



GROUP FOR LEGAL
AND POLITICAL
STUDIES

POLICY NOTE

Number 06 – March 2016

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Policy Note 06/2016

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March 2016

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Group for Legal and Political Studies is an independent, non-partisan and non-profit public policy organization based in Prishtina, Kosovo. Our mission is to conduct credible policy research in the fields of politics, law and economics and to push forward policy solutions that address the failures and/or tackle the problems in the said policy fields.

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Introduction

The recent events in Crimea have brought the legality of Kosovo's declaration of independence back into focus. Russia has played a double game with Kosovo, saying that Western intervention in Kosovo and the state's independence were illegal, but justifying the occupation and annexation of Crimea by citing Kosovo as a precedent.¹ This policy note rejects the cooptation of intervention in Kosovo and Kosovo's declaration of independence to legitimate a state taking territory from another. Starting from the cause of intervention and finishing with the act of changing borders, it details seven important differences between Kosovo and Crimea that debunk comparisons before discussing what the referendum means for Kosovo.

Before discussing these issues, it is important to make one note on terminology. According to Russia, Crimea first seceded from Ukraine and then joined Russia.² This paper finds this argument hollow. The referendum for secession was a choice between leaving Ukraine to join Russia and reverting to a constitution that would allow the government to apply to join Russia.³ Russia prepared to annex Crimea before the referendum took place.⁴ With such evident intent to take Crimea as Russian territory, this note considers it an annexation and will refer to it as such.

1. Kosovo faced real threats; Crimea faced only imagined ones

The impetus for Russia's annexation of Crimea was the alleged coming repression of ethnic Russians in the region. According to Russian President Vladimir Putin, the Ukrainian government would have oppressed Crimeans and, were it not for the Russian soldiers, "there could have been casualties as well."⁵ Evidence contradicts this claim, as Ukrainian soldiers did not attack even when besieged by Russian soldiers. Ethnic Albanian Kosovars did not enjoy such forbearance in the 1998-1999 war. The majority-Serb Yugoslav army and paramilitaries attempted to forcibly cleanse Kosovo of ethnic Albanians. Thus, while spurious complaints in Crimea created a pretext for a Russian intervention against a phantom threat, the very real complaints in Kosovo demanded a forcible international intervention to end a violent expulsion.

2. After stabilization and occupation, Kosovo opened up to international observers; Crimea remained closed until it was convenient

After the Russian occupation of Crimea, the Organization for Security and Cooperation in Europe (OSCE) sought to enter Crimea to report on the situation. This should have been standard procedure, as the OSCE monitors minority rights, rule of law and elections, among other issues, across Europe. However, Russian soldiers kept OSCE monitors out of Crimea during the early stages of the occupation⁶ and only issued an invitation when OSCE imprimatur would legitimize the Crimea referendum.⁷ In contrast, decisions on whether or not to deploy OSCE personnel to Kosovo were made entirely by the OSCE. Other international organizations could also deploy and report freely in Kosovo in the immediate aftermath of the 1998-1999 war.⁸ There is an important difference between international organizations setting the agenda and regions under observation doing so, as the former

¹Tanjung, "Russian embassy: Moscow's view on Kosovo remains the same," *Tanjung*, 12 March 2014, available at <http://www.tanjung.rs/news/121075/russian-embassy--moscows-view-on-kosovo-remains-same--.htm>

² RT, "State Duma welcomes Crimea referendum result, pledges full support," *RT*, 18 March 2014, available at <http://rt.com/politics/duma-crimea-support-referendum-518/>

³ Richard Balmforth, "No room for 'Nyet' in Ukraine's Crimea vote to join Russia," *Reuters*, 11 March 2014, available at <http://www.reuters.com/article/2014/03/11/us-ukraine-crisis-referendum-idUSBREA2A1GR20140311>

⁴ RT, "Lawmakers ready to pass bill allowing acceptance of Crimea into Russian Federation," *RT*, 6 March 2014, <http://rt.com/politics/russian-bill-crimea-federation-178/>

⁵ Vladimir Putin, "Address by President of the Russian Federation," *President of Russia*, 18 March 2014, available at <http://eng.kremlin.ru/news/6889>

⁶ Al Jazeera, "Warning shots end OSCE Crimea entry bid," *Al Jazeera*, 8 March 2014, available at <http://www.aljazeera.com/news/europe/2014/03/warning-shots-end-osce-crimea-entry-bid-20143815135639790.html>

⁷ Agence-France Presse, "Russia urges OSCE to send observers to Crimea referendum," *Yahoo! News*, 14 March 2014, available at <http://news.yahoo.com/russia-urges-osce-send-observers-crimea-referendum-105413681.html>

⁸ OSCE Mission in Kosovo, "Overview," *OSCE*, accessed 21 March 2014, available at <http://www.osce.org/kosovo/43378>

allows for comprehensive, unobstructed monitoring while the latter allows for careful, selective manipulation. The situation in Kosovo was verifiable; it was not in Crimea.

3. The Crimea referendum on joining Russia took place three weeks after occupation; the Kosovo government declared independence nine years after the end of the war

Less than a month passed from the fall of the Yanukovich government to the referendum in Crimea to join Russia. Between the Crimean Parliament's call for a referendum and the vote, there were 17 days. In this limited timeframe, the pro-annexation forces in Crimea controlled the media and did not allow anyone to make the case against Crimea leaving Ukraine. There was thus no time, means or information to create a legitimate, coherent opposition to Russia annexing Crimea. In Kosovo, nine years passed between the beginning of international administration and the declaration of independence. There were three separate elections where an anti-independence alternative to the pro-independence parties could have been established. Outside of the ethnic Serb parties, this never occurred. Kosovo allowed the political debate around independence to mature in a way that never occurred in Crimea. There was a better grasp for the popular will, strengthening Kosovo's claim to local legitimacy and self-determination.

4. Crimea was under Russian occupation when voting to join Russia; Kosovo's declaration of independence came during an internationally recognized civil and peacekeeping mission

Russia asserted itself in Crimea militarily and occupied the whole peninsula. The whole region came under Russian control and Russian soldiers guarded the referendum. Russia had explicit interests in Crimea's final status with a clear goal of annexing the peninsula, introducing legislation to ease the autonomous republic's path into the Russian Federation. Kosovo was never under such military threat. The international military presence in Kosovo at the time of independence was a peacekeeping force to prevent ethnic violence. The UN Security Council approved its mission and it had no stake in whether or not Kosovo became independent.⁹ The result would not change the nature of its mission. While the risk of external military coercion in Crimean decision-making was very high, it was non-existent in Kosovo.

5. In 2008, the Kosovo body declaring independence was at least somewhat representative and open; the 2014 Crimean Parliament was in disarray and closed

The Crimean government body that called for the independence referendum was of dubious legitimacy. After armed men stormed the Crimean Parliament on 27 February, they kept out the then Crimean Prime Minister, Anatoly Mogilyov, along with all reporters. The closed-door session that followed replaced Mogilyov with Sergei Aksyonov, the leader of the Russian Unity Party, which had three of one hundred seats and in the parliament and received barely more than four percent of the vote in the 2010 Crimean elections. The dominant party with 80 seats, the Party of Regions, opposed Crimea leaving Ukraine, as did the parties representing the Tatar ethnic minority. The Crimean Parliament claimed 53 members voted for Aksyonov's ascent and 61 for a referendum on annexation, but this could not be verified.¹⁰ With such an opaque process leading to the bizarre result of a minor party naming a prime minister who approved policies in line with the interests of the occupying power, the Crimean Parliament had dubious legitimacy when it called for unification with Russia.

The body that declared Kosovo independent in February 2008, on the other hand, was observed both by independent media and international observers. The body included all members of the Assembly and the Presidency save Serbian members, who boycotted the proceedings. These individuals had been elected through the Constitutional Framework established by the UN Mission in Kosovo and could thus give an accurate representation of the will of the people of Kosovo outside the Serb minority. It published a record of its

⁹ United Nations Security Council (UNSC), Resolution 1244, available at <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/1244.pdf>

¹⁰Alissa de Carbonnel, "Insight—How the separatists delivered Crimea to Moscow," *Reuters*, 12 March 2014, available at <http://uk.reuters.com/article/2014/03/12/uk-ukraine-crisis-russia-aksyonov-insigh-idUKBREA2B13D20140312>

proceedings that could be easily verified.¹¹ While unfortunate in not representing the Serb minority, the body still accurately represented a large portion of the population. Thus the Kosovo independence vote was much more likely to represent the popular mood than the vote in the Crimean Parliament.

6. United Nations Security Council Resolution 1244 did not bind Kosovo to Serbia; the Budapest Memorandum binds Russia to respect the borders of Ukraine

Serbia, Russia and other non-recognizing states use UNSC 1244 to argue that Kosovo's declaration of independence violated international law. UNSC 1244 does affirm the territorial integrity of the Federal Republic of Yugoslavia, from which Serbia is the successor state. However, it does so in a very narrow context, qualifying this respect by stating it complies with the Helsinki Final Act and Annex 2 of the resolution. The next section details the tension within the Helsinki Final Act over changes in borders. Annex 2 of UNSC 1244 is clear the territorial integrity of the Federal Republic of Yugoslavia only extended to interim institutions for autonomous self-government that did not extend past a settlement of the status issue.¹² Serbia and Kosovo's final statuses are not articulated. Serbia argued that since UNSC 1244 did not explicitly approve of Kosovo's independence, like UNSC 1246 did for East Timor, its separation was not permitted.¹³ This argument ignores that UNSC 1244 took a hazy middle ground on secession, not a position that bound Kosovo to Serbia. In resolutions before and after UNSC 1244, the UN Security Council explicitly affirmed the continuation of a single state in separatist conflicts in Cyprus¹⁴ and Georgia.¹⁵ The argument that UNSC 1244 demands Kosovo remain in Serbia by default is thus debunked.

Unlike in Kosovo, Ukraine and Russia reached an agreement that Crimea is a part of Ukraine. The 1994 Budapest Memorandum, where Ukraine traded old Soviet nuclear weapons for security guarantees, binds Russia, the US and the UK "to respect the Independence and Sovereignty and the existing borders of Ukraine."¹⁶ It also obligates the US, UK and Russia to consult with each other if any questions came up with regard to the Memorandum. Russia argues that the Budapest Memorandum became null and void when Victor Yanukovich was ousted as a new state took the place of the old one.¹⁷ This is an absurd claim, made even more so by the fact that Russia expects this "new state" to pay all of the arrears on Ukraine's gas purchases.¹⁸ It is also not sufficient to void the Budapest Memorandum, as the UK and US both vigorously disagree with Russia, meaning a consultation and final settlement between the guarantors should have been completed before declaring the Memorandum void.

7. Annexation and secession are not equivalent in international law

Finally, attempts to equate Kosovo and Crimea ignore the important legal difference between annexation and secession. Proponents of the "Kosovo precedent" argue that, since the autonomous region of Kosovo was allowed to secede from Serbia unilaterally, the autonomous republic of Crimea should be able to join Russia.¹⁹ This equivalence between secession and annexation in international law is false. The Helsinki Final Act and the UN Charter forbids the unilateral annexation of the territory of one signatory state by another. The Helsinki Final Act, to which Serbia, Russia and Ukraine are party, reads, "The participating States will respect each other's sovereign equality and individuality as well as all the rights in particular the right of every State...to territorial integrity."²⁰ The UN Charter is even more explicit, reading, "All members shall refrain from the threat or use of force against the

¹¹ Assembly of Kosovo, "Transcript: Plenary session of the extraordinary solemn Assembly of Kosovo with the declaration of independence, held on 17 February 2008," available at http://www.kuvendikosoves.org/common/docs/proc/trans_s_2008_02_17_al.pdf

¹² UNSC, Resolution 1244

¹³ *Accordance with International Law of the Unilateral Declaration of Independence by Provisional Institutions of Self-Government of Kosovo*, (Verbatim Record), [1 December 2009], p. 51, available at <http://www.icj-cij.org/docket/files/141/15710.pdf>

¹⁴ UNSC 1146

¹⁵ UNSC 1494

¹⁶ The Budapest Memorandum of 1994, available at http://www.larouchepub.com/eiw/public/2014/2014_1-9/2014-08/pdf/34-35_4108.pdf

¹⁷ Howard Amos, "Putin keeps military action on the table," *The Telegraph*, 4 March 2014, available at <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10676894/Putin-keeps-military-action-on-the-table.html>

¹⁸ Daryna Krasnolutska, Kateryna Choursina and Anna Shirayevskaya, "Russia invokes \$2 billion Ukraine gas debt amid Crimea crisis," *Bloomberg*, 7 March 2014, available at <http://www.bloomberg.com/news/2014-03-07/ukraine-refuses-to-bend-on-crimea-as-russia-vows-to-accept-vote.html>

¹⁹ <http://rt.com/news/merkel-ukraine-answer-sanctions-658/>

²⁰ Helsinki Final Act, Article I, available at <http://www.osce.org/mc/39501?download=true>

territorial integrity or political independence of any state.”²¹ Russia showed no respect for Ukraine’s right to territorial integrity it recognized by signing the Helsinki Final Act and used force to occupy Crimea and expel Kiev’s authority to stake a claim to Ukraine’s sovereign territory. The act of unilateral annexation clearly violates the principles enumerated in both documents.

In contrast, the UN Charter says nothing regarding secession and the Helsinki Final Act regards it as something that must be managed. The Helsinki Final Act advises participating states to “consider that their frontiers can be changed, in accordance with international law, by peaceful means and by agreement.”²² In addition, the act states, “Participating states will respect the equal rights of peoples and their right to self-determination.”²³ While Kosovo’s initial separation from Serbia was quite violent, the final divorce was done peacefully after extensive attempts to reach an agreement. The principle that frontiers should be changed by agreement admittedly clashed with the principle of self-determination. However, Serbia refused to see a conflict, denying the existence of a Kosovo “people” that could make a self-determination claim.²⁴ Belgrade’s absolute refusal to consider Kosovo’s self-determination rights broke both of its commitments to respect equal rights of its peoples and to consider that its frontiers could be changed to accommodate the right to self-determination. Pristina was left with a choice of nebulous stagnation and choosing its own fate. Not yet a state, thus under no obligation to respect Serbian territorial integrity, and facing uncertainty about its future, Kosovo took the best option available: independence. Thus, while Russia’s annexation of Crimea blatantly ignored all of the principles of international law, Kosovo’s secession was the best of bad options in upholding obligations under international law.

8. Dangers and Opportunities of the Crimea Referendum

Crimea’s most obvious danger is that it brings back the debate over Kosovo as a precedent. While this policy note has pointed out why Kosovo is not an applicable precedent for Crimea, Russia and Crimea’s use of Kosovo as a precedent may inflame the fears of those states that do not recognize Kosovo and believe it set a precedent for regions to secede unilaterally. This could delay potential future recognitions. It is too soon to define what effect the Crimea annexation will have on recognitions of Kosovo. So far, the signs, within Europe at least, are encouraging. While Kosovo became a wedge issue in Slovakia’s presidential campaign, with one candidate backing recognition and the other opposing it, this debate started before Crimea and neither candidate adjusted his position.²⁵ The fact that pro-recognition Andrej Kiska won the election shows that Crimea did not create a popular revolt over Kosovo and progress towards recognition was not hurt. The prime minister of Romania, Victor Ponta, was adamant that Romania did not consider Crimea and Kosovo equivalent.²⁶ Other EU non-recognizers and important extra-European non-recognizers such as India, Argentina and Brazil have not connected the two. The best-case scenario for Kosovo may be that the Crimea annexation did no harm to progress in recognitions and that these recognitions will progress as they would have if there had been no referendum.

Russia remains the more insidious, long-term problem. It is one of the gatekeepers of the international system, holding a permanent seat on the UN Security Council that allows it to veto new UN members. Kosovo requires Russian recognition to fully integrate into the community of states. It was already a possibility that Russia would condition recognition of Kosovo on Western recognition of Abkhazia and South Ossetia in the north of Georgia, which Russia recognized and occupied in 2008, partially in retaliation for Kosovo’s declaration of independence. These two breakaway republics, though, were lower priorities for Russia and the lack of support in the international community may have caused it to drop its demand. Now, Russia has taken a big geopolitical risk to acquire Crimea. It may now only trade recognition of Kosovo for Western recognition of Crimea as Russian territory, an issue far beyond Kosovo’s control. Kosovo would become even more of a political bargaining chip, an

²¹ UN Charter, Article 2, Paragraph 4, available at <https://www.un.org/en/documents/charter/chapterI.shtml>

²² Helsinki Final Act, Article I

²³ Helsinki Final Act, Article VIII

²⁴ *Accordance with International Law of the Unilateral Declaration of Independence by Provisional Institutions of Self-Government of Kosovo*, (Verbatim Record), [1 December 2009], p. 91

²⁵ Flash News, “EU commissioner supports Fico, discusses Kiska,” *The Slovak Spectator*, 18 March 2014, available at http://spectator.sme.sk/articles/view/53338/10/eu_commissioner_supports_fico_discusses_kiska.html

²⁶ Top Channel, “Romania gives signals for Kosovo,” *Top Channel*, 18 March 2014, available at <http://www.top-channel.tv/english/artikull.php?id=11312>

unenviable position for any state.

The situation in Crimea does hold two advantages for Kosovo, though. First, it further exposes the contradictions in Russia's Kosovo policy. Russia has been eager to apply the "Kosovo precedent" in almost any breakaway region that is not Kosovo, applying it to Abkhazia, South Ossetia and now Crimea. Russia's Kosovo policy lacks any credibility and shows no regard for the rest of the international community to which it makes its arguments about not recognizing Kosovo. Second, and related, Russia's strategy can help Kosovo drive a wedge between it and other non-recognizers. This is the second time Russia has broken an international commitment to a state's borders since Kosovo declared independence. It defied several UNSC resolutions that stated any settlement between Georgia and Abkhazia must end with Abkhazia as a part of Georgia by recognizing Abkhazia's independence. It has now trampled on the Budapest Memorandum, showing no respect for the international borders to which it is committed. Non-recognizers directly under threat from Russia, namely Moldova, Ukraine and Georgia, could show greater willingness to listen to a position on Kosovo putting them in opposition to Russia while rebutting Russian threats to their territory. Important non-recognizing states outside of Europe, including Brazil,²⁷ China²⁸ and Chile,²⁹ have shown discomfort with Russia's actions in Crimea. They may now be more amenable to recognizing Kosovo to blunt Russian invocation of a "Kosovo precedent," and highlight the difference between complex, but legal actions, and blatantly illegal ones.

While Russia's actions in Crimea are regrettable, the fact that it isolates Russia is good for Kosovo. It delegitimizes the voice of a state that likely forms the most insurmountable block to Kosovo's integration into the international community. While it invokes a "Kosovo precedent" that may worry states that were concerned such a precedent might be made with Kosovo's independence, it also allows Kosovo to show how very different its road to independence was from Russia's annexation of Crimea. It also allows Kosovo to make its case to states that may have previously been unwilling to listen.

²⁷Notimex, "Apoya Brasil solución negociada a crisis de Crimea," *Crónica.com.mx*, 19 March 2014, available at <http://www.cronica.com.mx/notas/2014/822700.html>

²⁸ Shannon Tiezzi, "China reacts to the Crimea referendum," *The Diplomat*, 18 March 2014, available at <http://thediplomat.com/2014/03/china-reacts-to-the-crimea-referendum/>

²⁹ Patricia Schuller, "Chile cree que referendum en Crimea es ilegal," *La Nación*, 15 March 2013, available at <http://www.lanacion.cl/noticias/mundo/chile-cree-que-referendum-en-crimea-es-ilegal/2014-03-15/174927.html>

POLICY NOTES

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