

CONNECTIONS

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Kosovo 1999 and Crimea 2014: Similarities and Differences

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Introduction

Since the so-called Kosovo conflict of 1999 the views of states, including those of major players, have been divided as to whether it was a humanitarian intervention or the collective aggression of NATO member states. In 2014 the Russian Federation annexed Crimea and Sevastopol (formally separate entities) to its territory. Since then the argument has shifted and the current disagreement centers around how we should assess these two changes of territorial status quo (Kosovo and Crimea) in Europe. The situation is further complicated as states wish to present their actions as moral and legal (the general expectation is that they do so). This results in a situation where the dominant discourse is supposed to support the aspirations of states both in the east and in the west. The main effort of each party goes in countering the other's position.

It is difficult to get hold of a reliable set of facts, as these are presented selectively by the different parties. A further challenge arises in that different fields are not kept distinct from one another, and hence the legal and political analyses are often used interchangeably and with insufficient differentiation. This is aggravated by the fact that the so-called normative approach to international (and domestic) politics prevails in the analysis. Every state feels compelled to prove that it acts in full accordance with international norms, including legal rules and moral predicaments. However, any attempt to correctly analyze the change of the territorial status quo in the two cases mentioned above requires the contrary: keeping the different aspects strictly separate and only synthesizing the results in the conclusions.

In this article I endeavor to keep the legal analysis separate from the political and moral assessment and wish to state in advance that they do not necessarily manifest in the same direction. Moreover, when the topic of analysis is as politically heavy-loaded as the change of territorial status quo in Europe, the international legal assessment must be disaggregated further. Namely, there is the positive international law as it exists, *de lege lata*, as adopted by the states or as it appears as *jus cogens*. There is also international law that does not exist, yet about which we speak as *de lege ferenda* with a view to its future evolution. Such differentiation will be particularly relevant in this case due to the swift evolution of norms in the area of humanitarian intervention relevant as point of reference in the case of Kosovo and the ambiguous content of the right to self-determination in the case of Crimea.

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International law has a further characteristic feature. Namely, its development cannot flexibly follow historical changes. This is particularly noticeable when major historical changes occur at a rapid pace. This was the case before and during World War II and more recently as the Cold War came to an end. The international system changed and international law in some areas did not follow. The gap between the international system and international law, where the latter forms part and parcel of the former, has widened. Furthermore, universal international law most often requires the consent of states in various regions of the world. This presents a challenge as states often profess different values and their value judgment serves different interests.

It is the purpose of this article to present the legal situation that underlies the two cases, the position of the main actors, and attempt to draw separate conclusions as regards the assessment *de lege lata* and *de lege ferenda*.

Legal Perspectives

International law is extremely restrictive insofar as territorial changes in the international system are concerned. This is fully understandable given that the foundation of the system is the existence of sovereign states. State sovereignty is established on a given territory. As sovereigns are obliged to respect each other's territory, territorial change can only occur with the consent of the state that practices sovereignty over it. Moreover, since 1945, if not earlier, there has been an unconditional prohibition to use force in interstate relations. The UN Charter obliges every state, be they members of the United Nations or not, to respect its rules (see art. 2, para. 6 of the UN Charter). There are basically two exceptions from the general prohibition of the use of force: individual or collective self-defense and enforcement by the United Nations. Threat or use of force not covered by the two exceptions fall under the general prohibition and are hence illegal. Assuming that the self-defense clause applies only in reaction to an earlier (and hence illegal) use of force and that the UN Security Council would not approve the use of force unless a state illegally used force earlier, use of force in international relations would not only be illegal but also unimaginable. However, the use of force has by far not become exceptional.

Such a simple picture does not help solve every problem. International law traditionally did not address domestic contingencies. However, in light of the development of international law since the end of World War II, certain domestic contingencies—in particular the violation of human rights—have remained unaddressed. Many territorial changes are induced by domestic political processes often supported by external forces, namely, foreign states. States are rarely ready to give up (a part of) their territory without contesting those that would like to acquire it. Hence, territorial changes are the most frequent sources of interstate conflict. It is difficult to imagine how to successfully persuade a state to consent to a change (reduction) in its territory without violence.

Looking at the evolution of international law since the adoption of the UN Charter reveals that one of the most important changes has been the weakening of the cohesive structure of the basic principles of international law enshrined in the Charter. Whereas in 1945 it was easy to conclude that all Article 2 principles protected the state (sovereign

equality, peaceful settlement of disputes, prohibition on the threat or use of force, non-interference in domestic affairs); since then, two principles have enriched the basic principles of international law. Both the right to self-determination and the respect for human rights protect entities other than the state. In the case of the right to self-determination, it is a collective entity—ethnicities, peoples—whereas the protection of human rights concerns the individual, and in some cases, a group of individuals. The former could serve as a point of reference lending external support to groups that label their fights as fought in the name of self-determination. In accordance with a non-binding resolution of the UN General Assembly:

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination, freedom and independence. In their *actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support* in accordance with the purposes and principles of the Charter.¹

This means that those claiming to be oppressed may receive external support for their fight, whereas states may contest intervention on account of their sovereignty. The sovereign, if necessary, may also seek external assistance to successfully contest those who fight in order to realize their right to self-determination. In this fight the state will naturally deny that the opponent is fighting for self-determination and will deprive the group of that “label” of legitimacy. Instead, the state, trying to retain its territory, will call them separatists, extremists, if not outright terrorists – with reason or without, all so that the state can avoid accusations of having violated international law. Both parties will “mainstream their messages” and use discourses that make their behavior legal and also morally acceptable.

The *de lege lata* situation is further complicated, given that since the beginning of the 21st century steady efforts have been made by politicians, diplomats, and experts to make international law reflect the fact that many outrageous developments cannot be addressed and condemned as they occur in or originate within a domestic context. A whistle-blower in this case was the UN’s iconic secretary general, Kofi Annan: “[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?”²

The consideration given to this pertinent problem resulted in the Responsibility to Protect (R2P) principle and report and in an avalanche of well-intentioned literature

¹ United Nations General Assembly, Resolution 2625 (XXV), 24 October 1970, Annex: Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, available at <http://www.un-documents.net/a25r2625.htm> (emphasis added).

² Kofi A. Annan, *We the Peoples: The Role of the United Nations in the 21st Century* (New York: United Nations, Department of Public Information, 2000), 48, available at <http://www.unmillenniumproject.org/documents/wethepeople.pdf>.

crossing the frontier of state sovereignty in the name of humanity and addressing matters that belong to domestic jurisdiction. Although many remember R2P as grounds for humanitarian intervention, those who were present at its inception share the view that the primary intention was to prevent intervention and give a better chance to conflict prevention.³ It is essential to note, however, that there is no legally binding document that codifies humanitarian intervention.⁴ Many states would object to making the philosophy of R2P part of universal international law. Short of such a norm, humanitarian intervention, however regrettable it may be, does not have solid legal foundations. Making humanitarian intervention part and parcel of positive international law is a slippery slope as it will provide further legal grounds to question, weaken, and undermine sovereignty. This is largely unacceptable to many countries and not only to those that systematically violate the human rights of their populations. While regionally, in Europe, it may not be possible to agree upon humanitarian intervention due to the abuse of this right in post-Cold War history, globally the reason for this is more so due to philosophical opposition against further eroding state sovereignty and providing grounds for interference. This was clearly evidenced in Libya in 2011, a case often regarded as the first UN Security Council approved humanitarian intervention. Irrespective how noble the objective was, the longer term consequence is a failing, if not outright failed state that also contributes to exporting instability.

The fact humanitarian intervention has not become part of positive international law does not mean much as far as the prohibition of the use of force is concerned. Short of (individual or collective) self-defense, there is one body in the world, the UN Security Council, in a position to decide whether “threat to the peace, breach of the peace or act of aggression” is in place.⁵ It is up to the Security Council in accordance with the rules enshrined in the Charter to take action or not (be the action a recommendation, a resolution, or a non-military or military sanction). The “threat to the peace” is a particularly elusive category, as it can be easily subjected to arbitrary interpretation. It is clear that if domestic conflicts have international repercussions, then threat to the peace also has to embrace situations that are of a domestic nature and preferably before they escalate internationally. Because of the ambiguity of the terms in the title of Chapter VII of the Charter, it is largely subject to the wisdom and the interpretation of the UN body to approve a decision. However, the following should be taken into consideration: the UN Security Council has behaved quite responsibly over the seven decades since its incep-

³ This is clear from the Report when it concludes among its priorities that “Prevention is the single most important dimension of the responsibility to protect.” *Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, December 2001), Priorities, p.xi., http://www.responsibilitytoprotect.org/ICISS_Report.pdf.

⁴ As of October 2015, 38 UN resolutions referenced Responsibility to Protect. However, this does not change the situation as far as the absence of a legally binding norm. See www.globalr2p.org/resources/335.

⁵ Charter of the United Nations, Chapter VII, available at <http://www.un.org/en/charter-united-nations/index.html>.

tion. Perhaps more importantly, the structure of the Security Council is such that it is difficult to abuse its powers. First of all, there are five permanent members, which can exercise a veto to block any resolution. The privileged status of the permanent members is the “price” the world is paying in order for the five states to remain interested in participation and in the functioning of collective security under the UN Charter. However, during the better part of the last seventy years since the inception of the United Nations, the structure of the international system has significantly broadened the circle of states enjoying impunity. During the Cold War very few states were not integrated on one side or another of the “divide.” They were proxies of one permanent member or another in the Security Council. They were hence protected, as their patron was always ready to stand behind them and cast a veto for them. This situation has reemerged and once again many states benefit from the protection of permanent members. It is a consequence of this situation that quite often no resolution can be passed concerning a state protected by a permanent member.

Kosovo and Crimea *de lege lata*

Neither the use of force in order to curtail the deprivation of Kosovo’s population of its fundamental human rights, nor the use of force to annex Crimea to the Russian Federation were based on the approval of the UN Security Council. In that sense, under the Charter, they have the same status and both actions could be regarded illegal, to which the Russian Federation has been referring since the Kosovo operation. This is certainly an important similarity between the two cases irrespective of the fact that they have significantly different foundations and, as will be demonstrated later, the assessment *de lege ferenda*, morally as well as politically, would not lead to the same conclusion.

It is a further similarity that force was used in both cases. In the case of Kosovo (Serbia), it meant bombing another state. In the case of Crimea (Ukraine), it meant the use of armed forces stationed on that territory in contravention of the agreement on the basis of which these forces were present. In its Annex, the UN General Assembly defines aggression as:

Any of the following acts ... qualify as an act of aggression: ... b) Bombardment by the armed forces of a State against the territory of another State ... e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement.⁶

The first case is extremely simple. Nevertheless, it must be noted that if bombardment by one state is not permitted, it is certain that bombardment by a group of states—members of an alliance—is also prohibited. The case of Crimea is a bit more complex, as one must refer to the agreement of the Russian Federation and Ukraine signed in 1997 and later extended in 2010 in the so-called Kharkiv Pact. According to the latter’s most relevant paragraph: “Military formations carry out their activity at stationing locations in

⁶ United Nations General Assembly, Decision 3314 (XXIX), “Definition of Aggression,” Annex, Art. 3(b) and 3(e).

accordance with Russian Federation legislation, respect Ukraine's sovereignty, abide by its legislation, and do not allow interference in Ukraine's internal affairs."⁷ There is no doubt that the agreement was in force between the two states when the Russian Federation used its troops in contravention of its provisions and that the 2010 extension of the treaty did not affect this part of the content of the 1997 agreement. In sum, and on the level of *de lege lata*, it is well-established that both actions violated international law.

There is one international legal document that pertains to the annexation of Crimea. Although the legally binding nature of the document may well be debated, there are overwhelming reasons to conclude that it is legally binding. Among others due to the fact that guarantees: 1. Can be directly derived from some of the basic principles of international law and hence irrespective the declaration must be respected. 2. As at least one author has argued persuasively, the commitment is repetition of obligations taken earlier in legally binding form.⁸ Namely, in December 1994 on the margins of the Budapest CSCE Summit, the Russian Federation, Ukraine, the UK, and the US signed the Budapest Memorandum on Security Assurances provided to Ukraine. Accordingly:

The Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America reaffirm their obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and that none of their weapons will ever be used against Ukraine except in self-defence or otherwise in accordance with the Charter of the United Nations.⁹

The Russian Federation was ostensibly one of the guarantors of the territorial integrity of Ukraine and with its annexation of Crimea it violated the agreement signed less than twenty years earlier. The violation continues in the southeast of Ukraine, although some of the foundations are not identical. In Crimea, a reference was made to Russian armed forces used in contravention of an agreement signed earlier, whereas in the so-called Donbas, it is "[T]he invasion or attack by the armed forces of a State of the territory of another State..." and "[T]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries..." that can be invoked.¹⁰

The Russian Federation has frequently asserted that it has not sent regular troops to the Donetsk and Lugansk areas. Evidence to the contrary has been growing gradually. Moscow also expressed the view that the Russian military personnel identified there were on holiday, i.e. not sent by the Russian state. However, the Russian argument is not

⁷ Quoted in Eric Posner, "The 1997 Black Sea Fleet Agreement between Russia and Ukraine," ericposner.com (blog), 5 March 2014, available at <http://ericposner.com/the-1997-black-sea-fleet-agreement-between-russia-and-ukraine/>.

⁸ For this see Thomas D. Grant, "The Budapest Memorandum of 5 December 1994: Political Engagement or Legal Obligation?" in *Polish Yearbook of International Law 2014*, Volume XXXIV (Warsaw: Wydawnictwo Naukowe SCHOLAR, 2015), 89–114.

⁹ United Nations General Assembly and Security Council, "Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons," A/49/765, S/1994/1399, 19 December 1994.

¹⁰ United Nations General Assembly, Decision 3314 (XXIX), "Definition of Aggression," Annex, Art. 3 (a) and 3 (g).

only flawed but also inherently weak. States are responsible for their territory and no exception has been granted to Russia since 2014 when the hostilities in Donbas broke out.¹¹ Hence, even if one gave credit to the Russian position regarding Russian military persons “on holiday,” Russia as a state would be responsible for controlling its borders and identifying its citizens beyond state borders. In sum, one way or another, it is a violation of public international law irrespective of whether Russia sends military personnel expressly, or just tolerates that its inhabitants cross the border and engage in hostilities.

The fact that there were weapon systems identified in Ukraine that were not present before and were not registered in Ukraine’s armed forces presents a further problem. When the Minsk 2 Agreement of February 2015 included reference to a weapon system that fell into this category, it was also legally clear and supported by solid evidence that the Russian Federation actively supported the separatists with military force in eastern Ukraine.¹² In sum, the Russian Federation, irrespective of making statements to the contrary, violated international law on multiple grounds.

As outlined above, international law does not offer a more positive assessment of the 1999 so-called Kosovo operation. Bombardment of former Yugoslavia (Serbia and Montenegro, including Kosovo) was not sanctioned by the UN Security Council and hence could not be regarded as legal use of force. It is also clear that a state or group thereof cannot act in self-defense outside its own territory. When a regional arrangement or agency acts under the UN Charter, it can happen on the basis of two possible grounds: 1. The peaceful settlement of disputes; 2. Enforcement action. It would be difficult, if not outright impossible, to qualify NATO’s actions as contributing to a peaceful settlement of disputes, which was rather an act of enforcement. However, the conditions of such activity by a regional arrangement or agency are restrictive. The Charter clearly states that “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.”¹³ Nevertheless, NATO had already much earlier expressed its view that it was not a regional organization under the Charter.¹⁴ In spite of the difference in terminology, it is clear that NATO could not be regarded as a regional arrangement or agency. Hence, it

¹¹ Russia is not in a state of civil war. Notably, if this were the case, the central government’s responsibility still would not extend to the part of state territory that is controlled by the state’s opponent.

¹² Ivan Konovalov, “Uragannyi ogon’ po ploshadyam,” *Voenno-promyshlennyyi kur’er*, 3 April 2013, available at <http://vpk-news.ru/articles/15219>, refers to the Tornado-G and Tornado-C systems that have been in the Russian arsenal (and only there) since 2012. This is mentioned by András Rácz and Sinikukka Saari, “The New Minsk Ceasefire: A Breakthrough or Just a Mirage in the Ukrainian Conflict Settlement?” *FIIA Comment* 5 (2015): 1, available at http://www.fiaa.fi/en/publication/485/the_new_minsk_ceasefire.

¹³ Charter of the United Nations, art. 53, para. 1, available at <http://www.un.org/en/charter-united-nations/index.html>

¹⁴ A letter to this effect was sent by NATO Secretary General Willy Claes to the UN Secretary General. Reference to the aforementioned letter was made by Bruno Simma in his seminal article, “NATO, the UN, and the Use of Force: Legal Aspects,” *European Journal of International Law* 10 (1999): 10, <http://www.ejil.org/pdfs/10/1/567.pdf>.

could only act under Chapter VII of the UN Charter. However, short of a specific resolution including express authorization, NATO could have acted only in self-defense. This would have required an arbitrarily broad interpretation of the Charter, as no NATO member state was attacked. In sum, the process followed leaves no doubt that the legal foundation of the operation was missing. A few weeks before the operation, Secretary General Annan stated that “normally a UN Security Council resolution is required.”¹⁵

Kosovo and Crimea *de lege ferenda*

It is clear that both the NATO Kosovo operation and the Russian military actions in Ukraine were in breach of international law. Moving the focus of analysis to raise the question of how the two actions entailing the use of force are to be assessed in light of *de lege ferenda* politically as well as morally, the difference between the two cases will become significant.

There is solid, extensive evidence that the overwhelmingly Albanian population of Kosovo suffered persecution before the start of the military operation of March 1999. It is a separate matter as to how western powers arrived at the point of having Kosovo’s politicians demonstrate their willingness to reconcile differences with Serbia, while Serbs remained in denial.¹⁶ The two taken together, persecution and reluctance to compromise while the other party demonstrated readiness, must have provided sufficient reason to take further action to protect the rights of Kosovo’s overwhelmingly Albanian population. Nevertheless, this should not have given the right to use force, though it could be interpreted as grounds for humanitarian intervention. It could also be argued in the name of morality.

However, the case of Crimea is different. The differences extend to the following: first, Kosovo was part of a state and has achieved independence, yet with recognition by only 111 states.¹⁷ Second, Crimea has become part of another sovereign entity. Instead of Ukraine, it is now part of the Russian Federation. Third, the declaration of Kosovo’s independent statehood was based on the decision of its parliament, whereas the accession of Crimea and Sevastopol to the Russian Federation were based on a referendum of the population. Fourth, Kosovo’s separation from former Yugoslavia was achieved by the use of force, whereas Crimea changed hands peacefully. Fifth, the legal status of Kosovo was regulated internationally by UN Security Council Resolution 1244, whereas Crimea’s belonging to Ukraine was based on the fact that it was part of the Ukrainian Soviet Socialist Republic since 1954 and, when the Soviet Union dissolved, it remained

¹⁵ Quoted in Simma, “NATO, the UN and the Use of Force,” 8. (Emphasis in the original.)

¹⁶ How U.S. diplomacy achieved that the Kosovo delegation signed the so-called Rambouillet accord whilst Serbia did not is documented by James Rubin, then spokesperson of the State Department. See James P. Rubin, “Countdown to a Very Personal War,” *Financial Times*, 30 September 2000; and James P. Rubin, “The Promise of Freedom,” *Financial Times*, 7 October 2000, i, ix.

¹⁷ On October 3, 2015. See <http://www.kosovothanksyou.com/news>.

part of Ukraine in accordance with the *uti possidetis* principle. Finally, neither decision was internationally monitored.

Both cases raised the right to self-determination and in neither case can it be regarded as legally unobjectionable. Kosovo could formally not claim independent statehood on its own as the UN Security Council resolution that was adopted upon the end of hostilities in June 1999 reaffirmed “the commitment of the Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act.”¹⁸ It reaffirmed the provision of “an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions.” It also reaffirmed “overseeing the transfer of authority from Kosovo’s provisional institutions to institutions established under a political settlement.”¹⁹

The situation is different in the case of Crimea. There was no international prohibition to change its territorial status. However, a few conspicuous factors have to be taken into account. First of all, the constitution of Ukraine does not allow holding a local referendum. Moreover, the constitution specifically mentions that “Issues of altering the territory of Ukraine are resolved exclusively by an all-Ukrainian referendum.”²⁰ Understandably, the Ukrainian authorities have never given their consent to either holding the referendum in Crimea, or to its result – the changing of its territorial status. Furthermore, the presence of Russian armed forces in Crimea and their “involvement in organization before the referendum” made the process and the result all the more questionable. This was underlined by the fact that Ukraine’s amended constitution clearly pointed out that “The location of foreign military bases shall not be permitted on the territory of Ukraine.”²¹ This meant that Russia faced a threat to the future stationing of its armed forces in Crimea, in spite of the Kharkiv agreement that was still in force. This must have caused worries in Moscow.

There are various opinions about the results of the referendum. Officially, 96.77 percent of the voters supported the “reunification” of Crimea with the Russian Federation and 2.51 percent supported Crimea staying with Ukraine.²² The chairman of the OSCE declared the referendum illegal. In spite of the invitation by the legislative body of the

¹⁸ United Nations Security Council (SC), Resolution # 1244, 10 June 1999, preamble and point 10.

¹⁹ *Ibid.*, point 11 f).

²⁰ Constitution of Ukraine, adopted on June 28, 1996, with amendments adopted before February 22, 2014. Available in English: Council of Europe, European Commission for Democracy through Law (Venice Commission), Constitution of Ukraine – Text provided by the Ukrainian authorities on 13 March 2014, CDL-REF 2014) 012, art. 73.

²¹ *Ibid.*, art. 17, last paragraph.

²² See the website of the news agency of the Republic of Crimea, c-inform.info.

Autonomous Republic of Crimea, the OSCE declined to monitor it.²³ The Russian Federation succeeded in mobilizing some western observers who arrived from right-wing parties supportive of Moscow and were occasionally subsidized by it.²⁴ The absence of official observers was understandable. It must be noted, however, that the absence of international election monitoring and monitors has various consequences. On the one hand, it deprives the referendum (or the election) of its international legitimacy. Oftentimes this is the objective rejecting the request for election observation. On the other hand, the monitors' absence deprives the organization and the broader international community of reliable information.

The Constitutional Court of the Russian Federation, a few days after the referendum in Crimea, passed a judgment with a set of reasons delineating why the referendum was legal.²⁵ This opened the way for the Russian Duma to adopt the necessary laws on the incorporation of Crimea and Sevastopol into the Russian Federation. The referendum suffered a major shortcoming related to the presence of Russian military forces in Crimea. The International Court of Justice, in its advisory opinion on the declaration of the independence of Kosovo, clearly stated that the 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*).”²⁶ The mere fact that the Russian forces were present in Crimea and were not used in concord with the treaty under which they were allowed to stay in Ukraine presented an irreparable flaw of the referendum. However, the advisory opinion of the International Court of Justice does not serve as precedent and not even a source of international law unless it codifies customary international law. Hence, reference to it as straddling Kosovo and Crimea may not be fully convincing. A greater problem inheres in the fact that the use of Russian armed forces on the territory of Crimea in violation of the underlying

²³ “Crimea Sends Official Invitation to OSCE to Monitor Referendum,” *Kyiv Post*, 11 March 2014, available at <http://www.kyivpost.com/content/ukraine/crimea-sends-official-invitation-to-osce-to-monitor-referendum-339003.html>; and “OSCE Chair Says Crimean Referendum in its Current Form Is Illegal and Calls for Alternative Ways to Address the Crimea Issue,” 11 March 2014, available at <http://www.osce.org/cio/116313>.

²⁴ Since the Crimea referendum, those observers who found everything in order, have faced an entry ban in Ukraine.

²⁵ *Postanovleniie po delu o proverke konstitutsionnosti nevstupivshevo v silu mezhdunarodnovo dogovora mezhdru Rossiiskoy Federatsiye in Respublikoy Krym o prinatiyi v Rossiyskuyu Federatsiyu Respubliki Krym i obrazovanii v sostave Rossiyskoy Federatsii novykh subyektov* (Judgment on the Case concerning the Review of Constitutionality of the Treaty between the Russian Federation and the Republic of Crimea on Admission of the Republic of Crimea into the Russian Federation and the Creation of New Subjects in the Composition of the Russian Federation), Constitutional Court of the Russian Federation, 19 March 2014, 6-II/2014, <http://doc.ksrfr.ru/decision/KSRFDecision155662.pdf>.

²⁶ International Court of Justice, “Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo – Advisory Opinion,” International Court of Justice Reports, 22 July 2010, para. 81, www.icj-cij.org/docket/files/141/15987.pdf.

agreement was contrary to international law per se, without reference to the advisory opinion of the International Court of Justice.

The Kosovo situation was even more blatant. There, it was the legislative branch that decided on 17 February 2008 to declare of independence. At the time, Kosovo was under UN administration. Thus, the UN Interim Administration Mission in Kosovo (UNMIK) should have approved or disapproved the decision of Kosovo's legislative bodies. However, the UN remained silent on the matter. This political development created a *fait accompli* for international law.

Conclusion

Territorial change is a regular occurrence in international relations. As sovereignty is practiced on every habitable part of the globe, establishing new sovereignty on a territory—be it the creation of a new state or the replacement of a former sovereign by another one—is the most politically loaded change in human history. Such change belongs to that particular realm where international law often gives way to extra-judicial processes and is practically violated.

In analyzing the so-called Kosovo conflict of 1999 and the accession of the Crimea to the Russian Federation, it is clear that both violated international law. It is in this sense correct to draw parallels and refer to similarities. However, beyond the *de lege lata* similarity, the two cases are different. Emerging norms of international law would provide stronger support to NATO's actions for terminating the persecution of Kosovo's population by the authorities of Serbia and the launching of a large-scale humanitarian emergency response. Kosovo was deprived of its autonomy by the regime in Belgrade back in 1989. The legality of changing the territorial status quo and integrating Crimea into the Russian Federation cannot be based on the same. Crimea enjoyed significant autonomy and there were no systematic complaints about discrimination against the population and certainly not against the Russian ethnicity.²⁷ In one sense, Crimea's changing of hands was better prepared than Kosovo's declaration of independence. Whereas a referendum decided the former, the latter was declared by the legislative authority in Pristina. Hence, it would be easier to argue for the democratic nature of the change in Crimea. However, knowing the rules of UN Security Council resolution 1244 and the role of UNMIK, it would have been impossible to hold a referendum without clearly violating the rules of both and thus it is understandable that the Kosovo authorities did not go down that road.

The use of force in former Yugoslavia suffered one major legal flaw: it was not sanctioned by the UN Security Council. The far lower intensity and camouflaged use of force in Crimea cannot be regarded as legal on the grounds of the persecution of the ethnic Russian population, and the reference to practicing the right to self-determination does

²⁷ Nevertheless, the Russian Federation made an attempt to argue on the basis of persecution but no evidence could be provided. See Glenn Kates, "Why Is Crimea Different from Scotland or Kosovo?" *Radio Free Europe – Radio Liberty* (RFERL), 13 March 2014, available at <http://rferl.org/articleprintview/25296187.html>.

not hold. Moreover, the Russian Federation disregarded a number of substantive legal rules, both international and domestic. The December 1994 guarantee for the territorial integrity of Ukraine as an independent state, given, among others, by the Russian Federation, is certainly the most important and unambiguous among them.

The difference between the two cases is primarily not in a more severe versus less severe violation of international law; it is in the legitimacy of the two actions lent by the historical processes that led to them. NATO's use of force in order to terminate the persecution of the Kosovars and the severe humanitarian situation created a point of reference for the Russian Federation, which Moscow did not miss the opportunity to use. With this, however, Russia, rather than respecting international law, has *de facto* recognized that the illegal activity of one international actor should legitimize the illegal action of the other. With this, the Russian Federation followed the West into the slippery slope of weakening the legal foundations of the international system.

Bibliography

Annan, Kofi A.. *We the Peoples: The Role of the United Nations in the 21st Century* ([link is external](#)). New York: United Nations, Department of Public Information, 2000.

Grant, Thomas D.. "The Budapest Memorandum of 5 December 1994: Political Engagement or Legal Obligation?" *Polish Yearbook of International Law* 34 (2014): 89-114.

Kates, Glenn. *Why Is Crimea Different from Scotland or Kosovo?* ([link is external](#)). Vol. 13 March 2014. Radio Free Europe – Radio Liberty (RFERL), 2014.

Konovalov, Ivan. "Uraganniy ogon' po ploshadyam" ([link is external](#)). *Voennopromyshlennyy kur'er* (2013).

Posner, Eric. *The 1997 Black Sea Fleet Agreement between Russia and Ukraine* ([link is external](#))., 20014.

Rácz, András, and Sinikukka Saari. "The New Minsk Ceasefire: A Breakthrough or Just a Mirage in the Ukrainian Conflict Settlement?" ([link is external](#))" *FIIA Comment* 5 1 (2015).

Rubin, James P.. "Countdown to a Very Personal War." *Financial Times* (2000).

Rubin, James P.. "The Promise of Freedom." *Financial Times* (2000).

Simma, Bruno. "NATO, the UN, and the Use of Force: Legal Aspects" ([link is external](#)). *European Journal of International Law* 10 (1999).