited that "it is entirely possible for a particular act – such as a unilateral declaration of independence – not to be in violation of international law without necessarily constituting the exercise of a right conferred by it."[49] The ICJ quickly added that it was not explicitly asked to determine whether such a right existed and so it did not look into the matter.

A number of states who participated in the proceedings claimed (as a secondary argument) that the population of Kosovo had the right to create an independent state either as a manifestation of their right to self-determination, or pursuant to a right of remedial

[47] Oral Statement of the United States, CR 2009/30, pp. 25-28.
[48] Written Statement of Cyprus Commenting on Other Written Statements, para. 28.
[49] Kosovo advisory opinion, para. 56.

secession in the face of the situation in Kosovo.[50] The ICJ noted that states had radically different views about whether the right of self-determination provides the people, outside the context of colonialism or other forms of foreign domination, the right to separate from a parent state. States also had different views regarding the right of remedial secession.[51] Does such a right exist in the first place? If so, what are the preconditions? Were the necessary circumstances present in the Kosovo case?[52] The ICJ raised many very interesting and highly relevant questions, but then concluded (surely with some relief) that "it is not necessary to resolve these questions in the present case" because it was not requested by the General Assembly and these questions did not concern declarations of independence, but rather the relevant consequences after such declarations, i.e. the right to separate from a parent state.[53] The ICJ said nothing which would affirm that Kosovo is a state or that it satisfies the traditional criteria of statehood.

To sum up, the ICJ added nothing substantial to the debate about external self-determination or remedial secession. Without going into a detailed discussion, there are good reasons to seriously doubt that there exists, under international law, a right to unilateral secession. The Supreme Court of Canada, in a leading judgment, confidently declared that "international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their 'parent' state".[54] The same conclusion was reached by the Independent International Fact-Finding Mission on the Conflict in Georgia, which declared that "Abkhazia was not allowed to secede from Georgia under international law, because the right to self-determination does not entail a right to secession."[55] Self-determination is thus presented as a pillar of international law and relations, but states become have become sceptical and abandon idealistic rhetoric when it begins to threaten their territorial integrity. It should be noted that this is not a legal argument, but a practical approach. However, inasmuch international law is not effected by words alone, but also by deeds, one cannot disregard such approaches.

4. RELEVANCE OF THE ADVISORY OPINION TO CRIMEA

Russia has always opposed the independence of Kosovo. During the proceedings before the ICJ, Russia took a very narrow position with respect to the right of self-determination and the right of secession. But in the case of Crimea, Russia reversed

[50] *See e.g.* Written Statement of Estonia, pp. 4-11; Written Statement of Germany, pp. 34-35; Written Statement of the Netherlands, paras 3.5-3.7; Written Statement of Russia, para. 88.

[51] *See e.g.* Written Statement of Argentina, para. 97; Written Statement of Azerbaijan, para. 25; Written Statement of China, pp. 3-7; Written Statement of Spain, para. 24; Written Statement of Slovakia, para. 6.

[52] Kosovo advisory opinion, para. 82.

[53] *Ibidem,* para. 83.

[54] *Reference re Secession of Quebec*, *supra* nota 11, para. 111.

[55] Report, Independent International Fact-Finding Mission on the Conflict in Georgia, 30 September 2009, Volume II, p. 147.

its position and used the arguments which were put forward by the United States (and were opposed by Russia) during the proceedings.

4.1. Events in Crimea and the international response

The events in Crimea unfolded very rapidly. The peninsula was incorporated into Russia less than a month after the start of the pro-Russian rallies in Sevastopol and other places. Already on 23 February 2014, the day after the departure of Viktor Yanukovych, Russians chanted in Sevastopol and Kerch that Crimea is Russian and wanted to replace Ukrainian flags with Russian ones. Four days later, the Supreme Council of Crimea decided to hold a referendum on the status of Crimea. The referendum was set for 25 May, but later was brought forward to 30 March and then again to 16 March.

Despite both international and Ukrainian criticism, the referendum was held and reportedly about 96 percent of voters were in favour of uniting with Russia. The next day, the Supreme Council of Crimea declared independence from Ukraine and requested accession to Russia.[56] On 18 March 2014, the leaders of Crimea and Sevastopol flew to Moscow and signed the treaty on the admission of the Republic of Crimea to Russia. Overnight, the Constitutional Court of Russia produced a 14-page judgment confirming that the treaty conforms to the Russian Constitution.[57] And then, on 21 March, the Federation Council ratified the treaty and President Putin signed the ratification instrument, effectively finalising the incorporation of Crimea into Russia.

The international community has overwhelmingly rejected the secession of Crimea from Ukraine and its incorporation into Russia, treating it as a violation of international and Ukrainian law. Russia claims that everything took place in accordance with international law. After signing the treaty with Crimean leaders on 18 March, President Putin addressed the State Duma, Federation Council, regional leaders and civil society representatives in the Kremlin to justify the incorporation of Crimea.[58] Leaving aside the emotional arguments referring to shared history, national pride and military glory, this article focuses on the legal arguments. After all, the ICJ indicated that the creation of a state is not simply a matter of fact or politics, but is subject to legal review.

[56] Парламент Крыма принял Декларацию о независимости АРК и г. Севастополя (Crimean Parliament adopted the Declaration of Independence of the Autonomous Republic of Crimea and the city of Sevastopol), 11 March 2014, available at: http://www.rada.crimea.ua/news/11_03_2014_1 (accessed 30 March 2015).

[57] Постановление по делу о проверке конституционности невступившего в силу международного договора между Российской Федерацией и Республикой Крым о принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов (Judgment on the Case concerning the Review of Constitutionality of the International Treaty between the Russian Federation and the Republic of Crimea on Admission of the Republic of Crimea into the Russian Federation and Creation of New Subjects in the Composition of the Russian Federation) Конституционный Суд Российской Федерации, 19 March 2014, 6-П/2014, available at: http://doc.ksrf.ru/decision/KSRFDecision155662.pdf (accessed 30 March 2015).

[58] Address by President of the Russian Federation, 18 March 2014, available at: http://eng.kremlin.ru/news/6889 (accessed 30 March 2015).

Russia's legal justifications are based on a superficial and opportunistic interpretation of international law and contradict with its previous positions. Unsurprisingly, Russia builds its position on the right of self-determination and the right of remedial secession, and refers to Kosovo as a supportive precedent.

4.2. Justifications for secession

In his speech, President Putin argued that in the referendum the residents of Crimea, for the first time in history, were able to peacefully express their free will regarding their own future and emphasised that when declaring independence, the Supreme Council of Crimea also referred to the United Nations Charter, which speaks of self-determination.[59] There is some merit in his speech, e.g. a referendum is the usual way to determine the will of the people, but as was discussed above the right of self-determination has preconditions and most certainly does not represent an absolute entitlement, permitting the people to unilaterally secede from a parent state at any time and without paying attention to the interests of the parent state.

It is safe to conclude that the referendum and declaration of independence in Crimea would have impossible without the support of Russian forces. It's true that Russia has insisted that the unmarked, but armed and uniformed, units operating in Crimea were not Russian troops, but spontaneously organised "self-defence forces" (the so-called "little green men"). However, these claims do not sound plausible. Months after the events in Crimea, President Putin has repeatedly confirmed that there were Russian troops in Crimea.[60] Russian troops and other Russian controlled units locked Ukrainian forces in their bases and controlled public infrastructure. This made it possible to hold the referendum and raises the question whether the people expressed their will "without external interference", as emphasised in the Friendly Relations Declaration discussed above. Because the use of force to support the secessionist activities was illegal, the declaration of independence in Crimea was also illegal.

Although according to the ICJ declarations of independence are not generally in violation of international law, it added an exception which applies in case of Crimea, i.e. that a declaration of independence is illegal if it is "connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)."[61] President Putin, however, has claimed that the presence of Russian troops was necessary to hold an open, honest, and dignified referendum.[62] His position is very close to another claim that a state may assist those people who are exercising self-determination if the parent state does not agree with their potential secession. This claim is based on the Friendly Relations Declaration which provides that "every State has the duty to respect this right in accordance with

[59] Crimean Parliament adopted the Declaration…, *supra* nota 60.

[60] *See e.g.* Direct Line with Vladimir Putin, 17 April 2014, available at: http://eng.kremlin.ru/news/7034 (accessed 30 March 2015).

[61] Kosovo advisory opinion, para. 81.

[62] *Ibidem*.

the provisions of the [United Nations] Charter."[63] There has never been a consensus on what exactly this provision means, but it certainly does not authorise other states to intervene militarily at their discretion. Otherwise it would open the system to abuses, i.e. states disguising their politically-motivated interventions with supposedly altruistic intentions. If the parent state oppresses its own people and forcefully prevents internal self-determination, they may seek protection (possible defensive military assistance) from the international community. Such protection preferably should be authorised by the Security Council and realised by a multinational coalition. Moreover, one cannot disregard the legal framework of the use of force as provided in the United Nations Charter, which permits the use of force only for self-defence and when authorised by the Security Council.[64] An intervention in support of self-defence falls under neither exception.

In late summer 2013, the United States, the United Kingdom and other states were considering whether to intervene in Syria to support the people who were rebelling against the repressive regime of al-Assad (in a way thus also exercising their right of self-determination). President Putin opposed this intervention and stressed in September 2013 that "[w]e believe that preserving law and order in today's complex and turbulent world is one of the few ways to keep international relations from sliding into chaos. The law is still the law, and we must follow it whether we like it or not."[65] But then a half a year later Russia intervened in Crimea, even though the seriousness of the situation on the ground was not comparable to that of Syria. Hence Russia resisted collective action in a serious armed conflict, but intervened unilaterally in a situation which perhaps amounted to a riot.

Russia was among the states who answered the ICJ's call to submit written statements on the question submitted to ICJ for an advisory opinion in the Kosovo case. Its written statement followed a conservative approach. Notably, "[t]he Russian Federation is of the view that the primary purpose of the 'safeguard clause' [in the Friendly Relations Declaration] is to serve as a guarantee of the territorial integrity of States. It is also true that the clause may be construed as authorizing secession under certain conditions. However, those conditions should be limited to truly extreme circumstances, such as an outright armed attack by the parent state, threatening the very existence of the people in question. Otherwise, all efforts should be taken in order to settle the tension between the parent state and the ethnic community concerned within the framework of the existing State."[66] So it seems fair to ask: What happened to this conventional

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[63] Friendly Relations Declaration, *supra* nota 5.

[64] Arts. 2(4), 42 and 51 of the Charter of the United Nations. *See e.g.* R. Värk, *The Legal Framework of the Use of Armed Force Revisited*, 15(1) Baltic Security and Defence Review 56 (2013), for a general discussion on the legality of the use of force.

[65] *A Plea for Caution from Russia: What Putin Has to Say to Americans about Syria*, New York Times, 11 September 2013, available at: http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html (accessed 30 March 2015).

[66] Written Statement of Russia, para. 88.

approach? Did not Russia simply abandon its earlier position and principles because it was politically convenient, or maybe it never really believed in them?

4.3. Crimea in comparison with Kosovo

Russia and the Russians in Crimea have repeatedly drawn parallels between Crimea and Kosovo. President Putin also mentioned Kosovo in his speech: "Moreover, the Crimean authorities referred to the well-known Kosovo precedent – a precedent our western colleagues created with their own hands in a very similar situation, when they agreed that the unilateral separation of Kosovo from Serbia, exactly what Crimea is doing now, was legitimate and did not require any permission from the country's central authorities."[67] As was discussed above, Kosovo and its supporters maintained and tried to show that Kosovo was a unique case and did not create a precedent. But it must be admitted that this is a fragile and dangerous argument, both politically and legally. Hence it is not a surprise that Russia refers to Kosovo as a justification for Crimea's actions. However, Crimea and Kosovo are not comparable for several important reasons. Before discussing the differences, it is fair to say that there are also some similarities, e.g. Kosovo was an autonomous region like Crimea, and in both regions the majority of people belonged to an ethnic minority. But these similarities are superficial, as shown by three essential differences.

First, Kosovo had been and still was under international administration when it declared its independence. The United Nations Interim Administration Mission in Kosovo was created by the Security Council (14 votes in favour, including Russia, only China abstaining).[68] The adopted resolution reaffirmed the commitment to the sovereignty and territorial integrity of Yugoslavia, but at the same time called for substantial autonomy and meaningful self-administration for Kosovo. The international community continued to recognise Serbia's sovereignty over Kosovo and hoped that a political solution would be found to determine the final status of Kosovo. Crimea on the other hand was under the unilateral and illegal control of Russia (numerous areas and objects were occupied by Russian troops) when the referendum was held and independence declared. This resulted in Crimea being incorporated into an occupying state. There were no attempts (or at least no meaningful and good faith efforts) to settle the concerns and differences with Ukraine. It was a divorce at gunpoint.

Secondly, Kosovo declared independence (17 February 2008) almost nine years after it was placed under international administration (10 June 1999), and only after numerous attempts to negotiate an acceptable solution between the parties had failed. As was outlined above, in Crimea the whole process of self-determination and secession took a mere month.

Thirdly, Serbia had begun to forcefully dismantle the autonomy of Kosovo in 1989. Almost a decade of oppressive measures led to the Kosovo War, which lasted from

[67] Address by President of the Russian Federation, *supra* nota 62.
[68] Security Council Resolution 1244 (1999), 10 June 1999.

February 1998 until June 1999 (and ended with the NATO military intervention). The Security Council determined several times that the situation in Kosovo constituted a threat to international peace and security.[69] The International Criminal Tribunal for the former Yugoslavia and numerous other institutions, including the Security Council, have explicitly recognised occurrences of war crimes, crimes against humanity, ethnic cleansing and massive human rights violations in Kosovo. Arguably, Kosovo was driven by the events of the 1990s and the 2000s to a point where the meaningful exercise of internal self-determination within Serbia was rendered very difficult, if not impossible. (It should be noted that Russia did not share this assessment and found that "the situation does not even begin to come close to the "extreme circumstances" under which the right to secession may be invoked.")[70] There was no comparable situation in Crimea, i.e. no impartially verified allegations of grave violations of human rights and fundamental freedoms. Crimea had an autonomous status within Ukraine. In fact, the Autonomous Republic of Crimea was created in 1996 in order to calm down separatist moods among Russians. They were given substantial linguistic and other privileges, including their own parliament and government, and the calls for separation eventually disappeared. In the light of the available facts, it is difficult to argue that the internal self-determination in Crimea was threatened or that the Ukrainian central government was dismantling Crimea's autonomy. Moreover, even if there were legitimate concerns in Crimea, the interim central government was not given a chance to address these concerns because the process of secession started within days after it was sworn in. Nevertheless, Russia believed that the situation was dangerous and necessitated rapid reaction. For example, when the Federation Council authorised the president to use force in Crimea, they mentioned that there was a real threat of bloodshed in Eastern and Southern Ukraine and of a humanitarian catastrophe throughout the country.[71] President Putin noted in his speech that the right of self-determination in Crimea was exercised in a "peaceful" manner and that it was not even necessary to resort to the authorisation from the Federation Council (at the same time reiterating that Russia had no armed forces in Crimea). He even thanked the Ukrainian armed forces for not putting up a fight, thereby avoiding violence and causalities.[72]

CONCLUSIONS

After the announcement of the advisory opinion, the Foreign Minister of Kosovo stated at a meeting of the Security Council that "[n]othing in the opinion issued by the

[69] *E.g.* Security Council Resolution 1203 (1998), 24 October 1998.

[70] Written Statement of Russia, para. 103.

[71] Обращение СоветаФедерации ФС РФ к Президенту Российской Федерации В.В. Путину о защите граждан Российской ФедерациинаУкраине (Appeal of the Federation Council to the President of the Russian Federation V. V. Putin on the Protection of Citizens of the Russian Federation in Ukraine), 1 March 2014, available at: http://council.gov.ru/press-center/news/39849/ (accessed 30 March 2015).

[72] Address by President of the Russian Federation, *supra* nota 62.

Court casts any doubt on the statehood of the Republic of Kosovo, which is an established fact" and the "[i]t is clear that Kosovo's independence has not set any precedent."[73] This was certainly not the whole truth, considering what the ICJ was asked and what the ICJ said. From the perspective of general international law, the ICJ did not say much useful or surprising. While it's true the ICJ did not question the statehood of Kosovo, this was because it answered only the posed question whether the promulgation of a declaration of independence (not its consequences) was in violation of international law. At the same time the ICJ did not confirm that Kosovo had the right to secede or that it had achieved statehood. The ICJ refused to examine the essence of external self-determination and remedial secession. The ICJ's analysis was thus incomplete and potentially dangerous, because secessionist movements may take its conclusion about declarations of independence as a defence for their cause, without actually analysing whether it actually means that they have the right of secession. The advisory opinion is certainly a precedent because it was based on general international law, and the ICJ did not consider Kosovo as a *sui generis* case. Generally, every judgment or advisory opinion is potentially a precedent and may be used as such by others. Moreover, if the issues are decided under *general* international law, the judgment or advisory opinion has potentially *general* applicability.

Predictably, the advisory opinion was used by Russia to justify the so-called referendum in Crimea and the subsequent incorporation of Crimea into Russia, but in fact the advisory opinion fails to provide any hoped-for support. Russia is advancing political and legal justifications which do not withstand criticism or, at the very least, are simply very difficult to understand. President Putin claimed that "[w]e have always respected the territorial integrity of the Ukrainian state, incidentally, unlike those who sacrificed Ukraine's unity for their political ambitions."[74] Russia has illegally orchestrated a secession of Crimea and apparently renounced their previous conservative positions. Let us recall that five years earlier Russia stated before the ICJ that "outside the colonial context, international law allows for secession of a part of a State against the latter's will only as a matter of self-determination of peoples, and only in extreme circumstances, when the people concerned are continuously subjected to most severe forms of oppression that endangers the very existence of the people". Did the situation in Crimea reflect these conditions and therefore necessitate external self-determination? The answer is clearly negative.

[73] UN Doc S/PV.6367 (2010), p. 9.

[74] Address by President of the Russian Federation, *supra* nota 62.