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SOME OBSERVATIONS ON THE EVENTS IN UKRAINE



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Evaluating the events regarding and in Ukraine in the light of international law at this moment in time is perhaps somewhat more difficult than advancing (with or without a glass of wine at the fire place) the 'Putin doctrine', a renewed 'Brezhnev doctrine', or wild views on the weakness of the West and the EU in particular. Gradually the Russian 'Master plan' is nevertheless unfolding and annexation of the Crimea seems part of it. The referendum of Sunday 16 March is now followed by adherence from the Crimea to the Russian Federation. The instrument used therefor is a treaty concluded between the newly independent Crimea -since Monday 17 March declared so- and Russia. This document was signed in the morning of Tuesday 18 March in Moscow by President Putin and Crimean counterparts and probably is still to be ratified by both the Russian Duma and the Crimean Parliament.

From an international law point of view some of the following observations may be not too daring to submit.

1. Whatever the history of the Crimea is, under international law it is now part of Ukraine. If it has to become a part of the Russian Federation, the latter has to conclude a **treaty** to that extent with Ukraine.

Under international law a military conquest by Russia of the Crimea (or of any other Ukrainian region for that matter) would be illegal. The presence of Russian troops on Ukrainian territory will

make any such territorial change in favour of Russia illegal (and that, we may presume, is well-known in Moscow).

2. **Territorial sovereignty** over the Crimea cannot be transferred to Russia by way of a **decision of the local Crimean Government or Parliament** (subsequently confirmed by a referendum as now has happened).

Can the Crimean Government decide to secede legally under international law from Ukraine and become an independent State? Would a Declaration of Independence as such be illegal under international law. In its **2008 Advisory Opinion on Kosovo** the ICJ stated that ‘...the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law’. The ICJ Opinion made clear that international law was more or less ‘neutral’ regarding such a declaration. A problem with the Opinion of the Court, however, is that the question to be answered was rather limited in nature. The Court made this clear in the course of its Opinion comparing that question to the one famously asked in 1998 to the Supreme Court of Canada in the case of the potential secession of Quebec. In that case the Supreme Court was asked to declare on: ‘Does international law give the National Assembly, legislature or Government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or Government of Quebec the right to effect the secession of Quebec from Canada unilaterally?’ (par. 55).

In its 2008 Kosovo Opinion the ICJ draws attention to the fact that the Canadian Supreme Court was asked its opinion on ‘...whether there was a right to “effect secession”.... By contrast, the General Assembly has asked whether the declaration of independence was “in accordance with” international law’. It is worthwhile to quote in full how the ICJ continues:

‘It follows that the task which the Court is called upon to perform is to determine whether or not the declaration of independence was adopted in violation of International Law. The Court is not required by the question it has been asked to take a position on whether International Law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether International Law generally confers an entitlement on entities situated within a State unilaterally to break away from it’. (par. 56)

I submit that if the question asked to be answered in the Kosovo Opinion would have been more or less similar to the question before the Supreme Court of Canada (or if the ICJ would have interpreted the actual question more broadly) its answer would have been similar as the answer the Supreme Court of Canada gave: a ‘no’, there is no entitlement of entities like the Crimea situated within a State **unilaterally** to break away.

3. All kinds of more or **less far-reaching forms of autonomy** of the Crimea and perhaps of other parts of Ukraine may peacefully result, but that is all to be seen. If serious unrest would occur amounting to a civil war, the legal perspective would of course change completely.

4. Russia, except at a low level, has not been willing to negotiate with the Ukrainian Government in Kiev. It is Moscow's choice so far not to recognize the Government there as its legal counterpart. One can say not to recognize the Kiev Government **de jure**. For Russia – at least for now-former President Yanukovich is still the legitimate Head of State of Ukraine, and not interim President Turchinov, although during a press conference President Putin admitted that Yanukovich had no power. The government in Kiev may soon enough be treated as the **de facto** Government of Ukraine.

5. During the presentation of the Russian views of events in Ukraine, on March 3rd, Russia's UN Representative Ambassador Churkin waved and read from a letter by Yanukovich asking Russia for the use of its armed forces to establish legitimacy, peace, law and order in the country alleging that Ukraine was on the brink of civil war. The significance of this request was not made completely clear but Mr Churkin seemed to imply that it could serve as justification for future Russian military intervention in Ukraine. President Putin and Minister of Foreign Affairs Lavrov seemed to prefer such actions in case Russian citizens would be mistreated or, more generally, human rights ('the right to life') would be in jeopardy.

6. The Yanukovich request for Russian help reminded me of another 'magic' appeal for help justifying the **US military invasion in the Caribbean Republic of Grenada** in 1983. Following a number of rather confusing legal justifications for the American invasion there, the Reagan Government announced that Governor General Scoon, the representative of the British Queen on the island, had asked for the US military intervention. That particular argument was not found acceptable in the UN, not even by the UK government of Mrs Thatcher. The competence of Mr Scoon to ask for the American intervention was generally denied or doubted. The powers of Yanukovich are even doubted by President Putin himself.

The argument that if the lives of Russian citizens are or would be in jeopardy or in case Russian citizens would be killed, Russia would be entitled under international law to intervene militarily, passing by the Ukrainian authorities, is not an argument that would find general support in International Law. This notwithstanding the occasional support for such justifications by some American governments, like the Reagan Government in the case of Grenada. An appeal to Russian military protection of Human Rights in Ukraine would generally be considered as a highly dubious form of 'humanitarian' intervention, both in terms of the factual situation and more in general. The

1999 NATO bombardments of Yugoslavia in the Kosovo war were strongly condemned by Russia. Today (March 18 2014) in a speech on the occasion of the signing of the Treaty with Crimea, Mr Putin merely accused Western nations of using double standards in its rejection of Crimean events.

7. In a sense the Russian emphasis on 'future action' seems to be illustrated by the **denial that already Russian military forces are present on Ukrainian territory, in particular in the Crimean peninsula**: as yet there is no Russian military presence except on the Russian military bases is the Russian position. The unknown armed men present are just locals who had purchased uniforms (and armed vehicles, even tanks) which according to Mr Putin are readily for sale in shops for everyone to buy.

Hence, there is no official Russian annexation of the Crimea. The illegality under international law of such an act is also well-known in Moscow.

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