ҚАЗІРГІ КЕЗДЕГІ ҚАҚТЫҒЫСТАР ЖӘНЕ ҚАУІПСІЗДІК МӘСЕЛЕЛЕРІ

СОВРЕМЕННЫЕ КОНФЛИКТЫ И ВОПРОСЫ БЕЗОПАСНОСТИ

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The Crimea – A case Study on territorial integrity and Self-Determination and the Use of Force

The following article analyzes the events in Crimea. In a first part the factual background will be explained. Then, the question shall be answered if the declaration of independence and the Russian participation in the developments violated international law with regard to the principles of territorial integrity, self-determination and the prohibition of intervention is closely scrutinzed taking into consideration also possible justifications of the Russian conduct, i.e. Through invitation, protection of own nationals and humanitarian intervention. The article comes to the conclusion that the secession of Crimea cannot be based on international law and that the Russian intervention is a violation of international law.
Key words: European Union, the Ukrainian president, cooperation, agreement, the world market, the Situation of Crimea, international law.

Маттиас Хартвиг

Қырым – аумақтық біртұтастық пен өзін-өзі анықтау және күш қолдану бойынша тақырыптық зерттеу

Аталған мақалада Қырымда болған соңғы оқиға талданады. Мақаланың бірінші бөлімінде нақты фактілер келтіріледі. Мақалада автор аумақтық біртұтастық және өзін өзі анықтау құқығы қағидаларының критерилеріне, сондай ақ интервенцияға тиым салуға қатысты сұрақтарға жауап іздейді. Сонымен қатар, мақалада Қырымда тұратын орыс тілді тұрғындарды қорғауға негізделген және гуманитарлық интервенция ретіндегі Ресей әрекеттерінің заңдылығы туралы мәселелер де қарастырылады. Қорытынды бөлімде Қырым сецессиясының халықаралық құқыққа сүйене алмайтыны және Ресей интервенциясының халықаралық құқық нормаларын бұзатындығы туралы тұжырымдар жасалады.
Түйін сөздер: Еуропалық одақ, Украина Президенті, келісім, ынтымақтастық, әлемдік нарық, Қырымдағы нарық, халықаралық құқық.

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Крым – тематическое исследование по территориальной целостности и самоопределения и применения силы

В данной статье анализируются последние события в Крыму. В первой части статьи излагаются факты. Встатье автор ищет ответы на вопросы относительно критериев принципов территориальнойцелостности и право на самоопределение, а также запрета интервенции. Кроме того, встатье поднимается вопрос о легитимности действий Россий, которые обосновываются защитой русскогонаселения, проживающего в Крыму и какгуманитарная интервенция. В заключении статьи делается вывод о том, сецессияКрыма не может опираться на международное право и, что Российская интервенция является нарушением норм международногоправа.
Ключевые слова: Европейский союз, Президент Украины, соглашение, сотрудничество, мировой рынок, ситуация в Крыме, международное право.

1. The factual background

1.1. The political developments in Ukraine in winter 2013/2014

In winter 2013 the draft of an association agreement between the Ukraine and the European Union was proposed for signature to the Ukrainian president. He was hesitating knowing that closer relations with the EU would make it impossible to join the Euroasian Union wFranshich under Russian lead wanted an enlargement to the west. Russia more or less openly linked the future gas supply for a price below the world market to the Ukraine to a closer cooperation between the two countries. As president Janukovich in the end decided not to sign the association agreement people went on the streets and started demonstrations against the government, requiring a more decisive orientation to the west. The situation escalated, demonstrators and policemen were killed. The foreign ministers of France, Germany and Poland intervened and actively supported by a representative of Russia they reached the signing of an agreement by president Janukovich and representatives of the Maidan. It provided for anticipated elections of the president in December 2014 and the reintroduction of the constitution of 2004. However, the agreement was never implemented, the Maidan movement took over power and president Janukovich left the country. He was destituted by a vote of the parliament. This certainly was not in line with the Ukrainian constitution, which established specific requirements to this end as for example a qualified majority and a legal opinion by the constitutional court [1]. Both requirements were not fulfilled. Therefore, the change of power in Kiev in February 2014 must clearly be qualified as a revolution. One of the first acts of the parliament was the adoption of a new law which should curtail the privileged position of the Russian language on the Crimea. Although it was never signed and, therefore, never went into force, it triggered a resistance by the Russian speaking population, specifically in Crimea, where the majority rejected the new government.

1.2. The Situation of Crimea

Crimea became part of the Russian Empire in 1783, when it was taken over from the Turkish Empire. When the Soviet Union was established, formerly as a Federation, Crimea remained with the Russian Socialist Federal Soviet Republic until 1954 when Chrutschow handed over this territory to Ukraine in order to commemorate 300 years of the treaty of Perejaslaw of 1654 when the Cossaks took an oath on the Russian Czar who in return promised to protect them against Poland. Beyond, it seemed convenient to attribute Crimea to Ukraine as most of the supply, specifically energy and water came from from Ukraine, not from Russia. After the break up of the Soviet Union Crimea remained with Ukraine according to the not outspoken application of the uti possidetis principle which means that when a State is dissolved and new States are created the former internal administrative borders become outer State borders. This principle which had its origin in the dissolution of the Spanish colonial empire in South America has been generally accepted also in the dissolution process of the Soviet Union. Therefore, Crimea remained with Ukraine. However, Russia leased the port facilities of Sevastopol where its Black Sea Fleet was stationed. This was confirmed in 1997 and prolonged in 2010 until 2042.

Crimea became an Autonomous Republic within the Ukraine, having legislative and executive powers of its own.

The Crimean population of almost two and a half million consists of almost 60% Russians, 24% Ukrainians and 10% Crimean Tartars. Russia granted Russian citizenship to many Russian speaking persons. Several groups in Russia raised claims on the Crimea since the breakup of the Soviet Union and this was echoed by parts of the Russian speaking population in Crimea; after the unconstitutional seizing of State power by the Maidan movement the reservation against the Ukrainian State turned into open resistance. State buildings were occupied and under armed guards and with the doors locked the Crimean parliament elected Ivan Aksyonov as new prime minister.

1.3. The Reaction of Russia

Russia took harsh reactions to the events in Ukraine. The Russian Federal Council authorized the use of armed forces to protect the Russian citizens in Ukraine. Unidentified armed groups carrying no military sign seized government buildings, the parliament was occupied and in the end it took a vote to hold a referendum to secede from the Ukraine and to join the Russian Federation. The Referendum was held on March 16 and delivered a result of more than 98% of the votes in favour of secession. Russia immediately recognized the new entity as an independent State and prepared for integrating it into the Russian territory. On March 18, 2014 Russia signed an agreement with

the Crimea on the accession of this entity to the Russian Federation. It declared that the Crimea would become part of the Russian Federation from the moment of the signing of the treaty. The Russian Constitutional Court reviewed the treaty with respect to its compatibility with the constitution as provided for by the Statute on the establishment of new States within the Russian Federation which also includes the integration of territories of another State; it did not find any incompatibility with the Russian constitution; questions of international law were not tackled [2]. The agreement was ratified by both chambers of the Russian parliament on March 21, 2014

2. Legal evaluation of the events

2.1. The recognition of the Crimea as an independent State and subject under international law

One may wonder why it was necessary to transform the Crimea first into a State before integrating it which meant that it would lose its statehood before long. As a matter of fact, the Crimea existed only for two days as a subject of international law in the Russian understanding of the events. From the Russian viewpoint it was necessary, as the Statute on the Formation of new subjects provided that in case of the integration of the territory of a another State the consent of the latter is required. It was out of discussion that the Ukraine would never agree to hand over the Crimea to Russia, therefore it seemed most convenient to create an entity as an international subject which could give the required consent.

However under international law the recognition of the Crimea as an independent subject is more than doubtful. Even leaving apart the form of its creation it could not be qualified as a State. A State has three characteristics: A territory, a population and State power. Even if one assumes that the first two requirements are met, it is highly questionable that this is the case with respect to the existence of effective State power. Just two days after the referendum on independence and with the Ukrainian military power still on the territory and the Ukrainian administration still in place it can clearly not be argued that the new organs already exercise the effective State power. The executive organs came to power under highly obscure circumstances, and they could not be seen as having any form of legitimacy.

Apart from this assessment one has to take into account the role of the Russian armed forces. It is beyond doubt that the Ukrainian State power did not intervene in the Crimea to defend the unity of the country because there was the outspoken threat of the Russian Federation to use military force in order to support the independence movement. The Russian parliament already had in duly order authorized the use of force in the Crimea, and the public statements by the Russian president did not give room to any doubts about the seriousness of this threat. Insofar the regime of Aksyonov can be qualified as a puppet regime of Russia. Even if international law does not authorize or prohibite declarations of independence as the International Court of Justice in its legal opinion on the declaration of independence by Kosovo underlined, the situation changes when the use of force comes into play [3]. Here, the International Court of Justice indicated – with reference to several UN-Security Council resolutions that a unilateral declaration of independence could be illegal, if it is connected to a violation of ius cogens, such as the violation of the the prohibition of international law is not so indulgent. The case of Norther Cyprus, which has been created after a Turkish invasion in 1974, is just the most prominent one. The organs of the United Nations clearly upheld that Norther Cyprus is not a State and cannot be recognized as such. This situation by now.

2.2. The principle of territorial integrity of the Successor States to the Soviet Union

When the Soviet Union broke up in 1991 15 new States were created each of them having its own territory, population and State power. The former internal administrative boundaries between the Republics as component parts of the Soviet Union became outer bounderies between these States, thereby although not outspoken using the principle of uti possidetis. The States recognized each other and guaranteed their territorial integrity in the founding document of the Commonwealth of independent of 1992. By this, territorial changes within the Soviet Union were confirmed.

When in 1994 Ukraine decided to dismantle its nuclear arms [4] the United States, Great Britain, the Russian Federation and Ukraine signed the Budapest Memorandum on Security Assurances which gave guarantees against any form of threat against Ukraine's territorial integrity. In a way the security assurance was the counterpart to Ukraine's

disarmament. The form of this document was less than an international treaty, however, it is claimed that binding force derives from it.

Russia again expressly reconized the Ukrainian territory including Crimea in the Treaty on Friendship, Cooperation and Partnership of 1997 [5].

2.3. The Right to Self-Determination

Much has been said about the right to self-determination. It is a generally recognized principle in international law. The Charter of the UN lays it down in art. 1, the UN Convenants on Civil and Political Rights and an Economic, Social and Cultural Rights mention it in a prominent position. Many UN documents confirm its importance the most famous among them the Friendly Relations Declaration of 1970. The right to self-determination conflicts with the above mentioned principle of the territorial integrity. The International Court of Justice – as above explained – declared in the advisory opinion on the Declaration of independence of the Kosovo in 2010 that such a unilateral declaration is neither allowed nor prohibited by international law. International law does not deal with the question, which is treated as a matter of fact. If the declaration leads to the creation of a State depends on if the criterias of a State are met, i.e. If there is a territory, a people and State power. The Canadian Supreme Court came to the conclusion in 1998 – in its famous judgement on the question of Quebec-that self-determination means a right to autonomy within a given State [6]. A right to secession does not exist in international law. Only in exceptional cases when a State denies the right to autonomy and gravely violates the human rights of a minority a right to secession may live up. However, no such case can be shown in the practice of international law. Even in the case of Kosovo the UN-Security Council did not establish such a right in favour of Kosovo inspite of the grave violations committed against the Albanian population, but declared in its resolution 1244 of 1999 that until a final settlement consented by both parties Kosovo remains an integral part of the State of Serbia. The Friendly Relations Resolution mentions both principles, the right to territorial intgrity as well as the right to self-determination. The exercise of the latter however is subject to the respect of the other as far as the right to internal autonomy is respected. With respect to Nagorny Karabakh, a territory with a today exclusively Armenian population within the borders of Azerbaijan the world community persistently rejected the right to secede from Azerbaijan [7]. Taking all together one must come to the conclusion that a right to self-determination cannot be derived from international law. Each State is free to take all measures to prevent a territory from seceding. Therefore, where undisputed secessions have taken place they

2.4. Qualification of the Russian military actions

Russia exercised military pressure in order to support the independence movement. Thereby, it is irrelevant how Russia exercized this power. If Russia directly sent armed troops it must be qualified as a violation of the prohibition of the use of force. If Russia was using private armed groups under its control it again must be qualified as a violation of the prohibition of aggression. The definition of aggression by the UN-General Assembly exactly includes this form of intervention [8].

Russia tried to explain its intervention with three argruments:

2.4.1. Intervention by invitation

In first line the argument must be analysed if there was no use of force as Russia was invited by the unconstitutionally destituted president Yanukovich and the unconstituionally installed prime minster of Crimea Aksyonov. Even if a State is free to invite armed forces of another State to be deployed on the own State territory, an invitation can effectivly be given only by an organ which exercises the effective power. One may argue that Yanukovich by the end of February and beginning of March 2014 still was the de jure president, as his destitution must be qualified as unconstituional. However, there is no doubt that he did not exercise effective power in Ukraine. The International Court is very reluctant in admitting the military intervention even by invitation in a „revolutionary“ situation stating that the prohibion of intervention would lose its effectivness as principle of law if intervention were to be justified by a mere request for assistence made by an opposition group in another State [9].

2.4.2. Protection of own citizens as justification

As a matter of fact quite a lot of persons living on the Crimea have the Russian citizenship, in part granted by Russia in a disputable way. Russia justified its military threats and eventually its open military support by claiming that it was defending its own nationals. In international law its is highly disputed if a State may intervene by military measures if own citizens are under thread abroad.

There have been incidents when States justified such interventions by selfdefence. Art. 51 UN-Charter which lays down this principle does not specify what selfdefence means. It goes without saying that it comes into play in case of an armed attack against the territory of a State. But it could be argued that selfdefence may be used also to defend the population even abroad, as it is one of the three elements which characterize a State (apart from the State territory and the State power). As a matter of fact, State have a number of times tried to justify their military action in order to protect own nationals by referral to selfdefence. (Suez 1956 Great Britain, Libanon 1958, Entebbe 1976, Grenada 1983, Panama 1989, South Ossetia 2008). A part of the scholarship took a careful approach declaring that a militarty intervention to protect the own citizens abroad is admissible if there is an imminent threat to them, if the State where they are is unwilling or unable to protect them and if the measures are proportional, i.e. Strictly limited to reach the goal, i.e. The protection. In this sense the British justification of 1956 was rejected as it was not limited to the rescue of it citizens but ended up in an occupation of the canal zone. The same was said about the US interventions in Grenada and in Panama, and also the bombing of the Georgian territory by Russia in 2008 was qualified as out of proportion. In other cases when a State tried to rescue its citizens the world community was condoning, so Germany was not critized for saving European citizens in Albania by the use of military airplans in 1997 or in Libya in 2011. In both cases were armed actions, however, there was no use of the arms during the intervention. It may be said that there is a new customary law in statu nascendi which allows for the interventions in questions.

However, even if one shares this position Russia cannot justify its intervention in Crimea refering to this exception from the use of force. First, it is generally undisputed that there was no real risk for the Russian population in Crimea. The very nationalistic tendencies within the movement of Maidan and the intention of the Ukrainian parliament to abolish the privileged position of Russian in Crimea as an official language – a law which has never been signed by the president and never entered into force – are elements which are by far not sufficient to justify an intervention in favour of own nationals. Beyond, the steps taken by Russia aimed at the incorporation of Crimea which undoubtedly is out of proportion if the State just pretends to rescue own nationals.

2.4.3. Humanitarian intervention

A second justification could be the humanitarian intervention. This concept is used to justify a military intervention in case of grave violations of human rights not just of people in general. The NATO-States called the military measures against Serbia in 1999 to protect the Albanian population a humanitarian intervention. However, the majority of States did not accept this argument. F.e. The group of non-aligned States critized the western States for the so-called Kosovo war. In the following the responsibility to protect was developed and adopted by the UN General Assembly on the world summit of 2005. However, with respect to the use of force the UN General Assembly remained very firm: There should be no use of force in the frame of the humanitarian intervention without a prior authorization by the UN Security Council. Insofar the responsibility to protect did not add anything to the exceptions from the prohibition of the use of force.

3. Conclusion

It follows from the forgoing that the secession of Crimea cannot be based on whatever international law, the referal to the right to self-determination is erroneous, as this right by now does not include a right to secession. Beyond, it is a clear violation of the Ukrainian constitution. The Russian intervention must be qualified as a violation of the prohibition of the use of force, an infringement of a ius cogens norm. As has been shown, the Russian measures cannot be justified under whatever aspect. However, it has to be admitted that there are some parallels to the conduct of the western States in the Kosovo case. There also was a unilateral declaration of independence, and many western States were very quick in recognizing Kosovo as a State. Of course, there are differences in comparison with the Crimea. First, mass violations of human rights against the Albanian population had taken place in the late 1990ies. Second, the western States did not use force in the context of the independence of Kosovo. Third, Kosovo was not integrated into the territory of a western State. Nevertheless, it must be held that also in the case of Kosovo there was no right to secede under international law, and the recognition by the western States must be seen as a violation of the territorial integrity of Serbia. Beyond, the

UN Security Council Resolution 1244 stated that the Kosovo continues to be part of Serbia. A future solution was left to a settlement reached by both parties. The UN administration of Kosovo after 1999 should guarantee this process. Serbia could not take unilateral means to definitively integrate Kosovo, but Kosovo likewise was hampered from a unilateral secession. Therefore, Kosovo as well as the State recognizing Kosovo violated the regime established by the UN Security Council and thereby international law. The legal opion of the International Court of Justice is insofar completely erroneous as it is based on wrong facts and false arguments.

However, in no legal system the violation of law may justify another violation of law [10]. On the contrary, Russia at that time – and until now – sharply critized the conduct of the western States, thereby recognizing the prohibition of such an action. Therefore, it cannot claim now that its own approach is legal under international law. It would be certainly react if f.e. Chechnya, Tartastan or the Kaliningradskaya Oblast' declared their independence and seceded from the Russian Federation, thereby confirming the actual legal order and contrasting all arguments brought forward in the context of Crimea.

It is therefore completly convincing if the UN General Assembly adopted a resolution declaring the referendum in Crimea illegal and stating no status altering the status of the Crimea als an Autonomous Republic of Ukraine should be recognized – with a 100 votes in favour, 11 against and 58 abstentions [11].

States should be very careful in changing the territorial order. Because once they start, they will not find an end. Recent examples of State breakups led to ongoing processes of further dismemberment, one may think of Yugoslavia which led to the claims of Kosovo or the Republika Srbska or of Sudan, where after the split off of South Sudan the fights among minorities just continue. The worst example can be seen in the time after the first world war, when territorial claims – Germany against Poland, Lithuania and Checoslovakia, Poland against Lithuania, Russia and Checoslovakia, Austria against Italy, Hungary against Rumania, Soviet Union against Poland and against Rumania – ended up in the Second World War. This experience should not be repeated. It must be a lesson learned.

References

1 Art. 111 of the Constitution of Ukraine

2 Conclusions of the Constitutional Court of the Russian Federation of 19 March 2014

3 Advisory Opinion of the International Court of Justice para. 81

4 By that time Ukraine had the third biggest nuclear arms potential in the world

5 Art. 2 of the Treaty reads: „High contracting parties according to provisions of the Charter of the United Nations and obligations under the Final act of Meeting on safety and cooperation in Europe respect territorial integrity of each other and confirm inviolability of borders existing between them.“

6 Decision of the Supreme Court of Canada of 20 August, 1998 https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do

7 See f.e. UN Security Council Resolutions 853, 874, 884 which treated this territory as part of Azerbaijan; resolution of the UN General Assembly of 14 March, 2008 reaffirmed Azerbaijan's territorial integrity with 39 votes in favour, 7 against and 100 abstentions

8 Art. 3 g of the Resolution 3314 of 14 December 1974 – Definition of Aggression – A/Res/29/3314

9 Decision of the ICJ in the Nicaragua Case, 1986, para. 246

10 Leaving apart the countermeasures, especially reprisals, but this is not in discussion in the given case.

11 UN Document A /68/L.39 of 24 March 2014