

# THE ANATOMY OF ANNEXATION

## HOW A 2010 ICJ RULING DESTABILIZED INTERNATIONAL LAW TO PUTIN'S BENEFIT

Boris Tadić

V LADIMIR 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 au-

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*President Tadić addresses the UN Security Council following the unilateral declaration of independence of "Kosovo"*

thority, creating a world where unilateral declarations of border changes become permissible.

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 International Criminal Tribunal for the Former Yugoslavia in the Hague, established by the UN to prosecute crimes committed during

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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 UK 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 Milošević—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 World War II, 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

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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 that 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.

Yet the wholesale dismissal of an opinion on Kosovo by the West threatened to be even more damaging. The judges

therefore had a thin line upon which to tread: a need to apply the tenets of international law, but also to bring the international community with it.

The conclusion in the Kosovo case was narrow and, in my opinion, wrong. It failed to give a meaningful answer to the question. It ruled that the declaration of independence itself (the document, not what it said) did not violate international law—as if this were an issue of free speech.

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Whether the act of secession was in accordance with international law was left entirely unaddressed. Nor did the court's conclusion express an opinion on whether Kosovo's recognition by third parties was contrary to international law. It stated:

“The Court does not consider that it is necessary to address such issues as whether or not the declaration has led to the creation of a State.”

This may have satisfied the West. But as a dissenting judge would write, it was clearly inadequate: “the unilateral declaration of independence [...] was not intended to be without effect. [...] It was the beginning of a process aimed at separating Kosovo from the State to which it belongs and creating a new State.”

Consequently, the ICJ advisory opinion at once justified nothing and everything. It opened the space for diametrically opposed interpretations. The Kosovo Albanians, having achieved recognition from UN member states upon its declaration, had not been found to violate international law. Yet in not confirming Kosovo's statehood, we in Serbia—and those that did not recognize Kosovo—felt the principle of territorial integrity still applied: the self-proclaimed state was an illegal entity. In reality, nothing had been resolved.

Moreover, it sent a signal to the rest of the world: independence movements could now proclaim independence risk-free, leapfrogging the national jurisdictions that bound them, with recourse to an advisory opinion in international law. Statehood was to be reliant on others' recognition, rather than being situated, as in the past, within international law. The UN member states were free to make up their own minds on whether to support them—and would do so based on who their allies were. In other words, on political—not legal—grounds. The same question the ICJ avoided answering in the case of Kosovo now stares at them from the trenches of Ukraine.



No right to secession, nor the necessary conditions for it, had been established by the ICJ's advisory opinion. Rather, a muddling precedent had been drawn into the architecture of international law. Contained within were the seeds of instability. Cross the Black Sea from Ukraine, and its damaging effects are today visible in conflict resolution in the South Caucasus.

**FAILURE IN THE SOUTH CAUCASUS**

On September 14<sup>th</sup>, 2022, the guns fell silent in the South Caucasus. Yet another ceasefire had been agreed to Europe's longest running conflict. Nearly 300 Armenians and Azerbaijanis had died in the flare up, the most significant since the Second Karabakh War came to an end on November 10<sup>th</sup>, 2020.

The conflict over Karabakh has been intractable. The region was once an autonomous province within the Soviet Socialist Republic of Azerbaijan. As the Soviet Union disintegrated, the ethnic Armenian leadership of the province declared independence in 1991, setting off a war between neighbors Armenia and Azerbaijan. The result would leave the former in control of around one-fifth of the latter's territory. In 1994, following a ceasefire that ended the

First Karabakh War, it then became one of many post-Soviet frozen conflicts—alongside Transnistria in Moldova, and South Ossetia and Abkhazia in Georgia. In 2020, the dispute heated back up: a short conflict (the Second Karabakh War) saw Azerbaijan recapturing back much—though not all—of its territory.

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At the beginning of the conflict, international law appeared unambiguously to be on Azerbaijan's side. In 1993, four separate UN Security Council resolutions, which are legally binding, would reiterate that the Armenian "occupying forces" should withdraw. Each would

be ignored by the Armenians, who at first rested their case in ancient history, backtracking on their commitment to the UN Charter. Having only recently joined the UN along with Azerbaijan, as freshly independent countries, they had agreed that Soviet-drawn borders would form each other's territorial integrity.

However, when Kosovo's claim to statehood was not rejected by the ICJ, Armenian separatists then presumed the law to be on their side. The West's assertion that it was *sui generis* fell on deaf ears: "That (ICJ) decision has an extremely important legal, political, and moral

significance and sets a precedent that cannot be confined to Kosovo," the unrecognized government of the so-called Nagorno-Karabakh Republic stated.

Like in the case of Kosovo, Azerbaijani offers for autonomy status were rejected by the Armenians, who now believed their right to self-determination would lead to their recognition as a state—eventually. Western partners did not help. Beginning to draw from temporary "facts on the ground" as a given, its commitment to the territorial integrity of Azerbaijan waned.

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In 2008, a UN General Assembly resolution was passed that reaffirmed "support for the sovereignty and territorial integrity of the Republic of Azerbaijan" and demanded the "immediate, complete and unconditional withdrawal of all Armenian forces from all the occupied territories of Azerbaijan." The United States and France voted against it. Many other Western powers abstained.

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on the grounds of vast differences in space and time. They all happened in a 30-year arc across the post-communist world. Everything, it seemed, was permissible. Nothing was principled.

Negotiations to diplomatically resolve the conflict dragged on meaninglessly. Pent up frustrations would spill over into the 2020 Second Karabakh War. That is partially a result of Kosovo: the Armenian leadership felt legitimized to hold out until its independence claim could be recognized; Azerbaijan felt its territorial integrity was the trump card. With-

out a shared common understanding of international law, the space for compromise did not overlap. With the peace process at a dead end, flexions of force became the only way to change the status quo. Two years after the Second Karabakh War in 2020, no peace settlement has yet been signed and the situation at the un-delineated international border between Armenia and Azerbaijan remains uncertain.

**THE COMING DISORDER**

Western territorial integrity fudges are becoming unstuck. In the immediate post-Cold War unipolar world, inconsistency was perhaps

tenable. Global order and its stability were underwritten by American might and supremacy. Allies were backed over principles because nobody had the cleft to challenge the West.

Today, the world is multipolar. Smaller countries coalesce around various centers of power based on their interests if it suits them. Whilst America is still the preeminent power, its relative authority has waned. In hindsight, past American (and Western) disregard for territorial integrity and international law looks short-sighted. With growing geopolitical tensions, such consensual rules are needed more than ever to temper power struggles. The conflict over Kosovo was never about one small Serbian province—it was about the challenge it represented to a post-World War II peace founded on territorial integrity. In trampling the principle, the West lost its moral authority.

Western appeals to principles of territorial integrity now hold diminished sway outside of its own backyard. When Russia officially annexed Crimea, a United Nations General Assembly resolution was tabled that

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affirmed Ukraine’s territorial integrity and rejected the validity of the referendum Putin claimed he was only honoring. The results? 100 votes for, 11 votes against, 58 abstentions, and 24 absent.

Whilst it may have passed, many UN member states clearly felt they had little to gain in upholding a system of mutual protection if others did not play by the rules. A similar vote was brought in October 2022 demanding Moscow reverse course of its “attempted illegal annexation” of the four Ukrainian provinces. Though there was improvement on the Crimea resolution, more than one-fifth of countries still voted against it or abstained—even after extensive Western lobbying. It is hardly the diplomatic victory that was proclaimed: compare it to a UN General Assembly resolution that passed in 1974 affirming the territorial integrity of Cyprus following the invasion of the North by Turkey: 117 votes for, 0 votes against, 0 abstentions.

The Kosovo precedent and the subsequent ICJ ruling not only has implications for the international community; it has also given license to

any group that wants to secede. With global instability on the rise, this will become increasingly dangerous.

The coronavirus pandemic, Russia’s invasion, and Western sanctions have profoundly shaken the global economy. Coupled with the growing devastation of climate change, the world faces a prolonged crisis. Against such headwinds, the center will struggle to hold. Marginal or disenfranchised groups are more likely to grow disaffected and agitate against their authorities. Secession attempts will become more common. States will likely turn more inwards at the precise moment when we need global cooperation.

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Of course, there is a simple solution. The Western states could roll back their recognition of Kosovo, reaffirming that the principle of territorial integrity applies across time and all contexts. This may not stop the likes of Putin, but it would remove his justification for illegal land grabs whilst dampening dormant secessionist forces around the world that will feed on future instability. Yet though practically straightforward, and its benefits self-evident, a Western *mea culpa* is as likely as Russia voting to affirm the territorial integrity of Ukraine. ●