



The Anatomy of Annexation: How a 2010 ICJ Ruling Destabilized International Law to Putin's Benefit

Description

Vladimir Putin's speech to mark the annexation of four Ukrainian regions was rich in history and hyperbole. However, the Russian leader leveled an accusation at the West it struggles to convincingly dismiss:

"It was the so-called West that trampled on the principle of the inviolability of borders, and now it is deciding, at its own discretion, who has the right to self-determination and who does not."

For those with long-enough memories, this refers to Kosovo. When the ethnic-Albanian leadership of the Serbian province unilaterally declared independence in 2008, most of the West immediately recognized it as a state (overall, slightly less than half of UN member states have done so, with several reversing their decisions). The UN Charter, which guarantees the sovereignty and territorial integrity of its members, was simply ignored. For Putin, his salami slicing of other nations begins with Kosovo: it has been repeatedly cited as precedent in recognizing or annexing South Ossetia, Abkhazia, Crimea, and now the latest regions in eastern and southern Ukraine.

This is not to point to a false equivalence between the West and Russia. It only highlights the former's once circumstantial approach to principles it now proclaims sacrosanct in Ukraine. In the age of Western interventionism following the Cold War, the principle of territorial integrity has never been applied consistently. Instead, it has been contingent on friendship: whether the West prefers those behind attempted secession, or those from whom they are trying to break away. Unfortunately, that inconsistency has denuded international law of its authority, creating a world where unilateral declarations of border changes become permissible.

Speaking from Experience

As president of Serbia at the time of Kosovo's attempted secession, I stated that the West's actions "annuls international law, tramples upon justice and enthrones injustice." That it set a dangerous precedent was reiterated by various world leaders, including some in the West who worried of its destabilizing effects on international relations. Ominously, already in 2008 Putin warned that the West

did not grasp the extent of its consequences: the recognition of Kosovo was “a two-ended stick and the second end will come back and hit them in the face.”

Some Western politicians argued Kosovo was a *sui generis* case: it set no precedent for others who aspired to independence because it was unique. However, on what grounds was never made clear.

It didn't pass the sniff-test. Within a matter of months, Russia would recognize Abkhazia and South Ossetia, secessionist regions in Georgia that had declared independence more than 15 years beforehand. Then-President Dmitry Medvedev would write in the *Financial Times*: “We argued consistently that it would be impossible, after that [the recognition of Kosovo], to tell the Abkhazians and Ossetians (and dozens of other groups around the world) that what was good for the Kosovo Albanians was not good for them.” Russia both criticized the decision, then also used it as a precedent. The double standard could now be used by anyone.

Little in principle separated the three secessionist regions. In fact, much in context connected them: Abkhazia, Kosovo, and South Ossetia had been autonomous regions within socialist republics inside communist blocs; all had their autonomy stripped from them upon the collapse of the Soviet Union and Yugoslavia; all had proclaimed independence on the basis that it protected the ethnic minority—Russians and Albanians, respectively—from the parent state. The main difference lay in those doing the recognizing: Russia on one side, the United States and almost all its NATO allies on the other.

For Kosovo, the West would argue the ghost of the Western Balkans wars from the 1990s changed everything. Yet in 2008, Kosovo Albanians faced no existential pressures. The Serbian leadership had grappled with its history, apologized for war crimes committed at Srebrenica, Bosnia, and Vukovar, Croatia, and fulfilled all obligations towards the Hague Tribunal, established by the UN to prosecute crimes committed during conflicts in the Balkans. Our government was on a liberal and pro-European trajectory. We were a fully-fledged democracy. A deal for extensive and full Kosovo autonomy within the Serbian state was on the table. Even the then British ambassador told the UN Security Council that “it is not ideal for Kosovo to become independent without the consent of Serbia and without consensus in this (Security) Council.”

There was, however, one difference: the Kosovo Albanians knew they had the full support of the United States, which had intervened on their side in the 1990s in a war while Serbia was ruled by Slobodan Milosevic—so, before the restoration of Serbia's democracy. This emboldened their leadership to shun compromise and reject Serbian offers of full autonomy.

None of this means Putin's claims today of a neo-Nazi genocide against ethnic Russians are true, or that thousand-year-old histories should be the basis for borders, or that the referendums to join Russia in the four Ukrainian regions are justified. What it does mean, however, is that it is the West that opened the door through which Putin would step through.

Perhaps more damaging was a by-product of the episode. Kosovo not only revealed the West thought there should be one set of international rules for themselves, and another for everyone else; it also led to an advisory opinion from the International Court of Justice (ICJ) that would weaken the cornerstone of the international legal architecture—territorial integrity. Its destabilizing effects are *only beginning* to percolate through the international order. The story behind its formation deserves to be better understood.

The Wisdom behind International Law

International law is by nature conservative. Borders are not perfect. But when the UN Charter was written in the ashes of the Second World War, a new member-state's imperfect lines were to be recognized, because that member-state committed to recognizing all others. On admittance, those lines bound a nation's territorial integrity—the lynchpin of the new order. UN states were codified as being the fundamental units of international relations and dispute resolution, rather than bonds of ethnicity.

Leaders recognized that tweaking at the edges would cause the edifice to collapse. Any violation was to be condemned because, if permitted, it would weaken the entire system. That is why, whenever a dispute arose over borders, the UN Security Council would favor territorial integrity.

The preference for the imperfect over the alternative would be underlined in the coming decades. As independence movements swept Africa in the 1950s and 1960s, liberation leaders were left with a dilemma. The continent was home to the world's least sympathetic borders. Its straight lines spoke to colonialists armed with pencils, rulers, and unreliable maps in Europe, rather than the realities of geography, religion, and ethnicity on the ground. The newly independent nations met in Cairo in 1964 under the Organization for African Unity to resolve the problem of their fabricated borders. They signed an agreement that, whilst recognizing that “border problems constitute a grave and permanent factor of dissension,” they nonetheless pledged to “respect the borders existing on their achievement of national independence.” They too recognized the alternative—redrawing the map—would unleash chaos.

Territorial integrity was the crowning principle of the post-World War II era. However, the UN charter also enshrined what has become a misunderstood principle: the right to self-determination. But it only granted a right to an independent state in cases of colonization or foreign military occupation should it result in an independent state. Specifically, this referred to foreign holdings, not territories within a state. It did not grant ethnic minorities the right to secede. Nevertheless, the Kosovo Albanians, and many other secessionist groups, would declare independence on the grounds of self-determination.

The Error of the ICJ

In February 2008, after the West rushed to recognize Kosovo, my government asked the ICJ for an advisory opinion. First, we needed a referral from the UN General Assembly. Many in the West initially opposed the proposal, but after pressure from other nations that criticized the blocking of a legal and peaceful path to resolution, most would end up abstaining from the vote on the UN resolution. Still, the United States and Albania would be amongst the mere six UN member-states that would vote against referring the case to the ICJ. Presumably it was preferable to be seen as obstructing peaceful resolution, rather than to have an advisory opinion.

Conclusively referred to by the General Assembly, Western lobbying of ICJ judges then began in earnest. Fortunately for those governments, the legitimacy of an international court is different to national sovereign jurisdiction. In the former, it rests on the voluntary political buy-in by individual nations; in the latter, citizens are—at least in principle—automatically bound by state law.

The United States and others let it be known that if Kosovo's declaration were ruled illegal, it would simply ignore the opinion. A rejection of an advisory ruling by the most powerful countries on Earth would have punctured the court's credibility, permitting others to equally ignore its conclusions.

The ICJ had been here before. It had been plunged into irrelevance for nearly two decades after a ruling in 1966 on South West Africa, now Namibia, that was widely seen as upholding colonialism. In its immediate aftermath, the supposed world court would end up hearing maritime disputes referred by mostly European nations. It only recovered credibility with the developing world after a series of later decisions that held up justice against powerful nations.

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