

Juan Francisco Escudero Espinosa

Self-Determination and Humanitarian Secession in International Law of a Globalized World

Kosovo v. Crimea

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Juan Francisco Escudero Espinosa
Faculty of Law
University of Leon
Leon, Spain

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*To the memory of my parents,
Juan Antonio and Paula,
who laid the foundations for all I am*

Preface

One of the great challenges facing an internationalist is the attempt to provide guidelines for behaviour in new situations arising within an international community in constant flux. Among the numerous and varied ranges of circumstances demanding attention, processes of fragmentation running counter to the trends for integration and globalization so characteristic of early twenty-first-century international society have proved an especially hard nut to crack. The cases of Kosovo and Crimea are two outstanding instances that have attracted attention from the international community over the last two decades. As events developed, basic principles of international law such as self-determination, territorial integrity of States, non-intervention, prohibitions on the threat or use of force by States, or notions like secession, statehood, or recognition were all brought under the microscope. The closeness of these cases, occurring in the continent of Europe, together with similar centrifugal movements of some virulence in Spain itself, was the trigger for this analysis of such trends in the light of international law and most recent international practice.

In many of these instances, claims were made that a supposed right to self-determination gave legitimate grounds for secession. In contraposition to this idea of the exercise of an entitlement to self-determination recognized in international law, the principle of territorial integrity has been invoked to defend continuity of unaltered boundaries for States. Recent cases of unilateral declarations of independence, those of Kosovo in 2008 and Crimea and its later annexation by the Russian Federation in 2014, are clear examples of the situation described. Even though Kosovo was deemed a 'unique case', it was cited by the Russian Federation in its attempts to justify the independence of Crimea. Nevertheless, reactions by the international community were totally distinct in these two instances, and the extent of recognition of the two new entities has been completely different.

With this as a starting point, the aim is to investigate the two cases so as to shed light on the international legal regime affecting entities smaller than a sovereign State. To this end, an analysis will be undertaken of the principles of international law brought into play in this matter, the intention being to determine their scope and review them in the light of the most recent practice and developments in

international law. Thereafter, the events of relevance for international law that occurred in the changing situations in Kosovo and Crimea will be examined and explained. Finally, on the basis of these legal considerations, the question will be addressed of possible reactions by the international community when faced with situations that may go against international law, together with the effectiveness of measures that might be taken. Whether certain situations might be legitimate will also be discussed, despite running counter to international law, because a concept could be emerging that unilateral secession may be justified in specific circumstances, such as serious and large-scale violations of basic human rights.

This task dovetails with the last case considered in the author's doctoral thesis, which was entitled 'La intervención humanitaria y el Derecho internacional' [Humanitarian Intervention and International Law], which was the North Atlantic Treaty Organization (NATO) intervention in Kosovo in March 1999. This research was suggested by and carried out under the supervision of Professor Romualdo Bermejo García, who himself has recently published a study under the title 'La vuelta de Crimea a la madre-patria: Algunas reflexiones a la luz del Derecho Internacional' [The Return of Crimea to the Motherland: Reflections in the Light of International Law]. One of the aims of this monograph is to pay homage and tribute to him as his academic career gradually approaches its close after 25 years of sharing the ups and downs of the Section of International Public Law and International Relations of the University of Leon.

The paper is divided into three parts. The first part, entitled 'Self-Determination and Secession Versus Territorial Integrity in International Law', strives to determine the scope of the principles of international law related to the topic under study. With this aim, the section is subdivided into two chapters. Chapter 2 concentrates on establishing the boundaries of the right to self-determination in contemporary international law. Chapter 3 attempts to delimit the scope of unilateral declarations of independence in international law on the basis of diverse postures adopted which finally leads to the view that international law is neutral with regard to them. However, there are certain circumstances in which secession has been claimed to violate peremptory norms such that it would be illicit according to international law.

The second part, with the title 'The Independence of Kosovo and Crimea in the Light of Contemporary International Law', provides an exposition of the facts seen as relevant for an assessment of the declarations of independence made by the entities Kosovo and Crimea. This section comprises three chapters. The first of these involves an explanation of the changes in claims to autonomy made by the Albanian-Kosovar population in Kosovo, the humanitarian crisis caused by government repression of these, NATO intervention and later administration by the United Nations Interim Administration Mission in Kosovo (UNMIK). Investigation of the instance of Crimea is undertaken in Chap. 5 of the paper. Particular attention is paid to commitments to respect the territorial integrity of Ukraine, the holding of a referendum in Crimea under Russian auspices and the later annexation of Crimea to the Russian Federation. This part ends with Chap. 6 of the paper, which performs an evaluation of the unilateral declarations of independence of Kosovo and Crimea in the light of international law and of the Kosovo Advisory Opinion of the

International Court of Justice (ICJ) from 2010, the attention being paid to any possible violation of peremptory norms of international law.

The third part, 'The Emergence of Humanitarian Secession as a Response to Humanitarian Crises', is the boldest and attempts to provide lines of argument for the possible response of the international community to such situations. Chapter 7 offers an analysis of reactions to supposed illicitness and the scope of the stance of non-recognition from the viewpoint of its legal content and of international practice in such matters. Chapter 8 considers the possibilities of actions that in certain situations might be deemed legitimate. These would involve infringement of some rules of international law, but would require acceptance of secession as a last resort for protecting populations having the nature of a people when they are faced with grave, massive violations of basic human rights. The case of Kosovo, while it cannot be claimed to set a precedent, does lay the foundations for humanitarian, rather than remedial, secession as an emerging concept in international law.

I should like to record my thanks to Professor Miguel Díaz y García-Conlledo, head of the Department of Public Law. He was lead researcher for the project 'Las garantías penales como límite y guía en la solución de problemas penales complejos: La necesidad de evitar atajos', reference DER2013-47511-R, funded by the Ministry of Economy and Competitiveness of the Government of Spain. I wish to thank him for all his unselfish help, as this study was undertaken with his assistance.

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Finally, I should like to express my gratitude to Steven Dodd, translator and translator-trainer, who carried out the tasks needed to ensure that the English in this piece of work to be published would be correct, and to Piedad Luna Tovar for her patient management of the University of Leon's translating and interpreting service.

Leon, Spain
12 October 2017

Juan Francisco Escudero Espinosa

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Abbreviations

<i>ADI</i>	<i>Anuario de Derecho Internacional</i>
<i>AFDI</i>	<i>Annuaire français de droit international</i>
<i>AFRI</i>	<i>Annuaire français de relations internationales</i>
<i>AHLADI</i>	<i>Anuario Hispano-Luso-Americano de Derecho Internacional</i>
<i>AJIL</i>	<i>American Journal of International Law</i>
<i>AJICL/RADIC</i>	<i>African Journal of International and Comparative Law/Revue africaine de droit international et comparé</i>
<i>APSR</i>	<i>American Political Science Review</i>
<i>ARIEL</i>	<i>Austrian Review of International and European Law</i>
<i>ASIL Proceedings</i>	<i>Proceedings of the Annual Meeting of the American Society of International Law</i>
<i>AVR</i>	<i>Archiv des Völkerrechts</i>
<i>Brook. J. Int'l L.</i>	<i>Brooklyn Journal of International Law</i>
<i>Brown JWA</i>	<i>Brown Journal of World Affairs</i>
<i>B.U. Int'l L.J.</i>	<i>Boston University International Law Journal</i>
<i>BYIL</i>	<i>British Yearbook of International Law</i>
<i>Cambridge LJ</i>	<i>Cambridge Law Journal</i>
<i>Cambridge RIA</i>	<i>Cambridge Review of International Affairs</i>
<i>Canadian YIL</i>	<i>Canadian Yearbook of International Law</i>
<i>Case W.Res.J. Int'l L.</i>	<i>Case Western Reserve Journal of International Law</i>
<i>Chicago JIL</i>	<i>Chicago Journal of International Law</i>
<i>Chinese JIL</i>	<i>Chinese Journal of International Law</i>
<i>CIS</i>	<i>Commonwealth of Independent States</i>
<i>COE</i>	<i>Council of Europe</i>
<i>Columbia JTL</i>	<i>Columbia Journal of Transnational Law</i>

CSCE	Conference on Security and Co-operation in Europe
<i>CWILJ</i>	<i>California Western International Law Journal</i>
<i>Déf. Nat.</i>	<i>Revue Défense Nationale</i>
<i>DJILP</i>	<i>Denver Journal of International Law and Policy</i>
<i>DUDI</i>	<i>Diritti umani e diritto internazionale</i>
ECHR	European Court of Human Rights
<i>EFAR</i>	<i>European Foreign Affairs Review</i>
<i>EILR</i>	<i>Emory International Law Review</i>
<i>EJIL</i>	<i>European Journal of International Law</i>
<i>Ethics & Int'l A.</i>	<i>Ethics & International Affairs</i>
EU	European Union
FARK	Forcat e Armatosura të Republikës së Kosovës (Armed Forces of the Republic of Kosovo)
<i>Finnish YIL</i>	<i>Finnish Yearbook of International Law</i>
<i>Fordham Int'l L.J.</i>	<i>Fordham International Law Journal</i>
FRY	Federal Republic of Yugoslavia
<i>Ga.J. Int'l & Comp. L.</i>	<i>Georgia Journal of International and Comparative Law</i>
<i>German LJ</i>	<i>German Law Journal</i>
<i>GoJIL</i>	<i>Goettingen Journal of International Law</i>
<i>HRLJ</i>	<i>Human Rights Law Journal</i>
<i>HRQ</i>	<i>Human Rights Quarterly</i>
ICFY	International Conference of the Former Yugoslavia
ICJ	International Court of Justice
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
<i>ICLR</i>	<i>International Community Law Review</i>
IICK	Independent International Commission on Kosovo
<i>IJGR</i>	<i>International Journal on Minority and Group Rights</i>
<i>IJHR</i>	<i>International Journal of Human Rights</i>
ILC	International Law Commission
<i>ILM</i>	<i>International Legal Materials</i>
<i>ILSA JICL</i>	<i>ILSA Journal of International and Comparative Law</i>
<i>Indian JIL</i>	<i>Indian Journal of International Law</i>
<i>Italian YIL</i>	<i>Italian Yearbook of International Law</i>
<i>IYHR</i>	<i>Israel Yearbook on Human Rights</i>
<i>JDI</i>	<i>Journal du Droit International</i>
<i>JILIR</i>	<i>The Journal of International Law and International Relations</i>
<i>JRMP</i>	<i>Jugoslovenska Revija za Međunarodno Pravo</i>

<i>JUFIL</i>	<i>Journal on the Use of Force and International Law</i>
KFOR	Kosovo International Security Force
KVM	OSCE Kosovo Verification Mission
LBD	Lëvizja e Bashkuar Demokratike (United Democratic Movement)
LDK	Lidhja Demokratike te Kosovës (Democratic League of Kosovo)
<i>LJIL</i>	<i>Leiden Journal of International Law</i>
<i>LNTS</i>	<i>League of Nations Treaty Series</i>
<i>Max Planck YUNL</i>	<i>Max Planck Yearbook of United Nations Law</i>
<i>MLR</i>	<i>Military Law Review</i>
<i>ML & LWR</i>	<i>Military Law and Law of War Review</i>
NATO	North Atlantic Treaty Organization
<i>N & EP</i>	<i>Nationalism and Ethnic Politic</i>
<i>NILR</i>	<i>Netherlands International Law Review</i>
<i>Nordic JIL</i>	<i>Nordic Journal of International Law</i>
<i>N.Y. Law Sch.J. Hum. Rights</i>	<i>New York Law School Journal of Human Rights</i>
<i>NYUJILP</i>	<i>New York University Journal of International Law and Politics</i>
<i>OJEU</i>	<i>Official Journal of the European Union</i>
OSCE	Organization for Security and Co-operation in Europe
<i>Oxford JLS</i>	<i>Oxford Journal of Legal Studies</i>
para.	Paragraph
<i>RBDI</i>	<i>Revue belge de droit international</i>
<i>RCEEL</i>	<i>Review of Central and East European Law</i>
<i>RDI</i>	<i>Rivista di diritto internazionale</i>
<i>Rev. dr. Int. et comp.</i>	<i>Revue de droit international et de droit comparé</i>
<i>Recueil des cours</i>	<i>Recueil des cours de l'Académie de droit international de La Haye</i>
<i>REDI</i>	<i>Revista Española de Derecho Internacional</i>
<i>REEI</i>	<i>Revista Electrónica de Estudios Internacionales</i>
<i>RGDIP</i>	<i>Revue générale de droit international public</i>
<i>RHDI</i>	<i>Revue hellénique de droit international</i>
<i>RICR/IRRC</i>	<i>Revue internationale de la Croix-Rouge / International Review of the Red Cross</i>
<i>Romanian JEA</i>	<i>Romanian Journal of European Affairs</i>
<i>RSPI</i>	<i>Rivista di Studi Politici Internazionali</i>
<i>Russian LJ</i>	<i>Russian Law Journal</i>
SACEUR	Supreme Allied Commander in Europe
SFRY	Socialist Federal Republic of Yugoslavia
<i>SJIL</i>	<i>Stanford Journal of International Law</i>
<i>Soviet YIL</i>	<i>Soviet Yearbook of International Law</i>

<i>Survival</i>	<i>Survival: Global Politics and Strategy</i>
<i>SZIER/RSDIE</i>	<i>Schweizerische Zeitschrift für internationales und europäisches Recht/Revue suisse de droit international et de droit européen</i>
<i>TLCP</i>	<i>Transnational Law & Contemporary Problems</i>
<i>Tul. J. Int'l & Comp. L.</i>	<i>Tulane Journal of International and Comparative Law</i>
<i>UCLR</i>	<i>The University of Chicago Law Review</i>
UN	United Nations
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Council
UN Doc.	Document of the United Nations
UN Charter	Charter of the United Nations
UNIMIK	United Nations Interim Administration Mission in Kosovo
<i>UNTS</i>	<i>United Nations Treaty Series</i>
UÇK	Ushtria Çlirimtare e Kosovës (Kosovo Liberation Army)
US	United States of America
USSR	Union of Soviet Socialist Republics
<i>U.St.Thomas J.L & Pub. Pol'y</i>	<i>University of St. Thomas Journal of Law and Public Policy</i>
<i>Vand. J. Transnat'l L.</i>	<i>Vanderbilt Journal of Transnational Law</i>
VJ	Vojska Jugoslavije (Yugoslav Forces)
<i>VJIL</i>	<i>Virginia Journal of International Law</i>
WTO	World Trade Organization
<i>YJIL</i>	<i>Yale Journal of International Law</i>
<i>ZaöRV/HJIL</i>	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law</i>

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