



Who Owns the State?

Secession and Self-Determination after *Kosovo*

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Who owns the State?

- The *Kosovo* Advisory Opinion
 - Background
 - Reasoning of the Judges
 - Interpretation of the Question
 - Consequences and Ramifications
- In *Kosovo* the ICJ was faced with two competing claims of ownership – that of the population (self-determination), and that of the State (Sovereignty). It diminished both claims, and has thus cast the ownership of the State into doubt.

Kosovo: Timeline to Independence (1)

- | | |
|---------------------------------|--|
| 25 th March 1991 | Slovenia and Croatia declare independence from Yugoslavia, and kick-start its disintegration; |
| 17 th September 1991 | Macedonia declares independence; |
| 22 nd September 1991 | Kosovo declares independence for the first time, but is recognised only by Albania; |
| 3 rd March 1992 | Bosnia and Herzegovina declares independence; |
| | These declarations precipitated a prolonged and bloody conflict in the Balkans, during which many atrocities were committed. |
| March 1999 | NATO begins air-strikes against Serbian targets following failed ceasefire talks. As a result the conflict intensifies; |

Kosovo: Timeline to Independence (2)

- June 1999 A ceasefire agreement is signed. Serbian forces in Kosovo agree to withdraw from the province, and NATO peacekeepers are deployed;
- 10th June 1999 The Security Council passes resolution 1244, which created an interim administration in Kosovo under the auspices of the United Nations Interim Administration Mission in Kosovo (UNMIK) to guarantee the autonomy of the province and to provide governance functions;
- 2001 UNMIK promulgates regulation 2001/9 establishing a Constitutional Framework for Provisional Self-Government;
- 2008 Kosovo's Assembly declares the province independent from Serbia, and states its commitment to continue to work with UNMIK and to comply with international law;

Since 2008 Kosovo has been a *de facto* independent State, supported by UNMIK and EULEX, and with a continued NATO presence under its KFOR mandate.

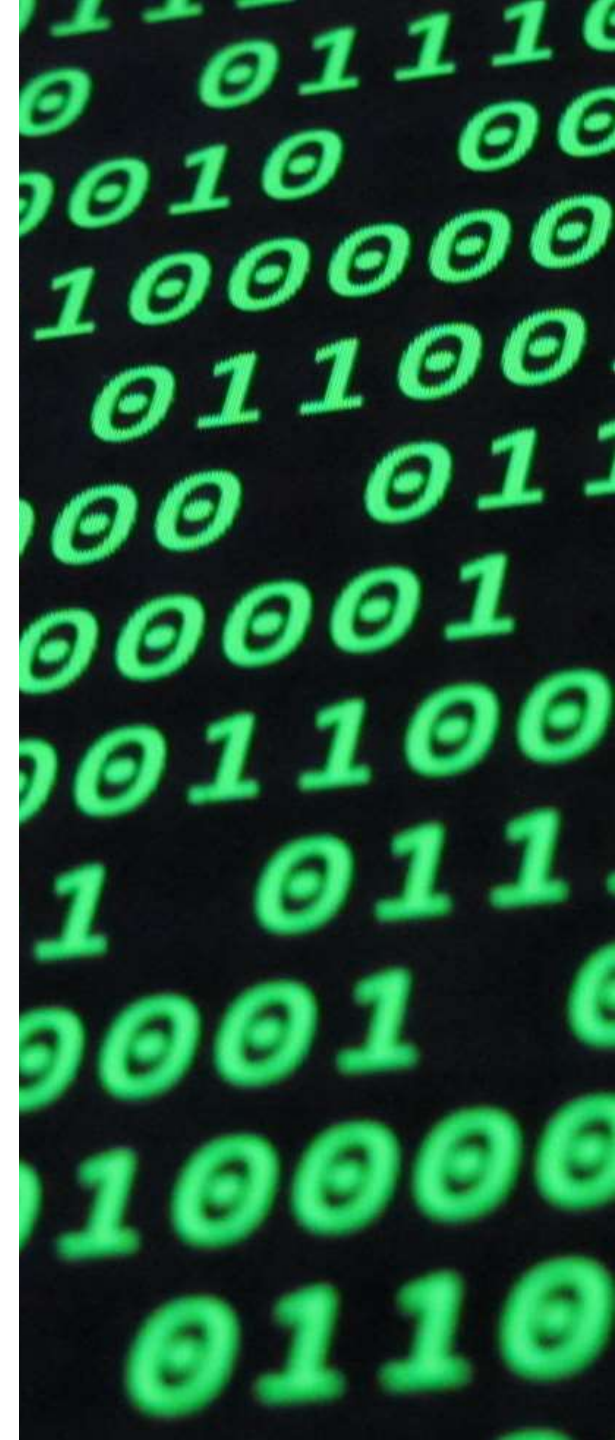


The Judgment of the Court

- The UNGA asked the Court:
‘Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?’
1. The declaration of independence was *probably not issued by the PISG*;
 2. Only sought an answer on whether the declaration was *prohibited*.

Why is that Problematic?

- The Court construed international law as a binary system, where only prohibitive rules exist.
- An action is either prohibited, or is unregulated by law. It consciously chose not to consider permissive rules.
 - Problematic for the idea of a gapless legal order.
 - Failed to consider the idea of balanced legal norms
 - Calls into question the concept of *international law rights*.





Judge Simma's Opinion

'I find [the Court's] approach disquieting in the light of the Court's general conclusion [...] that the declaration of independence "did not violate international law". [...] T]he Court has concluded in the present Opinion that, in relation to a specific act, it is not necessary to demonstrate a permissive rule so long as there is no prohibition.

'In this respect, in a contemporary international legal order which is strongly influenced by ideas of public law, **the Court's reasoning on this point is obsolete.** [...]

'**I believe that the General Assembly's request deserves a more comprehensive answer, assessing both permissive and prohibitive rules of international law.** This would have included a deeper analysis of whether the principle of self-determination or any other rule [...] permit or even warrant independence (via secession) of certain peoples/territories.' [2-3, 7].

Self-Determination

- In 2008 there was a developing International law right to secede as a remedy of last resort for a people.
- In its Judgment the Court effectively nullified that emerging right.
- The Court said that IL would take account of consequences without regard to rights
- Declaring independence only creates consequences if it is also possible to *displace sovereignty*
- A declaration of independence “is a collection of words writ in water; it is the sound of one hand clapping.” [James Crawford, CR 2009/32, p.47].





Sovereignty

- The Court also curtailed the scope of Sovereignty.
- Sovereignty had previously been understood as an attribute of States, but the Court cast it as an obligation.
- States, it said, are under an obligation not to infringe upon the territorial integrity or autonomy of another.
- That obligation, it said, applies only to States, and does not bind non-State actors (such as secession movements).
- States are not entitled to the protection of their territorial integrity against secessionists within their territories.

Where does that leave Secession?

‘Here, it appears, in a terribly primitive form, the mythic ambiguity of laws that may not be “infringed”—the same ambiguity to which Anatole France refers satirically when he says, “Poor and rich are equally forbidden to spend the night under bridges.” [...] For from the point of view of violence, which alone can guarantee law, there is no equality, but at the most equally great violence.’

Walter Benjamin, *Zur Kritik der Gewalt*.

The Ownership of the State

- The American and French declarations of 1776 and 1789 ‘marked the demise of the notion that individuals and peoples, as subjects of the King, were objects to be transferred, alienated, ceded, or protected in accordance with the interests of the monarch.’

Antonio Cassese, *Self-Determination of Peoples*

- UN Charter:
 - 1(2): 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;
 - 2(1): The Organization is based on the principle of the sovereign equality of all its Members;
 - 2(4): All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Ukraine: Putin signs Crimea annexa

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UN general assembly calls Crimea vote illegal

One hundred nations declare Crimea referendum illegal, with 11 against and 58 obtaining in largely symbolic resolutions.

20 Mar 2014 11:22 GMT | Russia, Europe, Ukraine

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A photograph showing several people seated at a long table in a conference room. They appear to be engaged in a discussion or listening to a speaker. A nameplate for 'BELARUS' is visible on the table.

Ukrainian forces withdraw from Crimea

By Nick Clements-Bruce April 12, 2014

Europe Tech Science Health Latin America Middle East

A close-up photograph of the Ukrainian national flag, showing the blue and yellow horizontal stripes.

REUTERS

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World | Thu Mar 20, 2014 8:40am EDT

Russian forces seize two Ukrainian bases in Crimea

SEVASTOPOL, UKRAINE/MOSCOW | BY ALEKSANDAR UNOSIC AND MARIA KISELYOVA

A photograph showing a group of Russian soldiers in military uniforms. Some are wearing berets, and they appear to be in a public setting, possibly a press conference or a public display.

the guardian

Putin confirms Crimea annexation as Ukraine soldier becomes first casualty

Russian president denounces hypocrisy of west but Ukraine's PM accuses Moscow of war crime after soldier is shot dead

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A photograph of Vladimir Putin, the Russian President, wearing a dark suit and a red sash, speaking into a microphone.

Putin signs treaty to annex Crimea as Ukraine authorises use of force

- One killed in base attack, captain also injured
- Assault by 'unknown forces'
- Ukrainian PM calls shooting 'war crime'
- Putin signs treaty for annexation
- Ukraine says it does not recognise annexation treaty
- UK halts military exports to Russia
- Read the main points from Putin's speech
- Read the latest summary

A photograph of Vladimir Putin, the Russian President, looking towards the camera.

On Ownership

‘And because the condition of Man, (as hath been declared in the precedent Chapter) is a condition of Warre of every one against every one; in which case every one is governed by his own Reason; and there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemyes; It followeth, that in such a condition, **every man has a Right to every thing; even to one another's body.** And therefore, as long as this naturall Right of every man to every thing endureth, there can be no security to any man, (how strong or wise soever he be,) of living out the time, which Nature ordinarily alloweth men to live.’

Hobbes, *Leviathan*

‘**This can be done after no other manner, than by a convention entered into by all the members of the society to bestow stability on the possession of those external goods,** and leave every one in the peaceable enjoyment of what he may acquire by his fortune and industry. By this means, every one knows what he may safely possess; and the passions are restrained in their partial and contradictory motions. Nor is such a restraint contrary to these passions; for if so, it could never be entered into, nor maintained; but it is only contrary to their heedless and impetuous movement. Instead of departing from our own interest, or from that of our nearest friends, by abstaining from the possessions of others, we cannot better consult both these interests, than by such a convention; because it is by that means we maintain society, which is so necessary to their well-being and subsistence, as well as to our own.’

Hume, *A Treatise of Human Nature*