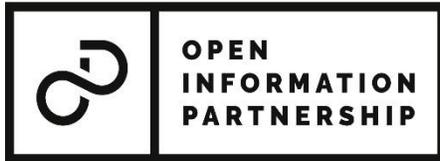




# Comparing the Incomparable: Kosovo's Independence and the Russian Aggression against Ukraine

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## 1. Introduction

From Bosnia, Croatia and Kosovo, to Caucasus and Ukraine, Serbia and Russia are at the epicentre of the crises and conflicts in the Balkans and Former Soviet space, respectively. The origins of the regional policies of Serbia and Russia are intrinsically linked to their rejection of the birth of new states and reshaping of the geopolitical maps in the former Soviet and Yugoslav spaces, in the aftermath of the Cold War.

Serbia never came to terms with the fact that its nationalist crusades of the 1990s to unite all the Serbs in one country failed. Serbia waged three wars in the former Yugoslavia, in order to grab territories from Croatia, to prevent Bosnia and Herzegovina from becoming an independent state, and to keep Kosovo under an Apartheid-style of repressive control from Belgrade. The disastrous consequences of the wars of 1990s and the new political realities that were created in the region in their aftermath left Serbia in a need to reshape its foreign policy strategy. However, notwithstanding its official pro-EU aspiration, Serbia has not yet distanced from the legacy of Milošević's era and this has been expressed openly by President Vučić, for whom Milošević was a "great Serbian leader" that was aiming "certainly for the best."<sup>1</sup>

As to the Russia, it seems that Moscow is regretting for not trying in the 1990s to unite the ethnic Russians that remained outside Russia with the independence of the former Soviet Republics. In fact, for Moscow it is not simply a question of uniting all Russians in one state, but all former Soviet citizens in the "Russian World." This was expressed most vividly by Putin's cry that the dissolution of the USSR was the "greatest geopolitical catastrophe of the century."<sup>2</sup>

The first articulated Russian reaction against the post-Cold War setting was the emergence in Moscow of the geopolitical concept of "near abroad," and the establishment of the regional organization named the Commonwealth of Independent States, in 1991. With this, Russia not only defined its exclusive sphere of influence in the former Soviet geography, but – as

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<sup>1</sup> Georgi Gotev, Euractiv, Commission frowns at Serbian president's praise of Milosevic, September 10, 2022, <https://www.euractiv.com/section/enlargement/news/commission-frowns-at-serbian-presidents-praise-of-milosevic/>

<sup>2</sup> NBC News, Putin: Soviet Collapse a "genuine tragedy", April 25, 2005, <https://www.nbcnews.com/id/wbna7632057>

the creation of statelet entities of Transnistria in Moldova, and Abkhazia and South Ossetia in Georgia in 1991, and subsequent wars in Georgia to Ukraine demonstrate – it attributed to itself the right to decide on how much sovereign and democratic the former Soviet republics can be. For apparent geopolitical and legal reasons, the Baltic republics are outside this vector.<sup>3</sup> This regional foreign policy outlook goes in parallel with Moscow’s push towards a multipolar world, with Russia as one of major great powers.

This political vision is expressed very fervently in Putin’s speech of February 21, 2022, one day before the announcement by Moscow of “special military operation” in Ukraine. This speech confirmed that there are three fundamental factors that shape Russia’s view and actions in Ukraine: *first*, in Russian’s lenses, the Cold War was not an ideological contest between the Soviet Communism with Western capitalist camp, led by the US. Rather, in Moscow’s perspective, the Cold War was expression of the inherent rivalry between Russian nation with Western countries, which are poised to destroy Russia. Hence, the dominant political and intellectual circles in Russia have experienced the collapse of communism and disintegration of the Soviet Union as a national, rather than as an ideological defeat. In other words, Russia has gradually since the collapse of Communism (re)defined its relationship with the West in existential terms. This, by default, makes Russia a revisionist power. *Second*, as a consequence of this reading of the Cold War, Russia views NATO not only as rival but as a direct existential threat to its security. *Third*, Putin and many in Russia reject the existence of an independent Ukrainian national identity and hence consider it as an artificial state whose very existence is tolerable only as a Moscow satellite.<sup>4</sup>

Interestingly, Kosovo was not explicitly included in the long list of “Russia’s grievances” that Putin put forward in his speech of February 21, 2022, to justify Moscow’s “special military operation” in Ukraine. However, Kosovo and NATO’s intervention in former Yugoslavia are part of Putin’s routine discourse on assault against Ukraine, since 2014. Thus, in justifying the decision to declare the independence of Crimea, in March 2014, which subsequently “integrated” with

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<sup>3</sup> For the concept of near abroad see among others, Gerard Toal. *Near Abroad: Putin, the West and the Contest over Ukraine and the Caucasus*. Oxford University Press, 2017; Oxana Shevel, “Russia and the Near Abroad”, *Great Decisions*, January 2015.

<sup>4</sup> See extract from the Putin’s speech on: <https://www.reuters.com/world/europe/extracts-putins-speech-ukraine-2022-02-21/>

Russia, the Crimean Parliament<sup>5</sup> and their master in Moscow<sup>6</sup> referred to the International Court of Justice's Advisory Opinion on Kosovo. Eight years later, Putin again tried to create another "Kosovo precedent" with the aim to justify its "special military operation" – a designation that Russia gave to its full-fledged military aggression against Ukraine in 2022.

This paper argues that any effort to draw analogy between Kosovo and territories of Ukraine which have been occupied by Russia is misleading and manipulative. These cases are totally different in historical, legal and political aspects. All these aspects shall be brought to light, in the comparative perspective between Kosovo with the Russian-occupied Ukrainian territories. The analysis dedicates particular attention to the Opinion of the International Court of Justice on Kosovo's declaration of independence. If anything, the Opinion of the International Court of Justice on Kosovo's declaration of independence proves totally the opposite of Russia's argument.

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<sup>5</sup> Crimea Parliament declares Independence from Ukraine ahead of Referendum', Russia Today, March 11, 2014, <https://www.rt.com/news/crimea-parliament-independence-ukraine-086/>

<sup>6</sup> Address by the President of the Russian Federation', *Kremlin*, 18 March 2014, <[eng.kremlin.ru/news/6889](http://eng.kremlin.ru/news/6889)>, visited on July 15, 2015.

## 2. Background: Federalism in the Soviet Union and Socialist Yugoslavia

Depicting the well-known trajectory of the process of dissolution of the Soviet and Yugoslav communist federations is a demanding enterprise and goes outside the ambit of this paper. However, it is imperative to provide brief account of the constitutional status in the Yugoslav and Soviet Federations, of Kosovo as well as of Ukraine with its breakaway territories. This necessitates outlining the major constitutional blueprint of these communist federations, including the position of Kosovo and of Ukraine and its secessionist territories of Crimea, Donetsk and Luhansk.

The conceptual design of the communist federations was articulated by Lenin and experimented for the first time in the USSR. Lenin's federalist devise hinged on balance between the unity of one people (i.e., Soviet working people) and the diversity of many ethnic nations and nationalities (e.g., Russian, Ukrainians, Georgians, Kazak, Armenians, Azeris etc).<sup>7</sup> The communist ideology was what linked together one people with many nations and nationalities.<sup>8</sup> Beyond these common grounds, the institutional architectures of the Soviet and Yugoslav federations were not exactly the same, with the Soviet system being more complex, more centralized, and embodying more layers of governance. It should be emphasized that the SFRY and the USSR had adopted several constitutions during the communist periods, but in this analysis the last constitutions of both countries are taken as a point of reference.

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<sup>7</sup> Viktor Knapp, "Socialist Federation-A Legal Means to the Solution of the Nationality Problem: A Comparative Study", *Michigan Law Review*, Volume 82 Issue 5, 1984.

<sup>8</sup> Article 6 of the Constitution of the Soviet Union stipulated as follows:

*"The leading and guiding force of Soviet society and the nucleus of its political system, of all state organisations and public organisations, is the Communist Party of the Soviet Union. The CPSU exists for the people and serves the people. The Communist Party, armed with Marxism-Leninism, determines the general perspectives of the development of society and the course of the home and foreign policy of the USSR, directs the great constructive work of the Soviet people, and imparts a planned, systematic and theoretically substantiated character to their struggle for the victory of communism. All party organisations shall function within the framework of the Constitution of the USSR."*

## 2.1. Federalism in the Soviet Union

According to the last Constitution of the USSR, of 1977, the hierarchical order of different territorial layers of political power was as follows: union republics,<sup>9</sup> autonomous republics,<sup>10</sup> autonomous regions<sup>11</sup> and autonomous areas.<sup>12</sup> The fifteen soviet republics were recognized as socialist states which had united with the Soviet Republics and recognized explicit constitutional right to freely secede from the USSR.<sup>13</sup> On the other hand, the autonomous republics had a high level of autonomy, including legislative powers, yet they were a constituent part of one of the Union Republics, but not a constituent unit of the Soviet Federation. Meanwhile, the autonomous regions and autonomous areas were not vested with any legislative powers, but only with certain degree of administrative autonomy.<sup>14</sup>

While Ukraine itself was a union republic, neither Crimea, nor Donetsk and Luhansk had any federal status, nor were they part of any decision-making at the level of Soviet Federation. Crimea was part of the Russian Federation Soviet Socialist Republic until 1954, when Khrushchev decided to transfer it within Ukrainian Soviet Socialist Republic.<sup>15</sup> During the entire Soviet period, Crimea had status of “oblast,” or autonomous region of Ukraine (it was not Autonomous

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<sup>9</sup> Article 76 of the Constitution of the SSSR: “A Union Republic is a sovereign Soviet socialist state that has united with other Soviet Republics in the Union of Soviet Socialist Republics. Outside the spheres listed in Article 73 of the Constitution of the USSR, a Union Republic exercises independent authority on its territory. A Union Republic shall have its own Constitution conforming to the Constitution of the USSR with the specific features of the Republic being taken into account.”

<sup>10</sup> Article 82 of the Constitution of the USSR: “An Autonomous Republic is a constituent part of a Union Republic. In spheres not within the jurisdiction of the Union of Soviet Socialist Republics and the Union Republic, an Autonomous Republic shall deal independently with matters within its jurisdiction. An Autonomous Republic shall have its own Constitution conforming to the Constitutions of the USSR and the Union Republic with the specific features of the Autonomous Republic being taken into account.”

<sup>11</sup> Article 86 of the Constitution of the USSR: “An Autonomous Region is a constituent part of a Union Republic or Territory. The Law on an Autonomous Region, upon submission by the Soviet of People’s Deputies of the Autonomous Region concerned, shall be adopted by the Supreme Soviet of the Union Republic.”

<sup>12</sup> Article 88 of the Constitution of the USSR: “An Autonomous Area is a constituent part of a Territory or Region. The Law on an Autonomous Area shall be adopted by the Supreme Soviet of the Union Republic concerned.”

<sup>13</sup> Article 72 of the Constitution of the USSR: “Each Union Republic shall retain the right freely to secede from the USSR.”

<sup>14</sup> Knapp, opt.cit. p. 1219.

<sup>15</sup> It should be emphasized that during the 1940’s, Moscow forcibly altered the demographic balances in peninsula, by transferring the indigenous Tatar population to other parts of the Soviet Union, a move that allowed ethnic Russians to become a majority Crimea. See, <https://law.marquette.edu/facultyblog/2014/03/understanding-the-constitutional-situation-in-crimea/>.

Republic). There were more than twenty such regions in Ukraine. In 1991 – on the eve of the collapse of the USSR – the status of Crimea was upgraded to that of “Autonomous Republic” within Ukraine, as a result of the referendum held on January 20, 1991. Yet, Article 1 of the Constitution of Crimea stipulates that the Autonomous Republic of Crimea shall be an integral part of Ukraine as specified by the Constitution of Ukraine.<sup>16</sup>

Donetsk and Luhansk, on the other hand, did not have any advanced constitutional status during the Soviet period. After the independence of Ukraine, its system of administrative and territorial organization is composed of the Autonomous Republic of Crimea, oblasts, districts, cities, city districts, settlements and villages. Donetsk and Luhansk have the status of oblasts (regions), which are smaller administrative units within the administrative and territorial structure of Ukraine.<sup>17</sup> Article 2 of the Constitution of Ukraine of 1996 stipulates that Ukraine is a unitary state and the territory of Ukraine within its present border is indivisible and inviolable.<sup>18</sup>

## **2.2. Federalism in Socialist Yugoslavia**

The skeleton of the Yugoslav federation was erected along the Soviet constitutional concept. According to the Constitution of 1974 (the last Constitution before the breakup), the SFRY consisted of eight constituent units, six socialist republics and two autonomous socialist provinces. Kosovo and Vojvodina were autonomous provinces with dual constitutional status, namely they were constitutive unit of the Yugoslav Federation and at the same time nominally part of the Republic of Serbia – yet they were not subordinated to Serbia’s legislative or executive authority.

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<sup>16</sup> Article 1 of the Constitution of Crimea of 1998. Available at: [https://en.wikisource.org/wiki/Constitution\\_of\\_Crimea,\\_1998](https://en.wikisource.org/wiki/Constitution_of_Crimea,_1998)

<sup>17</sup> Ukraine is composed of the Autonomous Republic of Crimea, Vinnytsia Oblast, Volyn Oblast, Dnipropetrovsk Oblast, Donetsk Oblast, Zhytomyr Oblast, Zakarpattia Oblast, Zaporizhia Oblast, Ivano-Frankivsk Oblast, Kyiv Oblast, Kirovohrad Oblast, Luhansk Oblast, Lviv Oblast, Mykolaiv Oblast, Odesa Oblast, Poltava Oblast, Rivne Oblast, Sumy Oblast, Ternopil Oblast, Kharkiv Oblast, Kherson Oblast, Khmelnytskyi Oblast, Cherkasy Oblast, Chernivtsi Oblast and Chernihiv Oblast, and the Cities of Kyiv and Sevastopol. The Cities of Kyiv and Sevastopol have special status that is determined by the laws of Ukraine. Constitution of Ukraine, Article 133 (<https://www.refworld.org/pdfid/44a280124.pdf>).

<sup>18</sup> Article 2 of the Constitution of Ukraine. Available at: <https://www.refworld.org/pdfid/44a280124.pdf>.

The constitutional right to self-determination and secession in the SFRY was not as clearly provided as in the Constitution of the USSR. The dominant legal interpretation was that Yugoslav Constitution of 1974 bestowed the right to self-determination, including secession, upon “all nations” of the Federation. Yet this right was not explicitly recognized to the nationalities, which practically meant to the non-Slavic people living in Yugoslavia.<sup>19</sup> Although Albanians were considered in legal terms as “nationality,” numerically they were more or less equal with the “nations” of Slovenes and Bosnian Muslims, and much larger than Macedonians and Montenegrins. The decision-making on fundamental political issues in the Yugoslav Federation was based on the consensus among the federal units, namely republics and autonomous provinces.

During the Yugoslav period, the political status of Kosovo was upgraded several times culminating with the federal constitution of 1974. Although Kosovo and Vojvodina did not acquire the status of a republic, they became federal units with almost full rights and powers of a republic, including representation in the Federal Parliament, Government and the collective Presidency. In this regard, it has to be underlined that Article 5 of the Yugoslav Constitution stipulated that the borders of the Yugoslav Federation could not be changed without the agreement of the republics and autonomous provinces.<sup>20</sup> Furthermore, for changing the territorial boundaries between the federal units, namely republics and autonomous provinces, their prior consent was required.<sup>21</sup>

SFRY disintegrated violently and consequently Kosovo was deprived from its right to decide about its destiny. Instead, it remained practically under the Marshall Law imposed illegally by Serbia that lasted until the establishment of the UN administration, in June 1999.

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<sup>19</sup> See, among others, Marc Weller, “Settling Self-determination Conflicts: Recent Developments,” *The European Journal of International Law*, Vol. 20, No1, 2009, pp. 111 – 165.

<sup>20</sup> This, effectively, meant that the socialist Yugoslavia could not get legally dissolved without the consent of Kosovo.

<sup>21</sup> Opt. cit., Article 5.

### **3. Kremlin's manipulative narratives: NATO Intervention and Kosovo's Independence *versus* Russian Aggression in Ukraine**

It sounds ironic that after opposing Kosovo's independence fiercely at every possible international platform for many years, in 2014 Russia started to rely on, what they labelled as "Kosovo precedent," in an attempt to wrap up with the veil of international legality its military annexation of over twenty percent of the territory of Ukraine. "The republics of Donbas had the same right to declare their sovereignty, as Kosovo, since the precedent was set. Right? Do you agree with this?" Putin asked the UN Secretary General, Antonio Guterres, during a meeting in Moscow, on April 25, 2022, who answered that the UN did not recognize Kosovo. "But the court did recognize it," Putin replied. "If this precedent was set, the republics of Donbas could do the same," he went on to say, while Russia got the right to recognize them as independent states.<sup>22</sup> What made this conversation particularly bizarre was the self-blaming attitude of the UN's Secretary-General, Guterres. Under the pressure of the interrogatory tone of the Russia's President, the UN Secretary-General, in a way, put a blame on more than one hundred UN member states who have recognized Kosovo's independence – including the leading financial contributors of the UN. Moreover, in an apologetical attempt to appease Putin, the UN Secretary-General confused the elementary fact that the UN does not recognizes independent states, but it admits them within its ranks upon their application and following specific procedure prescribed in the Charter.

A thorough analysis of the Opinion of the International Court of Justice, which shall be conducted in the following part, reveals the falsity of Putin's interpretations. Before elaborating the Opinion of the world court, it is important to highlight some other facts that draw clear distinction line between Kosovo and the territories of Ukraine annexed or occupied by Russia.

One of the major differences between the case of Kosovo and the Russian invasion in Ukraine is the role of the UN and the international community in general, in both cases. In Kosovo, the role of international community was crucial in ending the conflict and defining its

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<sup>22</sup> TASS, "Putin cites precedent of Kosovo in explaining recognition of DPR, LPR." April 26, 2022. See, <https://tass.com/politics/1443661>

final status, whereas aggression of Russia in Ukraine and illegal annexation of parts of its territory are largely condemned by international community.

It was the role of the international community, particularly of the United States and Europe, in the case of Kosovo, that is misused by Putin in his aggression in Ukraine. In this regard, one of the key Russian manipulative narratives in relation to Kosovo is the attempt to justify its aggression in Ukraine by comparing it with the NATO's intervention in Yugoslavia (24<sup>th</sup> March – 10<sup>th</sup> June 1999) on one hand, and justification of annexation of Crimea and recognition of independence of Donetsk and Luhansk regions with the independence of Kosovo, on the other. The following analyses will highlight that these comparisons used by Kremlin are unfounded.

### **3.1. NATO Intervention**

The NATO intervention in Kosovo was preceded by three United Nations Security Council (UNSC) resolutions, namely 1160 (1998), 1199 (1998), 1203 (1998), adopted under the provisions of the Chapter VII of the UN Charter. It is very important to highlight that these binding resolutions were supported by Russia as well.

The UNSC Resolution 1160 of March 31, 1998, among others, imposed an arms embargo on Yugoslavia (Serbia and Montenegro – FRY); urged the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia to gather information on violence in Kosovo, and most importantly, emphasized that a failure to achieve “constructive progress towards peaceful resolution of the situation in Kosovo would lead to the consideration of additional measures.”<sup>23</sup> In reaction to escalation of fighting and deteriorating humanitarian situation in Kosovo, on September 23, 1998 the UNSC adopted the Resolution 1199.<sup>24</sup> This resolution affirmed that the situation in Kosovo “constituted a threat to peace and security in the region,” and clearly indicated the possibility of authorization of “other measures,” not excluding military intervention, to maintain or restore peace and stability in the region.”<sup>25</sup>

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<sup>23</sup> UNSC Resolution 1160 (1998), March 31, 1998. Available at: <http://unscr.com/en/resolutions/1160>

<sup>24</sup> UNSC Resolution 1199 (1998), September 28, 1998, <http://unscr.com/en/resolutions/1199>

<sup>25</sup> Ibid.

A comparison of the text of these two resolutions brought to the surface an evolution in the position of UNSC members, including Russia, regarding the blame for deteriorating situation in Kosovo. Thus, the Resolution 1160 called for an immediate cessation of violence on the ground, it did not specify explicitly the source of the ‘threat to international peace and security.’ Resolution 1199 (1998) went further and explicitly specified that such a threat was deriving from Serbian Police and Yugoslav Army violence against the civilian population of Kosovo.<sup>26</sup> This opened the door to a bold course of the international community related to the war and humanitarian disaster in Kosovo. Changing of this course, including that of Russia, was a consequence of Milošević’s failure to honour the agreement with President Yeltsin of June 18, 1998, to resume talks with the Kosovo’s political leadership. Instead, Serbia reinforced the military presence on the ground.<sup>27</sup>

In response to the deteriorating situation in Kosovo, on October 13, 1998, the North Atlantic Council issued activation orders (ACTORDs) for limited air strikes and phased air campaign, which was supposed to begin in “approximately 96 hours,”<sup>28</sup> and which were not objected by Russia. This resulted in the Holbrooke – Milošević agreement on the deployment in Kosovo of the OSCE Verification Mission and NATO air-verification mission over Kosovo.<sup>29</sup>

The subsequent UNSC Resolution 1203, adopted on October 24, 1998, among others, welcomed establishment of the OSCE verification mission in Kosovo and the NATO’s air-verification mission over Kosovo. Furthermore, this resolution expressed deep alarm on the “continuing grave humanitarian situation throughout Kosovo and the impending humanitarian catastrophe, and also re-emphasized the need to prevent this from happening.” Furthermore, this resolution called for “prompt and complete investigation, including international supervision and participation, of all atrocities committed against civilians and full cooperation with the International Tribunal for the former Yugoslavia.” The resolution also reaffirmed that situation in

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<sup>26</sup> “Gravely concerned at the recent intense fighting in Kosovo and in particular the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties and, according to the estimate of the Secretary-General, the displacement of over 230,000 persons from their homes” Ibid.

<sup>27</sup> Alex Bellamy, J. *Kosovo and International Society*. Palgrave Macmillan UK, 2002, p.91

<sup>28</sup> Statement by the Press by the Secretary General, NATO HQ, October 13, 2008, <https://www.nato.int/docu/speech/1998/s981013a.htm>

<sup>29</sup> Bellamy, J. Alex, *Kosovo and International Society*, Palgrave Macmillan UK, 2002, pp. 98-99.

Kosovo constituted a threat to peace and security in the region,<sup>30</sup> thus effectively moving towards the intervention, in a case of further deterioration of security and humanitarian situation.

However, the OSCE mission proved to be incapable of halting the conflict and Belgrade's atrocities against the civilian population in Kosovo. After a summary execution of 45 Kosovo Albanians civilians, committed by Serbian armed forces in the village of Reçak, on January 15, 1999, NATO issued a warning to Serbia, by expressing its readiness to use air-strikes, if necessary, to stop the violence.<sup>31</sup> Again, this warning was not objected by Russia. Faced with this threat, Milošević agreed to peace talks with Kosovo Albanians under the auspices of the Contact Group (consisting of U.S., U.K., France, Germany, Italy, and Russia), which were held in Rambouillet (France). Ultimately, the Kosovo Albanians agreed with the accords (proposal) drafted by the Contact Group representatives (and signed them in Paris, on March 15, 1999), whereas Belgrade refused these accords.<sup>32</sup> After the last failed attempt of the US Envoy Richard Holbrooke to convince Milošević to accept the Rambouillet accords, on March 22, 1999, NATO decided to launch air-strikes against Yugoslavia in order to stop the unfolding genocide, to impose peace in Kosovo and to prevent the spillover of the war in the region. In the words of the then NATO Secretary General Javier Solana "all efforts to achieve a negotiated political solution to the Kosovo crisis having failed, no alternative is open but to take military action."<sup>33</sup> Holbrooke would recall later that he called Milošević the next morning and asked if he (Milošević) believed that NATO would strike. Milošević sneered, "You'll never go to war to protect Shiptars" (a derogatory term for Albanians).<sup>34</sup>

NATO started airstrikes against Yugoslavia on March 24, 1999 with the aim to prevent human catastrophe and to bring Serbia to the peace terms.<sup>35</sup> It is important to note that on March 26, 1999 the Security Council rejected by the vote 12 to 3 (China, Russian Federation and Namibia) a draft resolution presented by Russia, Belarus and India demanding the cessation of

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<sup>30</sup> UNSC Resolution 1203 (1998), October 24, 1998. Available at: <http://unscr.com/en/resolutions/1203>

<sup>31</sup> NATO, NATO's Role in relation to the conflict in Kosovo, July 15, 1999

<sup>32</sup> Marc Weller, "The Rambouillet Conference on Kosovo." *International Affairs*, Vol.75, No.2, April, 1999, p.234

<sup>33</sup> Ibid. p.236

<sup>34</sup> David Phillips, "Twenty years on, Kosovo remains unfinished business." *Balkans Insight*, March 25, 2019.

Available at: <https://balkaninsight.com/2019/03/25/twenty-years-on-kosovo-remains-unfinished-business/>

<sup>35</sup> NATO, Press Statement by Dr. Javier Solana, Secretary General of NATO, March 23, 1999

the use of force against Yugoslavia. There were no other initiatives undertaken by the bodies of the United Nations related to the NATO's airstrikes against Yugoslavia. Interestingly, Russia did not initiate any resolution within UN General Assembly (UNGA) in this case. Moreover, the UNSC Resolution 1239, adopted on May 14 1999, in the midst of air-strikes, did not mention the NATO intervention. This resolution emphasized that "the humanitarian situation will continue to deteriorate in the absence of a political solution to the crisis consistent with the principles adopted by the G8 Foreign Ministers including the one of Russia, on May 6, 1999 (S/1999/516)".<sup>36</sup> These principles, among others, provided for withdrawal from Kosovo of military, police and paramilitary forces of Serbia, deployment in Kosovo of effective military and civilian presences, establishment of an interim administration decided by the UNSC, safe and free return of refugees and displaced persons, Rambouillet accords as an interim political framework, and demilitarization of the Kosovo Liberation Army (KLA).<sup>37</sup>

On the other hand, it has to be noted that, on April 29, 1999, the Federal Republic of Yugoslavia filed to the International Court of Justice (ICJ) claims against Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, United Kingdom and United States for "alleged violations of their obligation not to use force against another State." In 2004, ICJ rejected these cases by concluding that when Belgrade brought these applications was not a member of the United Nations, and in that capacity a State party to the Statute of the ICJ.<sup>38</sup> Furthermore, on the same day, Yugoslavia had demanded the ICJ to issue provisional measures to order the respondent State concerned "to cease immediately its acts of use of force and [...] refrain from any act of threat or use of force" against Yugoslavia. The ICJ delivered the decisions on 2 June 1999, rejecting the requests filed by Yugoslavia by concluding that the Court lacked jurisdiction and consequently, it could not indicate such measures.<sup>39</sup>

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<sup>36</sup> UNSC Resolution 1239 (1999), May 14, 1999. Available at: <http://unscr.com/en/resolutions/1239>

<sup>37</sup> Statement by the Chairman on the conclusion of the meeting of the G-8 Foreign Ministers held at the Petersberg Centre on May 6, 1999, S/1999/516. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/132/59/PDF/N9913259.pdf?OpenElement>

<sup>38</sup> Legality of the use of force, ICJ, [Latest developments | Legality of Use of Force \(Serbia and Montenegro v. Belgium\) | International Court of Justice \(icj-cij.org\)](#)

<sup>39</sup> Ibid.

Russia joined the West in efforts for a diplomatic solution that would make Milošević surrender to the terms of NATO. Subsequently, in a joint meeting that took place in Bonn, on 2-3 June, 1999, the US Deputy Secretary of State, Strobe Talbott, Russia's Envoy, Viktor Chernomyrdin, and the former Finnish President Martti Ahtisaari (in the capacity of the EU Envoy), agreed on a joint plan that met all NATO terms. The plan was accepted by Milošević on June 3, 1999.<sup>40</sup> The war ended with the signing of Military - Technical Agreement [Kumanovo Agreement] between the NATO's led International Security Force (KFOR) and the FRY and Serbian Governments, on June 9, 1999, that provided full withdrawal of security forces of Belgrade from Kosovo and deployment of KFOR in Kosovo.<sup>41</sup>

Following the agreement for withdrawal of the FRY/Serbian security forces, on 10 June 1999 the Security Council adopted Resolution 1244 (UNSC/RES/1244). The UNSC Resolution 1244 put the legal stamp of the Security Council to the new situation created by NATO intervention and Kumanovo Agreement. The UNSC Resolution 1244 effectively deprived the Federal Republic of Yugoslavia (constating of Serbia and Montenegro) from the exercise of any sovereign power over Kosovo. Instead, this resolution, which was adopted under Chapter VII, authorized the deployment of international administration in Kosovo, consisting of two components: 1. Civil component: The United Nations Interim Administration Mission in Kosovo – UNMIK. 2. Military component: International Security Force – KFOR, which is a NATO-led mission peace-enforcement mission, that also included few other countries outside the Alliance.<sup>42</sup> Therefore, it can be concluded that NATO has not invaded Yugoslavia, but its troops have entered the territory upon the agreement with Belgrade and the explicit authorization by the UNSC.

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<sup>40</sup> Daniel Williams, "Serbia Yields to NATO Terms,." *Washington Post*, June 4, 1999. Available at: <https://www.washingtonpost.com/wp-srv/inatl/longterm/balkans/stories/belgrade060499.htm>.

<sup>41</sup> Military - Technical Agreement between the NATO's led International Security Force and the Yugoslav and Serbian Governments, on June 9, 1999. Available at: <https://www.nato.int/kosovo/docu/a990609a.htm>

<sup>42</sup> UNSC Resolution 1244 (1999), June 10, 1999. Available at: <https://digitallibrary.un.org/record/274488?ln=en>

### 3.2. Kosovo's Status Process

The definition of Kosovo's final political status was a process that has been driven by the United Nations and the Contact Group. In this vein, UNSC Resolution 1244 decided that the first responsibility of the international civil administration deployed in Kosovo was "promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of Annex 2 and of the Rambouillet accords (S/1999/648)." According to this resolution, the substantial autonomy was limited to the interim period. The Resolution 1244 included the reference to the Rambouillet accords, which envisaged that the settlement of the final status should be based, among others, on the "will of people," and, as such, did not exclude the option of independence for Kosovo.<sup>43</sup>

After six years of the UN interim administration in Kosovo, the UN Secretary General Kofi Annan on November 15, 2005 appointed Martti Ahtisaari as Special Envoy for the Future Status Process for Kosovo, and this has been approved by the UNSC.<sup>44</sup> Furthermore, the Contact Group meeting at the level of foreign ministers, including Russia, on January 31, 2006 reaffirmed the guiding principles adopted on its meeting of November 2005. These principles determined that there should be: "no return of Kosovo to the pre-1999 situation, no partition of Kosovo, and no union of Kosovo with any or part of another country." Most importantly, the guiding principles stipulated that the "Ministers looked to Belgrade to bear in mind that the settlement needs, *inter alia*, to be acceptable to the people of Kosovo."<sup>45</sup>

Due to a lack of progress in the negotiations, on September 20 2006 the Contact Group at the level of foreign ministers instructed President Ahtisaari to "prepare a comprehensive proposal for a status settlement and on this basis to engage the parties in moving the negotiating process forward." Furthermore, this ministerial statement of the Contact Group considered the

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<sup>43</sup> Marc Weller, "The Vienna Negotiations on the Final Status of Kosovo." *International Affairs*, Vol. 84, No.4, July 2008, p.662.

<sup>44</sup> UN Meetings Coverage and Press-Releases, Secretary-General appoints former President Martti Ahtissari of Finland as Special Envoy for the Future Status Process for Kosovo, November 15, 2005. Available at: <https://press.un.org/en/2005/sga955.doc.htm>

<sup>45</sup> Kosovo Contact Group Statement, London, January 31, 2006, points 6 and 7. Available at: [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/declarations/88236.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/declarations/88236.pdf).

case of Kosovo as “as the last major issue related to the break-up of Yugoslavia.”<sup>46</sup> Based on these instructions, on February 2 2007 President Ahtisaari presented to the Contact Group the Draft Comprehensive Proposal on the Kosovo Status Settlement that provided for supervised independence of Kosovo.<sup>47</sup> On March 26, 2007, the UN Secretary General endorsed the proposal and forwarded the final draft of the Comprehensive Proposal on the Kosovo Status Settlement to the UNSC.<sup>48</sup>

Nevertheless, the Comprehensive Proposal was not voted by the Security Council due to the Russia’s veto threat. Instead of endorsing the proposal, Russia chose to align with Serbia with the aim of blocking the settlement of the Kosovo status. In order to make a last effort to break the impasse at the UNSC, the Contact Group at the Ministerial Meeting of September 27 2007 appointed a troika of negotiators, led by German Ambassador Ischinger representing the European Union, senior Russian diplomat Alexander Botsan-Harchenko and US Ambassador Frank Wiesner. The Troika presented a report to the UN Secretary General on December 4, 2007, by concluding that Kosovo and Serbia were unable to reach an agreement on Kosovo’s final status.<sup>49</sup> It is of crucial importance to highlight that the Resolution 1244 did not make it mandatory for the final status of Kosovo to be approved by the UNSC.

Subsequently, Kosovo, based on the proposal of President Ahtisaari, declared independence on 17 February 2008, after close consultations and coordination with the European Union and the United States. It is important to underline that the United Nations, including the General Assembly, have neither condemned nor called for non-recognition of Kosovo’s independence.

Acting upon Serbia’s initiative, on October 8, 2008, the UN General Assembly adopted a resolution requesting an advisory opinion of the International Court of Justice (ICJ) on whether

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<sup>46</sup>Kosovo Contact Group Ministerial Statement, September 20, 2006. Available at: <https://2001-2009.state.gov/r/pa/prs/ps/2006/72892.htm>.

<sup>47</sup> Joint Contact Group Statement, February 2, 2007. Available at: <https://2001-2009.state.gov/p/eur/rls/or/79892.htm>.

<sup>48</sup> UNSC, Letter from the Secretary-General addressed to the President of the Security Council, S/2007/168, March 26, 2007. Available at: <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kosovo%20S2007%20168.pdf>.

<sup>49</sup> UNSC, S/2007/723, Letter dated 10 December 2007 from the Secretary-General to the President of the Security Council. Available at: <https://reliefweb.int/report/serbia/un-sgs-letter-dated-10-dec-2007-president-un-sc-report-euussussian-fed-troika-kosovo>.

the unilateral declaration of independence of Kosovo is in accordance with international law.<sup>50</sup> The ICJ delivered its Advisory Opinion on July 22, 2010 that stated clearly that the declaration of Kosovo did not violate international law, including here the Resolution 1244 (1999).<sup>51</sup> Following the Opinion of the ICJ, on September 9, 2010, the UNGA with consensus adopted the resolution GA/10980, which acknowledged the Opinion of the Court.<sup>52</sup> In this regard, it is of utmost importance to note the fact that the United Nations does not take decisions on the existence of states, rather decides about their membership to the organization.

Before providing comprehensive elaboration of the ICJ's Advisory Opinion on Kosovo, it is important to analyse the trajectory of Russia's aggression in Ukraine in order to deconstruct the Russian unfolding comparisons with the case of Kosovo.

### **3.3. Russia's aggression in Ukraine**

In contrast to NATO's intervention in Yugoslavia, Russian aggressions against Ukraine in 2014 and 2022, are a pure unilateral acts of occupation and annexation against territorial integrity of a neighbouring country. The United Nations, through several resolutions of its Assembly, has condemned Russia's aggressions and illegal annexations of Ukrainian territories.

Immediately after the illegal annexation of Crimea, on March 27, 2014 the UNGA adopted the Resolution 68/262, "Territorial Integrity of Ukraine,"<sup>53</sup> with 100 votes in favour, 11 against and 58 abstentions. This resolution underscored that "the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on March 16, 2014, have no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol." Furthermore, this resolution called "upon all states, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of

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<sup>50</sup> UNGA, A/Res/63/3, October 8, 2008. Available at: <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kos%20A%20RES63%203.pdf>.

<sup>51</sup> ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect to Kosovo, July 22, 2010. Available at: <https://www.icj-cij.org/public/files/case-related/141/141-20100722-ADV-01-00-EN.pdf>.

<sup>52</sup> United Nations, Meetings Coverage and Press Releases, GA/10980, September 9, 2010.

<sup>53</sup> UN. General Assembly (68th sess. : 2013-2014), March 27, 2014. Available at: <https://digitallibrary.un.org/record/767883?ln=en#record-files-collapse-header>.

Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.”<sup>54</sup> This was an explicit appeal of the UNGA to all states, not to recognize secession of Crimea.

In parallel with the Russian illegal annexation of Crimea, in 2014, the Russian separatist groups started violence in the Donetsk and Luhansk regions of Eastern Ukraine and in April 2014 and on May 11, 2014 referendums were held on their independence. In the meantime, Russia supported these separatists by military personnel, weapons, training, finances and other forms,<sup>55</sup> and armed clashes between the Ukrainian forces and Pro-Russian militias in this region ensued.

Prior to the unrecognized referendums, on April 17, 2014, in a meeting held in Geneva, the representatives of European Union, Russia, Ukraine and United States issued a joint statement by which they agreed on initial steps to de-escalate tensions and restore security. This proposal was declined by the separatist leaders of Donetsk and Luhansk.<sup>56</sup>

International efforts in finding peace in Eastern Ukraine resulted in the OSCE-Trilateral Contact Group Minsk Declaration, of September 5, 2014 (First Minsk Protocol), signed by the representatives of the OSCE, Ukraine, Russia and the separatists of Donetsk and Luhansk.<sup>57</sup> This agreement, among others, provided for immediate cease-fire and its monitoring by the OSCE, monitoring of the Russian-Ukrainian border by the OSCE, decentralization by adoption of the Ukrainian law “On temporary Order of Local Self-Governance in Particular Districts of Donetsk and Luhansk Oblast.”<sup>58</sup>

However, this agreement was not followed with a sustainable cease-fire. Few weeks after the First Minsk Protocol, a memorandum was signed in order to strengthen a fragile case-fire. Nevertheless, the battle over the Donetsk Airport between Ukrainian and separatist forces that

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<sup>54</sup> Ibid.

<sup>55</sup> Zadorozhnii, Oleksandr, *Russian doctrine of international law after the annexation of Crimea: Monograph*. Ukrainian Association of International Law, Institute of International Relations, Taras Shevchenko Kyiv National University, Department of International Law. Kyiv, 2016, p.96.

<sup>56</sup> EEAS, Press Release, Press Release: EU, US, Ukraine and Russia to meet on 17 April 2014 in Geneva / Geneva Statement on Ukraine, April 17, 2014.

<sup>57</sup> The First Minsk Protocol was signed by Swiss Ambassador Heidi Tagliavini representing OSCE, former President Leonid Kuchma, representing Ukraine and Ambassador Mikhail Zurabov representing Russia, and the heads of separatist regions of Donetsk and Luhansk, Zakharchaneko and Plonitskiy.

<sup>58</sup> Sebastian Van Severen, *The Minsk Agreements: Has the Glimmer of Hope Faded? In Principled pragmatism in practice: the EU's policy towards Russia after Crimea*. Fabienne Bossuyt and Peter Van Elsuwege (eds), Brill Nijhoff, Leiden/Boston, 2021, pp. 25-36

started by the end of September 2014, marked the failure of the First Minsk Protocol and of subsequent memorandum.<sup>59</sup> Against this backdrop, the negotiations based on the Normandy format (France, Germany, Ukraine and Russia) and the OSCE Trilateral Contact Group, resulted in the Second Minsk Agreement. This agreement, called the “Package of Measures for the Implementation of the Minsk Agreements,” was signed on February 12, 2015, entailing further measures for sustainable cease-fire and interim self-government in the regions of Donetsk and Luhansk, and subsequently was endorsed by the UNSC Resolution 2202/2015. Most importantly, this agreement reaffirmed the “full respect for the sovereignty, independence and territorial integrity of Ukraine.”<sup>60</sup> However, the provisions of the Minsk Agreements remained nowhere near full implementation.<sup>61</sup> As noted above, the Minsk Agreements did not have the nature of peace accords that would define any political status, either interim or final, for the separatist regions of Donetsk and Luhansk. Instead, they were basically cease-fire and conflict de-escalation agreements, which, if implemented, could have led, hypothetically, to a political solution for the situation in the two separatist regions. They were not agreements meant to alter or rearrange territorial integrity of Ukraine as a UN member, but a clear indication as to the future legal and political framework within which to settle disagreements of Kiev with its separatist groups.

In the period between 2014 and 2022 (first and second Russian assault against Ukraine), the UNGA has adopted several other resolutions related to the situation in Ukraine. This includes Resolution 71/205, of December 19, 2016, Resolution 72/190 of December 19 2017, Resolution 73/263 of December 22 2018, Resolution 74/168 of December 19, 2019, and Resolution 75/192 of December 16, 2020. All these resolutions addressed the situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol of Ukraine, namely the violation of human rights of the residents of this areas by Russia.<sup>62</sup> The UNGA Resolution 73/194 , on “the

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<sup>59</sup> Ibid.

<sup>60</sup> UN, Meetings Coverage and Press Releases, Unanimously Adopting Resolution 2202 (2015), Security Council Calls on Parties to Implement Accords Aimed at Peaceful Settlement in Eastern Ukraine, February 17, 2015. Available at: <https://press.un.org/en/2015/sc11785.doc.htm>.

<sup>61</sup> Sebastian Van Severen, *The Minsk Agreements: Has the Glimmer of Hope Faded? In Principled pragmatism in practice: the EU's policy towards Russia after Crimea*. Fabienne Bossuyt and Peter Van Elsuwege (eds), Brill Nijhoff, Leiden/Boston, 2021, pp.30-39.

<sup>62</sup> For further inquiry see: Documents adopted by UN, OSCE, CE, Austrian Ministry of Foreign Affairs. Available at: <https://vienna.mfa.gov.ua/en/tot/5059-dokumenti-oon-obse>.

problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov,” labelled Russia as “occupying power,” in Ukraine and urged it to “withdraw military forces from Crimea” and to end the “temporary occupation of Ukraine’s territory without delay.”<sup>63</sup> Whereas the Resolution 74/17 of December 9, 2019, on “the problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov,” expressed deep concern that “the provisions of those resolutions and relevant decisions of international organizations, specialized agencies and bodies within the United Nations system have not been implemented by the Russian Federation” and urged again Russia as the “occupying power” to end the occupation of Crimea.<sup>64</sup> On December 7, 2020, the UNGA adopted the Resolution 75/29, with the same title, which reiterated the demands of the previous UNGA resolutions towards Russia.<sup>65</sup>

The situation took new and more dramatic course at the end of 2021 and beginning of 2022. Thus, amidst massive build-up of Russian military forces at the border with Ukraine, which started in December 2021, the Russian Parliament voted on February 15, 2022 an appeal addressed to Russian President Vladimir Putin to recognize the independence of separatist regions of Donetsk and Luhansk.<sup>66</sup> On February 21, 2022, the Russian President announced Russia’s recognition of the self-proclaimed independence of Donetsk and Luhansk and on February 24, 2022, Russia started a full-scale military invasion of Ukraine by Russia.

In reaction to the brutal acts of military aggression against territorial integrity of one of its member states, Ukraine, by one of the permanent members of the Security Council, Russia – which is also a nuclear power, the UN could only provide moral support to the former and utilize the UNGA resolutions to condemn the actions of the latter. Initially, on March 2, 2022, the UNGA

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<sup>63</sup> UNGA Resolution 73/194, December 17, 2018. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/451/02/PDF/N1845102.pdf?OpenElement>.

<sup>64</sup> UNGA Resolution 74/17, December 9, 2019. Available at: <https://guam-organization.org/en/un-ga-resolution-74-17-problem-of-the-militarization-of-the-autonomous-republic-of-crimea-and-the-city-of-sevastopol-ukraine-as-well-as-parts-of-the-black-sea-and-the-sea-of-azov/>.

<sup>65</sup> UNGA Resolution 75/29, December 7, 2020,. Available at: [https://vienna.mfa.gov.ua/storage/app/sites/113/TOT\\_Docs/a-res-75-29-en.pdf](https://vienna.mfa.gov.ua/storage/app/sites/113/TOT_Docs/a-res-75-29-en.pdf).

<sup>66</sup> UNSC Report, Ukraine Briefing, February 16, 2022. Available at: <https://www.securitycouncilreport.org/whatsinblue/2022/02/ukraine-briefing-4.php>.

adopted the Resolution ES-11/1, “Aggression against Ukraine,” with 141 votes in favour, five against and 35 abstentions.<sup>67</sup> This resolution condemned the Russian aggression, reaffirmed territorial integrity of Ukraine, demanded unconditional and immediate withdrawal of all military forces of Russia from Ukraine and deplored the decision of the Russian Federation to recognize the independence Donetsk and Luhansk regions of Ukraine, by considering it as a violation of the territorial integrity and sovereignty of Ukraine.<sup>68</sup> In addition, on March 16, 2022, the ICJ with 13 votes to 2, issued its Order on provisional measures (that has binding effect), demanding suspension of all military operations of Russia in the territory of Ukraine. The ICJ requested Russia to ensure that “any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations.”<sup>69</sup> Russia, obviously, has totally disregarded this Order of ICJ on interim measures. In reaction to the escalation to the Russia’s aggression, the UNGA adopted another resolution on April 7, 2022, that suspended the rights of membership of Russia in the Human Rights Council,<sup>70</sup> with 93 votes in favour, 24 against, and 35 abstentions.<sup>71</sup>

In sum, it can be concluded that the main difference between NATO intervention in Yugoslavia in 1999 and the Russian aggressions in Ukraine since 2014, is that NATO intervention was preceded by three UNSC Resolutions under the provisions of the Chapter VII of UN Charter. NATO’s airstrikes against Yugoslavia were never condemned by any UN body. Moreover, the UNSC rejected a draft resolution sponsored by Russia demanding the cessation of the use of force against Yugoslavia. This is not the case with Russia’s aggressions against Ukraine and illegal

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<sup>67</sup> UN News, General Assembly resolution demands end to Russian offensive in Ukraine, March 2, 2022, [General Assembly resolution demands end to Russian offensive in Ukraine | | UN News](#).

<sup>68</sup> UNGA Resolution ES-11/1 “Aggression against Ukraine”, March 2, 2022. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/293/36/PDF/N2229336.pdf?OpenElement>.

<sup>69</sup> Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), March 16, 2022. Available at: <https://www.icj-cij.org/public/files/case-related/182/182-20220316-PRE-01-00-EN.pdf>.

<sup>70</sup> UNGA Resolution ES-11/3, Suspension of the rights of membership of the Russian Federation in the Human Rights Council, April 7, 2022, <https://digitallibrary.un.org/record/3967950?ln=en#record-files-collapse-header>

<sup>71</sup> UN News, UN General Assembly votes to suspend Russia from the Human Rights Council, April 7, 2022, [UN General Assembly votes to suspend Russia from the Human Rights Council | | UN News](#)

annexations of parts of its territory that were condemned by several UNGA resolutions and the ICJ Order on interim measures.

Contrary to Russia's forceful occupation of parts of Ukraine, NATO has not occupied any part of territory of Yugoslavia; and the Alliance's led peace-enforcement mission – KFOR, in which Russia participated as well, has entered in Kosovo after the agreement with the authorities of Yugoslavia and explicit authorization given by the UNSC Resolution 1244 (1999), adopted under Chapter VII of the UN Charter. On the other hand, the Russian illegal annexation of Crimea in 2014 and full-scale invasion of Ukraine in February 2022, were blatant acts of aggression and violation of territorial integrity of Ukraine.

When it comes to the declaration of independence of Kosovo and annexation of Crimea and recognition of the independence of the separatist regions of Donetsk and Luhansk by Russia, the key difference is that Kosovo was the last remaining problem of the bloody dissolution of the Socialist Yugoslavia, as acknowledged by the Contact Group. This is not the case with Crimea, Donetsk and Luhansk, which are not problems that derived from the peaceful dissolution of the Soviet Union, but they were instigated by Russia's hegemonic ambitions.

The independence of Kosovo was a result of the UN-led negotiation process for determination of its final status, after six years of international administration. The annexation of Crimea and recognition of independence of Donetsk and Luhansk regions by Russia, did not result from any international process, led by the UN or any other international organization.

Finally, the United Nations have neither condemned nor called for non-recognition of Kosovo's independence, and the ICJ has clearly confirmed that the declaration of Kosovo did not violate international law. On the other side, the annexation of Crimea and the recognition of independence of Donetsk and Luhansk by Russia were condemned by the UNGA, which also has requested that their altered status not be recognized by its member nations.

#### **4. (Mis)interpretations of the Advisory Opinion of the International Court of Justice on the Declaration of Independence of Kosovo**

After vehement opposition of the independence of Kosovo, in September 2008 Serbia succeeded to sponsor a resolution in the UN General Assembly, which referred the issue to the ICJ for an Advisory Opinion. This was held in Belgrade as a big victory for the Serbian diplomacy. On 22 July 2010, the ICJ issued the Advisory Opinion on *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*. This Opinion spelled out the authoritative legal interpretation on the proclamation of independent states – one of the most pivotal issues of international law.

##### **4.1. The scope of the question and the answer of the UN court**

The question that was formulated by Serbia and was referred to the ICJ by the UNGA Resolution 63/3, on October 8, 2008, was specific and narrow:

*“Is the unilateral declaration of the independence from the Provisional Institutions of Self-Government in Kosovo in accordance with international law?”*

The Court first found unanimously that it had jurisdiction to issue an Advisory Opinion in this case. Next, with nine to five votes the Court decided to comply with the request. Finally, with ten to four votes, the ICJ ruled that Kosovo’s declaration of independence did not violate any applicable rule of international law.

In the Court’s view, the question did not ask whether or not Kosovo had achieved statehood, nor did it ask about the validity or the legal effects of the recognition of Kosovo by the other states.<sup>72</sup> Ironically, Serbia, the sole sponsor of the Resolution 63/3, stated during the debate in the UNGA that “the question represents the lowest common denominator of the positions of the Member States on this question, and hence there is no need for any changes or

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<sup>72</sup> ICJ, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, July 22, 2010, p.24

additions.<sup>73</sup> However, when the Opinion of ICJ was issued Serbia rejected it, notwithstanding the fact that it was the sponsor of the UNGA resolution asking the ICJ for an Advisory Opinion on this case.

As to the gist of the case, the Court constructed its reasoning on legality of the proclamation on independence of Kosovo by referring to three legal bases: **(i)** the general international law; **(ii)** the UNSC resolution 1244; **(iii)** the Constitutional Framework of Kosovo, which was promulgated through the UNMIK Regulation 2001/9.<sup>74</sup>

First, the Court discerned the normative backdrop established by the international law on declaration of independence of states. In this direction, ICJ explained that during the last three centuries there were many occasions of the declaration of independence that were strongly opposed by the state from which the new state seceded. In some cases, these declarations lead to the creation of a new state and in others it did not. Yet, “in no case does the practice of States as a whole suggests that act of promulgating the declaration of independence was regarded as contrary to international law.”<sup>75</sup> Accordingly, the Court concluded that the general international law contains no prohibition of declarations of independence. In reaching this conclusion, the ICJ reinvigorated the precedent set by its predecessor, the Permanent Court of International Justice, in the famous “Lotus case,” in 1926. The “Lotus case” established the principle that under international law, that which is not prohibited is permitted. In other words, international law consists primarily by a set of binding rules that prohibit certain actions in international life.<sup>76</sup> Accordingly, the Court concluded that the declaration of independence of Kosovo, *per se*, did not encroach on any applicable principle of general international law.

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<sup>73</sup> United Nations Official Records of the General Assembly, Sixty-third Session, 22<sup>nd</sup> plenary meeting, October 8, 2008 (A/63/PV.22), p. 2 [Dossier No. 6].

<sup>74</sup> From 1999 to 2008, United Nations Interim Administration in Kosovo – UNMIK, exercised the ultimate legislative authority through adoption of regulations or other lower sub-legal acts. The Constitutional Framework of Kosovo was promulgated by the Special Representative of the Secretary General (head of the UNMIK), on May 2011, through Regulation 2001/09. The Constitutional Framework created the legal framework for sharing of powers between the local institution that were created through democratic elections and the international institutions, which existed within the UN interim administration umbrella.

<sup>75</sup> ICJ, Accordance with international law of the unilateral declaration of independence in respect of Kosovo, July 22, 2010, para. 79.

<sup>76</sup>The decision of the Permanent Court of International Justice in the *Lotus Case* is available at: <https://eprints.soas.ac.uk/30377/3/Chinkin%20ozkurt%20Case%20aka%20the%20Lotus%20Case.pdf>.

Besides general international law (i.e., *lex generalis*), the Court had to establish whether any individual norm or act of international law that applies specifically to Kosovo (*lex specialis*), prescribed any prohibition on the proclamation of independence of Kosovo, or on the final status of Kosovo. From the ICJ's perspective, the *lex specialis* in the case of Kosovo consisted primarily of UNSC Resolution 1244.<sup>77</sup> In addition, ICJ referred to the Constitutional Framework of Kosovo, which was part of Kosovo's transitory legal order created under the umbrella of UN interim administration mission.<sup>78</sup> The ICJ held that the Security Council Resolution 1244 imposed international legal obligations and was part of the applicable international law. Whereas the Constitutional Framework, according to the ICJ, possessed international legal character and was part of specific legal order created in Kosovo pursuant to UNSC resolution 1244, and regulated matters which were the subject of internal law.<sup>79</sup>

Before examining ICJ's findings on the UNSC Resolution 1244 and the Constitutional Framework of Kosovo, it is crucial to underline that two parallel legal orders cannot coexist in the same territory and over the same subjects. The UNSC Resolution 1244 had placed Kosovo under the international administration, whereby the UN was sole political authority vested with the sovereign prerogatives, including the exercise of the legislative, executive and judiciary powers. Hence, in legal sense, the FRY/Serbia's Constitution and its constitutional order was not applicable in Kosovo from the timing of entry into force of the UNSC Resolution 1244. UNSC Resolution 1244 was the superior legal act governing Kosovo and, based on authorizations deriving therefrom, the Special Representative of the Secretary General for Kosovo (head of UNMIK) promulgated the Constitutional Framework in Kosovo. As a caveat, it is important to highlight that, in essence, the legal and institutional infrastructure of a *de facto* state of Kosovo was erected during the international administration and under the UN's umbrella. Thus, a new legal order was promulgated, contours of free-market economy were laid down, the euro was adopted as the country's currency and the practice of free multi-party elections was set in

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<sup>77</sup> ICJ, Accordance with international law of the unilateral declaration of independence in respect of Kosovo, July 22, 2010, para. 83.

<sup>78</sup> Marc Weller. "Modesty Can Be a Virtue: Judicial Economy in the ICJ Kosovo Opinion?", *Leiden Journal of International Law*, 24, (2011), pp. 127-147.

<sup>79</sup> See, ICJ, Reports of Judgments, Advisory Opinions and Orders. Available at: <https://www.icj-cij.org/public/files/case-related/141/141-20100722-ADV-01-00-EN.pdf>.

motion.<sup>80</sup>As to the issue of status of Kosovo, the ICJ concluded that the UNSC Resolution 1244 established an interim regime for Kosovo with the aim of creating the ground for a political process to determine its final status. This resolution contained no provision dealing with the final status of Kosovo or with the conditions of its achievement. Consequently, the Court concluded that the UNSC Resolution 1244 did not preclude the issuance of the declaration of independence for Kosovo.<sup>81</sup> The Court recalled the past practices which indicate that where the Security Council has decided to impose restrictive conditions for the final status of a territory, those conditions were spelled out explicitly in relevant resolutions.<sup>82</sup>

Finally, the Court addressed the accordancy of the declaration of independence with the Constitutional Framework of Kosovo. The real question here was whether the authors of the declaration of independence had the right to do so. The Court held that the authors of the declaration of independence did not violate any provision of the Constitutional Framework, as they were not bound by it.<sup>83</sup>

#### **4.2. Birth of states through the lenses of ICJ Opinion on Kosovo: the case of Crimea, Donbas and Luhansk**

What makes ICJ Opinion on Kosovo a milestone act for international law is that it dealt with some of the most crucial issues and principles of international law.

**First**, the Opinion of the ICJ on the issue of independence of Kosovo clarified that there is no intrinsic link between proclamation, creation and recognition of a state. In other words, these three aspects are not linked in any causal relations. This means that proclamation of

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<sup>80</sup> Rand Institute. *Nation Building: The Inescapable Responsibility of the World's Only Superpower*. Available at: <https://www.rand.org/content/dam/rand/www/external/publications/randreview/issues/summer2003/rr.summer2003.pdf>. See also, Marcus Brand. "Institution-Building and Human Rights Protection in Kosovo in the Light of UNMIK Legislation." *Nordic Journal of International Law* Vol. 70. No. 4 (2001), 461–488.

<sup>81</sup> Peter Hilpold. "The Kosovo Opinion of 22 July 2010: Historical, Political and Legal Pre-Requisites" in: Peter Hilpold (ed.) *Kosovo and International Law: The ICJ Advisory Opinion of 22 July 2010*, Martin Nijhof Publishers, 2012, p. 11.

<sup>82</sup> Kosovo Before the ICJ, Handbook published by Ministry of Foreign Affairs of Kosovo, 2011, p. 76.

<sup>83</sup> Cedric Rynagert and Sven Sobrie. "Recognition of States: International Law or Real-politik? The Practice of Recognition in the Wake of Kosovo, South Ossetia and Abkhazia." *Leiden Journal of International Law*, 24 (2011), pp. 467-490.

independence of a state does not automatically imply that the state exists in reality, nor does it lead to its recognition by the other states.<sup>84</sup>

**Second**, the ICJ confirmed that international law is generally neutral with regards to the birth of states. This neutrality ends when the situation involves “egregious violations of norms of *general international law*, in particular those of a peremptory character (*jus cogens*)” and this is confirmed by the UN. This argument has been advanced by Kosovo’s legal team and several other countries in the ICJ proceedings.

The ICJ embraced this legalistic position, while addressing the cases of Southern Rhodesia, Northern Cyprus and *Republika Srpska* of Bosnia and Herzegovina. With regards to these three cases, after recalling the reference to these cases by several participants to the proceedings on the Kosovo case, the ICJ concludes that:

*“[T]he Court notes, however, that in all those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, 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).”<sup>85</sup>*

From a purely legal standpoint, this finding of the ICJ means that the birth of a new state in the current international system must go through the moral catalyst constructed upon the peremptory norms of international law (i.e. prohibition of aggression, prohibition of genocide, rules of international humanitarian law, prohibition of slavery, discrimination etc ).<sup>86</sup>

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<sup>84</sup> The point of reference in International Law is the Montevideo Convention of 1933, which prescribes four conditions for the existence of a state: A permanent population, defined territory, government and capacity to enter into relations with other states. Apparently fulfills all these conditions, Yet, this was not a question presented to the ICJ.

<sup>85</sup> ICJ, Accordance with international law of the unilateral declaration of independence in respect of Kosovo, July 22, 2010, para. 109.

<sup>86</sup> According to the International Law Commission, “A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no

**Third**, the ICJ did not directly address the independence of Kosovo within the ambit of the principle of self-determination. It did, however, confirm that the applicability of the principle of self-determination beyond the colonial context remains ambiguous. As such, this issue remains as much an issue of domestic law as it is of international law. The ICJ noted that radically different views were presented by those taking part in the proceedings in the Kosovo case, as to whether the right to self-determination confers upon part of a population of an existing state the right to separate.<sup>87</sup> While Serbia and some countries claimed that Kosovo did not enjoy the right to self-determination, many countries argued the contrary. However, the Court considered that the content of the question presented by the UNGA has requested the Court's opinion only on whether or not the declaration of independence is in accordance with international law.

**Fourth**, the ICJ touched upon the principle of territorial integrity. Serbia's major legal argument revolved around the allegation that the independence of Kosovo violated its territorial integrity. The Court referred to the UN Charter – in particular Article 2, paragraph 2, as well as to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, and the Helsinki Final Act. In Court's interpretation, all these fundamental instruments of international law confine the scope of the principle of territorial integrity to the realm of relations between states.<sup>88</sup> Therefore, this principle does not cover behavior of non-state actors nor processes and dynamics within a state.

#### **4.3. Inapplicability of the ICJ Opinion on Kosovo in the cases of Crimea, Donetsk and Luhansk**

Russia's aggression against Ukraine is naked, in legal sense, in the lenses of the Advisory Opinion of the ICJ on the case of Kosovo. This legal conclusion transpires from three major interpretations of the ICJ on the case of Kosovo. First, unlike Kosovo where *lex generalis*, *lex specialis* and

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derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Available at: [Chapter V: Peremptory norms of general international law \(jus cogens\) -- Report of the International Law Commission: Seventy-first session \(29 April–7 June and 8 July–9 August 2019\)](#).

<sup>87</sup> Ibid. para. 82.

<sup>88</sup> ICJ, Accordance with international law of the unilateral declaration of independence in respect of Kosovo, July 22, 2010, para. 437

domestic law were silent on the question of its final status, in the territories of Ukraine annexed by Russia these three interrelated legal frameworks prohibit the unilateral secessions. Second, Russia bluntly violated two agreements it had signed with Ukraine and/or other countries, namely the Budapest Memorandum, Treaty on Friendship, Cooperation and Partnership, and the Minsk agreements. Third, the principle of territorial integrity is applicable in the case of Ukraine and is brutally infringed by Russia.

#### **4.3.1 *The Russian intervention in Ukraine and the separatism in Crimea, Donbas and Luhansk is in grave violation of the fundamental principles of general international law***

The standard reconfirmed by the ICJ in the case of Kosovo is that general international law, i.e., *lex generalis*, contains no applicable prohibition of declarations of independence. What may render the declarations of independence of states as illegal is if they are product of the use of force or involve other egregious violations of norms of general international law, in particular those of a peremptory character. Following the interpretation that the ICJ made to the cases of Southern Rhodesia, Northern Cyprus and *Republika Srpska*, the egregious violations of international law in such cases is established by the UN resolutions.

As explained above, the UN did not make any such finding for Kosovo but it had done so in the case of Ukraine, with several resolutions of the General Assembly. The first one was made in March 27, 2014, few days after the referendum in Crimea, when the UNGA adopted resolution 68/262 on “Territorial integrity of Ukraine,”<sup>89</sup> which affirmed the UNGA’s “commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders.”<sup>90</sup> The resolution held that the referendum in Crimea “had no validity and could not form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol.”<sup>91</sup> Furthermore, the resolution called upon states “to desist and refrain from actions aimed at the partial or total disruption of the national unity and

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<sup>89</sup> The resolution was adopted by a vote of 100 Member States in favor and 11 against, with 58 abstentions.

<sup>90</sup> UNGA Resolution 68/262, paragraph 5. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/455/17/PDF/N1345517.pdf?OpenElement>.

<sup>91</sup>Ibid. Para. 5.

territorial integrity of Ukraine, including any attempts to modify Ukraine’s borders through the threat or use of force or other unlawful means.”<sup>92</sup> The allusion here was clearly on Russia, which had flagrantly masterminded and orchestrated the secessionist rebellion in Crimea. This resolution made explicit call on the UN member states “not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol.”<sup>93</sup>

As explained above, prior to the second phase of Russia’s aggression against Ukraine, the UNGA adopted several resolutions on Crimea.<sup>94</sup> In the last UNGA’s resolution prior to the whole scale invasion of Russia, entitled: “Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov,” of December 7, 2020, the UNGA re-urged the Russian Federation, “as the occupying Power,” to immediately, completely and unconditionally withdraw its military forces from Crimea and end its temporary occupation of the territory of Ukraine without delay. In this resolution, the UNGA reiterated that no territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful. The UNGA expressed condemnation to the ongoing temporary occupation of part of the territory of Ukraine, namely, the Autonomous Republic of Crimea and the city of Sevastopol, by the Russian Federation, and reaffirmed the non-recognition of its annexation.<sup>95</sup>

With the beginning of the whole-scale Putin’s war against Ukraine, in February 2022, the UNGA adopted several resolutions condemning Russia’s aggression, confirming the territorial integrity of Ukraine and demanding the immediate and unconditional ending of Russia’s invasion. In all these resolutions, the UNGA reaffirmed that no territorial acquisition resulting from the threat or use of force shall be recognized as legal.<sup>96</sup> On April 7, 2022, the UNGA voted a resolution

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<sup>92</sup> Ibid. Para. 2.

<sup>93</sup> Ibid. Para. 6.

<sup>94</sup> Resolution 71/205 of December 19, 2016; Resolution 72/190 of December 19, 2017; Resolution 73/194 of December 17, 2018; Resolution 73/263 of December 22, 2018; Resolution 74/17 of December 9, 2019; Resolution 74/168 of December 18, 2019.

<sup>95</sup> Resolution of the General Assembly, “Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov.” Available at: [file:///C:/Users/Kobit%20PC/Downloads/A\\_RES\\_75\\_29-EN.pdf](file:///C:/Users/Kobit%20PC/Downloads/A_RES_75_29-EN.pdf)

<sup>96</sup> See, among others, the Resolution of the General Assembly: SG /SM/21164 of March 2, 2022; Resolution A/RES/ES-11/1 of March 18, 2022.

to suspend Russia from the Human Rights Council.<sup>97</sup> As highlighted above, in addition to the General Assembly, another principal body of the UN, ICJ, has confirmed with its decision on interim measure of March 16, 2022, calling the Russian Federation to suspend all military operations in the territory of Ukraine.”<sup>98</sup> As expected, Russia blocked by veto the attempts of the UNSC to adopt a resolution condemning aggression against Ukraine.<sup>99</sup>

In this regard, it is important to note that the Russian Federation membership to the Council of Europe (CoE) was suspended on February 25, 2022, a day after it launched its unprovoked invasion of Ukraine. Russia made a declaration of its intent to withdraw from the CoE on March 15, 2022. On the same day, the Parliamentary Assembly adopted an Opinion which stated that Russia can no longer be a member state of the organization. The resolution of the Committee of Ministers, adopted on March 16, 2022, emphasized that aggression against Ukraine constitutes a serious violation by Russia of its obligations under Article 3 of the Statute of the Council of Europe, and expelled Russia from the organization.<sup>100</sup> Before this, in March 2014, the European Court of Human Rights had imposed an interim measure to Russia, after the request submitted by Ukraine, urging the Government of Russia to refrain from military attacks against civilians and civilian objects in Ukraine, including residential premises, emergency vehicles and other specially protected civilian objects such as schools and hospitals, and to ensure immediately the safety of the medical establishments, personnel and emergency vehicles within the territory under attack or siege by Russian troops.<sup>101</sup> This was another confirmation by a respectable international judicial mechanism, such as the European Court of Human Rights, that Russia was directly involved in the military operations within the territory of Ukraine.

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<sup>97</sup> UNGA, A/RES/ES-11/3. Available at: [file:///C:/Users/Kobit%20PC/Downloads/A\\_RES\\_ES-11\\_3-EN.pdf](file:///C:/Users/Kobit%20PC/Downloads/A_RES_ES-11_3-EN.pdf).

<sup>98</sup> Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), March 16, 2022, [The Court indicates provisional measures \(icj-cij.org\)](https://www.icj-cij.org/).

<sup>99</sup> See the UN press release Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto available at:

[https://press.un.org/en/2022/sc14808.doc.htm?\\_gl=1\\*\\_hizyfn\\*\\_ga\\*MjUzMTg2Mjk5LjE2NTg5MzE4Mzk.\\*\\_ga\\_TK9BQL5X7Z\\*MTY1OTAwNzY0NC4yLjEuMTY1OTAwOTUyOS4w](https://press.un.org/en/2022/sc14808.doc.htm?_gl=1*_hizyfn*_ga*MjUzMTg2Mjk5LjE2NTg5MzE4Mzk.*_ga_TK9BQL5X7Z*MTY1OTAwNzY0NC4yLjEuMTY1OTAwOTUyOS4w).

<sup>100</sup> Resolution of the Committee of Ministers of the Council of Europe, CM/Res(2022)2. Available at:

[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=0900001680a5da51](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5da51).

<sup>101</sup> Decision for interim measure of the European Court of Human Rights in the case of: *Ukraine and Netherlands v. Russia*. Applications no: 8019/16, 43800/14 and 28525/20. Available at:

<https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7272764-9905947&filename=The%20Court%20grants%20urgent%20interim%20measures%20in%20application%20concerning%20Russian%20military%20operations%20on%20Ukrainian%20territory.pdf>.

Although the resolutions of the UNGA do not have the binding force of those adopted by the UNSC, they manifest clearly the position of the vast majority of member states and also are adopted by one of the principal bodies of the UN. Seeing this issue from the lenses of the ICJ Opinion, unlike in the case of Kosovo, the general international law sets prohibitions in the declarations of independence of the Ukrainian territories annexed by the Russian Federation, namely Crimea, Donetsk and Luhansk.

#### **4.3.2 *Lex specialis in the case of Ukraine***

Evidently, the resolutions of the General Assembly on Ukraine do not constitute general international law, as a UN “soft law,” but they give formal confirmation that the self-proclaimed independent republics of Crimea, Donetsk and Luhansk are product of infringement of some of the fundamental norms of international law. In other words, these resolutions have not created any specific legal obligation but just have confirmed that the Russian Federation was breaching the existing norms of international law – indeed some of the most fundamental ones.

There are three international agreements specific to the situation in Ukraine that the Russian Federation is breaching: the Budapest Memorandum of 1994; Treaty on Friendship, Cooperation and Partnership, of 1997, and the Minsk Agreements of 2014 and 2015.

The Budapest Memorandum was signed in 1994, by Russia, Ukraine, USA and UK, and was titled: *Memorandum on security assurances in connection with Ukraine’s accession to the Treaty on the Non-Proliferation of Nuclear Weapons*. Under the terms of the memorandum, Ukraine agreed to relinquish its huge nuclear arsenal, inherited from the Soviet Union, and transfer all nuclear warheads to Russia for decommissioning. In return, the signatory states, including Russian Federation, “reaffirmed their commitment to respect the independence, sovereignty and existing borders of Ukraine.” China and France, as the two nuclear powers, extended similar assurances to Ukraine, but did not sign the Budapest Memorandum.<sup>102</sup> With the annexation of intervention in Crimea in 2014 and the full-scale aggression against Ukraine, in February 2022,

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<sup>102</sup> *Memorandum on security assurances in connection with Ukraine’s accession to the Treaty on the Non-Proliferation of Nuclear Weapons*. Available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%203007/Part/volume-3007-I-52241.pdf>.

Russian Federation breached its obligations stipulated in Article 1 of the Budapest Memorandum “to respect the independence, sovereignty and existing borders of Ukraine.”

Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation, was signed on May 31, 1997 and entered into force on April 1, 1999. The Treaty was concluded for ten years – with possibility for extension every ten years – and was effectively in force until 2019.<sup>103</sup> Most importantly, Article 2 of this Treaty created the bilateral obligation for the parties (i.e., Russian Federation and Ukraine) to honor each other’s territorial integrity and to acknowledge the inviolability of the borders existing between them. Further, Article 3 provided that the parties shall base their relations on the principle of sovereign equality, territorial integrity and inviolability of borders.<sup>104</sup>

Furthermore, as explained above, the Minsk Agreements of 2014 and 2015 reaffirmed the full respect for the sovereignty, independence and territorial integrity of Ukraine; provided for the restoration of full control of the state border by the government of Ukraine and called for withdrawal of all foreign armed formations, military equipment and mercenaries.<sup>105</sup>

By the virtue of the Article 2 (a) of the Vienna Convention on the Law of Treaties, “*‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.*”<sup>106</sup> By orchestrating military campaign against Ukraine in 2014 and 2022, Russia breached its obligations under the [Budapest Memorandum](#), Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation, as well as Minsk Agreements, given that by signing of these agreements, Russia undertook extra specific legal obligations to respect the Ukraine’s sovereignty and territorial integrity.

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<sup>103</sup>See on this, Yulia Ioffe, “Termination of the Treaty of Friendship between Ukraine and Russia – Too Little Too Late?” Available at: <http://opiniojuris.org/2019/05/01/termination-of-the-treaty-of-friendship-between-ukraine-and-russia-too-little-too-late-%EF%BB%BF/>.

<sup>104</sup> See Articles 2 and 3 of the Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation.

<sup>105</sup> Reuters. Factbox: What are the Minsk agreements on the Ukraine conflict? February 21, 2022, Available at: <https://www.reuters.com/world/europe/what-are-minsk-agreements-ukraine-conflict-2022-02-21/>.

<sup>106</sup> Vienna Convention on the Law of Treaties. Available at: [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

### **4.3.3 The Constitution of Ukraine and annexation of Crimea, Donetsk and Luhansk**

The ICJ Opinion on Kosovo has confirmed that beyond the colonial context or foreign occupation, the right to self-determination is more an issue of national constitutional law. In the case of Kosovo, the boundaries of international law and constitutional law were blurred by the specific legal status of Kosovo under international administration. With the UNSC resolution 1244, Kosovo was put under the UN Interim Administration whereby UNMIK was empowered, among others to, to exercise law-making and law-enforcement powers. The international echo of the decision of the Supreme Court of Canada on the right of secession on Quebec is strong testimony on the interface between the national constitutional law and international law on the issue of self-determination and secession. The reasoning of the Supreme Court of Canada on the inherent link between the internal and external self-determination became unavoidable reference to any debate and adjudication on the right to secession – including the right to a remedial secession.

In this regard, the case of Ukraine is clear-cut. The Ukrainian Constitution remains the highest legal norm governing the entire territory of Ukraine, including Crimea, Donetsk and Luhansk. Every constitutional order is hierarchical and it is an undisputed legal fact that the Constitution of Ukraine is the highest law of the land. As highlighted in the second part of this analysis, the Constitution of Crimea in Article 1 stipulates the Autonomous Republic of Crimea shall be an integral part of Ukraine and shall have only the powers conferred upon it by the Constitution of Ukraine.<sup>107</sup> This is in line with the Article 8 of the Constitution of Ukraine, which stipulates that the Constitution of Ukraine has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it.<sup>108</sup> Further, Article 2 of the Constitution of Ukraine provides that the sovereignty of Ukraine extends throughout its entire territory. Ukraine is a unitary state and the territory of Ukraine within its present border is indivisible and inviolable.<sup>109</sup> Most importantly, Article 73 of the Constitution of Ukraine prescribes that altering the territory of Ukraine is resolved exclusively by an All-Ukrainian

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<sup>107</sup> Article 1 of the Constitution of Crimea of 1998. Available at:

[https://en.wikisource.org/wiki/Constitution\\_of\\_Crimea,\\_1998](https://en.wikisource.org/wiki/Constitution_of_Crimea,_1998)

<sup>108</sup> Article 8 of the Constitution of Ukraine. Available at: <https://www.refworld.org/pdfid/44a280124.pdf>.

<sup>109</sup> Article 2 of the Constitution of Ukraine. Available at: <https://www.refworld.org/pdfid/44a280124.pdf>.

referendum.<sup>110</sup> Hence, the Constitution of Ukraine requires a national referendum, not a local one (such as the referendums of Crimea, Donetsk and Luhansk were), for any alteration of status of any part of its territory.

Thus, the logic of holding “referendums for independence” in every town and city of the territory of Ukraine that is occupied by Russia, is everything but legal. It is also important to note that Article 157 of the Constitution of Ukraine forbids constitutional amendments “oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine.”<sup>111</sup>

In light of the above, the Constitution of Ukraine does not permit secession, whereas the alteration of borders can be done only through an all-Ukrainian referendum. Furthermore, no constitutional amendment is possible if that jeopardizes sovereignty and indivisibility of the territory of Ukraine. With regard to the prohibition of secessions, the Constitution of Ukraine is in line with the predominant constitutional approach, with around eighty percent of the constitutions of the countries of the world prescribing such prohibitions.<sup>112</sup>

#### ***4.3.4 Violation of the principle of territorial integrity in Ukraine***

The ICJ Opinion on Kosovo’s declaration of independence made a compelling interpretation of the confines of the principle of territorial integrity of states – which lies at the foundation of the Post-World War II international system. According to this authoritative interpretation, the principle of respect of the territorial integrity of states applies in the relation between sovereign states. As noted above, Serbia’s major legal argument in ICJ revolved around the allegation that the independence of Kosovo violated its territorial integrity. The Court referred to the UN Charter – in particular Article 2, paragraph 2, as well as to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, and the Helsinki Final Act. In Court’s interpretation, all these

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<sup>110</sup> Article 73 of the Constitution of Ukraine. Available at: <https://www.refworld.org/pdfid/44a280124.pdf>.

<sup>111</sup> Article 157 of the Constitution of Ukraine. Available at: <https://www.refworld.org/pdfid/44a280124.pdf>.

<sup>112</sup> Verfassungsblog, “We the Territorial People” and the Russia-Ukraine War. May 7, 2022, Available at: <https://verfassungsblog.de/we-the-territorial-people-and-the-russia-ukraine-war/>.

fundamental instruments of international law confine the scope of the principle of territorial integrity to the realm of relations between states.<sup>113</sup> Therefore, this principle does not cover behavior of non-state actors nor processes and dynamics within states. In light of this interpretation, in the case of Kosovo ICJ clearly confirmed that the declaration of independence did not follow from the 1999 use of force, but rather from the legal regime established by the UNSC resolution 1244 in June 1999.

The legal situation in Ukraine is different, as the change of legal status of any part of its territory would follow directly from Russia's military aggression.<sup>114</sup> The principle of territorial integrity and the prohibition of the use of force are intertwined. In this vein, Article 2(4) of the Charter stipulates that "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."<sup>115</sup> Coincidentally, the initial draft of the UN Charter, in 1944, only referred to the prohibition of the use of force and it was only thanks to the initiative of the less powerful countries that the reference was to territorial integrity and political independence was included in the Charter.<sup>116</sup> The less powerful states invigorated this legal safeguards as a shield *vis-à-vis* the threat from the more powerful ones.<sup>117</sup>

Against this backdrop, in his attempt to conceal the classical aggression against Ukraine, Putin qualified its large-scale military invasion as a "special military operation." International law does not prescribe any quantitative or semantic parameter in order to determine whether an unprovoked use of force of one country against another and grabbing of its territory is illegal and in violation of the principle of territorial integrity. While eight months since the commencement of the "special military operation" of Russia against Ukraine, its final objectives remain unclear, one of the products of aggression has been the self-proclaimed independences of Crimea,

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<sup>113</sup> ICJ, Accordance with international law of the unilateral declaration of independence in respect of Kosovo, July 22, 2010, para. 437.

<sup>114</sup> Jure Vidmar. "Crimea's Referendum and Secession: Why it Resembles Northern Cyprus More than Kosovo." March 20, 2014, Available at: <https://www.ejiltalk.org/crimeas-referendum-and-secession-why-it-resembles-northern-cyprus-more-than-kosovo/>.

<sup>115</sup> Article 2 of the Charter of United Nations.

<sup>116</sup> Christian Marxsen, Territorial Integrity in International Law – Its Concept and Implications for Crimea, 2015, Available at: [https://www.zaoerv.de/75\\_2015/75\\_2015\\_1\\_a\\_7\\_26.pdf](https://www.zaoerv.de/75_2015/75_2015_1_a_7_26.pdf).

<sup>117</sup> Ibid.

Donetsk and Luhansk and their subsequent illegal annexation by Russia. This fact has been confirmed by several resolutions of the UNGA and many other documents and statements, which have been explained above. Therefore, the creation of the phantom territorial entities within sovereign states, through military intervention from outside represents the most severe encroachment on the principle of territorial integrity and the self-proclaimed Russian republics within Ukraine are the most typical examples.

In light of the above, the ICJ Opinion on the declaration of the independence of Kosovo proves totally the opposite of Putin's claims to legitimize his grabbing of the Ukrainian territories. The declarations of the independences of Crimea, Luhansk and Donetsk do not stand the legal test of the ICJ Opinion on Kosovo. The self-proclaimed independences of Crimea, Donetsk and Luhansk brutally infringed some of the fundamental principles of the general international law, starting from the norm of prohibition of the use of force and respect for territorial integrity of states. This was confirmed by the UNGA resolutions and the ICJ decisions. Further, by attacking Ukraine, Moscow violated its explicit obligations arising from the three specific agreements that Russia was part of and which guaranteed the territorial integrity of Ukraine; namely the Budapest Memorandum, the Treaty on Friendship, Cooperation and Partnership, and the Minsk Agreements. Lastly, the Russia's aggression and the secessionist actions in Crimea, Donetsk and Luhansk contravened the Constitution of Ukraine. This Constitution is the supreme legal act in the entire Ukraine, and, as such, it governs Crimea, Donetsk and Luhansk. This Constitution provides that Ukraine is a unitary state, its borders are indivisible and inviolable, and prohibits particular referendums for changing the status of the territory of Ukraine-such as the referendums in Crimea, Donetsk and Luhansk were.

It transpires that the ICJ's holding that the principle of territorial integrity applies in relations between states, not within them, and as such it applies in the case of Crimea, Donbas and Luhansk, which are consequence of Russian aggression and violation of territorial integrity of Ukraine. Contrary to Kosovo, where the process of independence rouse from the bloody disintegration of the Socialist Yugoslavia and with heavy international involvement, the attempts for secessions of Crimea, Donetsk and Luhansk were direct outcome of Russia's aggression against Ukraine.

## 5. Conclusion

This paper has confirmed that efforts to draw any analogy between Kosovo and the separatist regions of Ukraine which are occupied and annexed by Russia are misleading and manipulative. These cases are totally different in historical, legal and political aspects. The only common denominator of both cases is the fact that the deep sources of conflicts in Kosovo and Ukraine are to be found in the revisionist policies of Serbia and Russia. Both these countries, in addition to being traditional allies, have not reconciled with the new geopolitical map that emerged out of dissolution of the communist federations of the Soviet Union and Socialist Yugoslavia. Beyond this correlation, it is impossible to establish any similarity between Kosovo and the Ukrainian territories of Crimea, Donetsk and Luhansk. Kosovo was a constitutive federal unit of the Yugoslav Federation, and, as such, was vested with the decision-making powers at the Federal level.

In 1999, NATO intervened to stop the brutal military campaign of Yugoslavia against the people of Kosovo, to bring it to the peace terms, and to prevent the spillover of the war in the fragile region of the Balkans. The NATO intervention was preceded by several UNSC resolutions that were adopted under Chapter VII of the UN Charter and which were also voted by Russia. In addition to emphasizing the grave humanitarian catastrophe in Kosovo caused by the ruthless campaign of the Yugoslav army against the civilian population, these resolutions qualified the situation in Kosovo as a threat to international peace and security. Furthermore, NATO's air campaign against Milošević came after all international efforts to find peaceful solution to the situation in Kosovo were rejected by Belgrade. The war in Kosovo was concluded with a military agreement between the NATO-led peacekeeping force and the Yugoslav army and the subsequent adoption of the resolution 1244 by the UNSC. Thus, in contrast to Russia's aggression in Ukraine, NATO's troops entered Kosovo with the authorization of the UNSC under the provisions of the Chapter VII of the UN Charter. Most importantly, the UNSC Resolution 1244 put Kosovo under the international administration, for an interim period, pending to its final status. This ultimately paved the way for an internationally-led process for determining Kosovo's final status, which culminated with the proposal for a supervised independence that was put forward by the Special Envoy of the UN Secretary-General, Marti Ahtisaari. Finally, after the rejection by

Serbia of the independence of Kosovo and upon its initiative, the issue was referred to the ICJ for an Advisory Opinion. On July 22, 2010, the ICJ with its Advisory Opinion confirmed that the adoption of the declaration of independence of Kosovo was in conformity with international law, given that it did not violate any of its general norms or specific acts.

The path towards the crisis in Ukraine is altogether different. At the crux of the problem lies Russia's imperial impulse, which is manifested in Putin's claim that Moscow holds keys of sovereignty of the former Soviet Republics and hence they can be sovereign to the extent that Russia feels comfortable.. In this vein, according to Putin's terms, Russia could afford to have an independent Ukraine only if it was ruled by a pro-Russian government.

On the other hand, in contrast to Kosovo, Crimea, Donetsk and Luhansk did not have any federal constitutional status within the Soviet Federation. After the dissolution of the Soviet Union, Crimea's status was upgraded to that of Autonomous Republic within independent Ukraine, whereas Donetsk and Luhansk remained regions. The annexation of Crimea, and declaration of independence of Donetsk and Luhansk were direct outcome of the aggressions that the Russian Federation committed against Ukraine, in 2014 and 2022 and occupation of parts of its territory, in grave violation of the international law and territorial integrity of Ukraine. This was confirmed by several resolutions of the UNGA and the decision of the interim measure of the ICJ. They were all disrespected by Russia, as were the agreements that Moscow signed with Ukraine and the third parties, in which it undertook to respect the sovereignty and territorial integrity of Ukraine.

In the lenses of the Advisory Opinion of the ICJ on the case of Kosovo's Declaration of Independence, the Russia's invasion of Ukraine is a naked case of aggression and violation of the territorial integrity of Ukraine. Firstly, unlike Kosovo, where *lex generalis*, *lex specialis* and domestic law were silent on the question of its final status, in the territories of Ukraine annexed by Russia these three interrelated legal frameworks prohibit the unilateral secessions. Secondly, Russia bluntly violated two agreements it had signed with Ukraine and other countries, namely the Budapest Memorandum, Treaty on Friendship, Cooperation and Partnership, and the Minsk agreements. Thirdly, following the reasoning of the ICJ in the case of Kosovo, the principle of territorial integrity in the case of Ukraine is brutally violated by Russia.

While there is hardly anything that can prevent Kremlin from referring in a manipulative manner to NATO's intervention in Yugoslavia and to Kosovo's independence in the way it suits Russian interests, any such reference, if anything, demonstrates that under Putin's Russia is devoid of any legal or moral considerations.