

Interview

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Introduction: In June, 2014, the ICRP conducted a comprehensive interview with Dr. Gábor Kardos, CsC, head of the International Law Department of the Faculty of Law of ELTE University Budapest and member of the Committee of Experts of the European Charter for Regional and Minority Languages. Professor Kardos provided very valuable opinions and notions on the topic of the international law context of the Russian intervention in Crimea and Eastern Ukraine as well as the international sanctions against Russia. The ICRP were chiefly interested in his personal but also expert perception of the current Russia-Ukraine relations and the possible consequences of the intervention and the annexation of Crimea. To sum up, the questions focused on three main areas, namely on the violation of international law, the sanctions imposed by the West and the possible solution of the conflict.

Do you think the Russian military presence in Crimea and the territory's accession to Russia is legal under the provisions of international law? Does this military presence supposed to be an aggression or a humanitarian intervention? Can Russia refer to the Crimean residents' right to self-determination? In July the Chatham House organized a roundtable discussion regarding the Ukrainian crisis when the following question occurred: can the Russian intervention in Ukraine and the NATO intervention in Kosovo be compared? What do you think of this parallelism?

The Russian military presence in Crimea is illegal, (although many decades ago Khrushchev's decision to annex the peninsula to Ukraine has been an unfortunate one.) Russia was referring to three international law principles to justify the military intervention in Crimea. The first concept was the protection of citizens living abroad; the second reason was Yanukovich's invitation for Russian intervention and the third one was the Crimean people's right for self-determination.

As for the protection of the citizens living abroad, I would note that some countries – such as the United States, the United Kingdom and Russia – have made a unilateral statement earlier, in which they declared that they considered any attack against their citizens on the territory of another state as an attack against their own country. However, these statements are not necessarily legal under international law. Even assuming that the statements are lawful, it is still questionable whether the dual citizens in Ukraine had been insulted.

The most interesting question is whether the change of government in Ukraine was constitutional or not. (If the change of government is constitutional, the foreign countries do not have any obligations and do not consider whether to maintain diplomatic relations or not. When the government rises to power unconstitutionally, the foreign countries have to make a decision about recognition of the new government. Accordingly, they have the opportunity to recognize the new authority as the legal government of the state. Under the rules of international law this is a political decision. However, some aspects have to be taken into consideration while making this decision, such as whether the new, unconstitutional authority has effective control.) Now the question is whether Yanukovich's replacement was illegal or not. I would say this was made by the Parliament under the people's pressure and the circumstances did not entirely meet the letter and the spirit of the constitution of Ukraine but apparently, the Parliament abducted Yanukovich on its own will. The other aspect is whether Yanukovich exercised authority afterwards. I think he did not because he fled from the country. Even if Yanukovich had exercised effective power afterwards over certain parts of Ukraine and had been replaced unconstitutionally, would he have had the right to call for Russian intervention? According to the Ukrainian constitution such decision cannot be taken without the parliament's consent.

Regarding the self-determination issue, the following question arises: is it applicable only in case of all the people of Ukraine or can it be invoked by a certain population of Ukraine? According to the constitution of Ukraine a national referendum is needed in cases of

secession. Also in international law the whole population living on a given territory is entitled to the right for self-determination. So we can say that the residents in Crimea do not have a separate right for self-determination.

However, it must be added that there is a minority opinion within the international legal scholarship according to which the right for self-determination can be recognised if the rights of a group of people, a section of the population are grossly and systematically violated. Basically it is only a doctrinal concept with very limited support in state practice. It was referred to, for example, by the Supreme Court of Canada inversely in case of Quebec explaining why the French Canadians do not have separate right for self-determination.

Even if we accept that the gross and systematic violations of minority and human rights enough for an ethnic group to gain right for self-determination and moreover we consider that Ukraine violated certain minority rights, primarily regarding the official use Russian language the specific case in Ukraine did not meet the above mentioned high standard for right to self-determination. In Kosovo there was a large scale ethnic oppression that eliminated the Albanian institutions and every feature of autonomy during Milosevic. On the top of all that even in the case of Kosovo, Martti Ahtisaari's Report did not mention any reference to self-determination but simply came to the conclusion that the conflict could only be resolved by secession. So, the breakaway was explained by an argument beyond international law.

The Russian presence in Crimea cannot be considered as a humanitarian intervention either, because it might be legal only in case of gross and systematic violations of human rights. Moreover it is rather dubious whether humanitarian intervention may be exercised unilaterally.

Did Russia violate the General Assembly Resolutions 2625 or 3314 by its military presence?

Either we have a look at United Nations General Assembly Resolution 3314 about the definition of aggression or the Resolution 2625 about the principles of friendly relations we will be definitely led to the conclusion, Russia violated the above mentioned rules in case of Crimea. Here I would note that the actions in Eastern Ukraine cannot necessarily be regarded also an aggression, because the International Court of Justice put the standard high already in the *Nicaragua case* in this regard...

The Russian actions mean a severe intervention to the internal affairs of Ukraine. Nevertheless these actions do not necessarily reach the level which we would regard as an act of aggression.

How much is the protection of the civil population realized in Eastern Ukraine?

Regarding international law the basic question is whether it is an international or an internal armed conflict. I do not think that it would be an international armed conflict. Thus the humanitarian principles enshrined in common Article 3 of the 1949 Geneva Conventions and the rules of the Additional Protocol II 1977 should be applied. (Ukraine ratified the Additional Protocol II.) However, serious incidents have occurred, the most obvious example is the crashed Malaysian airplane. The civil population is in great danger due to human rights violations.

In 1994, Ukraine gave up the nuclear weapons inherited from the Soviet Union, while Russia – along with the United States and the United Kingdom – committed itself to maintain Ukraine's territorial integrity and sovereignty in return. Based on this fact as well as the international law, is the referendum in the Crimea acceptable?

Well, it has a significance regarding that it is one of the agreements in which Russia recognized Ukraine's borders including the Crimea. There were four such treaties. We need to have a look at the referendum from this perspective. Apparently Russia was not acting in good faith.

How will Ukraine's rights change regarding the oil transportation and development in the Black Sea after the Crimea's joining to Russia?

At the time of territorial change, there is a change in all dimensions of the territory. Indisputably there was a *de facto* change. Thus the hydrocarbon fields in the continental shelf will be explored by Russia. It is a separate issue that most countries do not recognize Crimea as a part of the Russian Federation. It must be added, that the sanctions of the European Union also took effect in this region, and consequently no foreign direct investment can be made

by EU-members. If oil and natural gas exploration begun, Russia would try to sell it to the West, but those products would be still the subjects to embargo. It is a sensitive issue indeed. Firstly, technically thinking, you cannot know exactly the oil's place of origin. And moreover, the EU members' energy supply is dependent on Russia. For these reasons the EU would be very cautious if it wants to be involved in the conflict even indirectly.

Similarly to this situation, the United States did not recognise the annexation of the Baltic republics by the Soviet Union during 1940–1991, Washington could signify this policy symbolically when the members of the US administration did not accept invitations for the summits held in Riga, Vilnius or Tallinn. I do not know what the future brings but I think there will be no symbolic recognition even the parties get over this conflict.

How will Crimea's annexation to Russia affect the principle of territorial settlement globally?

On the one hand we can conclude that the willingness for secession has to be prevented and where the situation of the minority is problematic and questionable, territorial autonomy has to be provided in order to prevent secession. On the other hand we can be led to the opposite conclusion – though, they did have autonomy but they wanted more sovereignty than they were granted hence the region seceded. The settlement of interstate territorial disputes is one of the most sensitive issues. There is no state that would willingly give up even one square centimetre of its territory. We can find almost no precedent: after the Second World War the Western powers wanted to annex Schleswig-Holstein – two historical duchies of Germany – to Denmark, but the Danish government did not agree on this, due to a reasonable cause. Copenhagen was aware of Germany will remain a regional power while Denmark will not be again as it was in the 18th century. So the loss of consent seemed to be a rational decision, which is hard to make, since the national grandeur is a symbol of political power. This restrains the states from supporting the idea of territorial settlement, even if the maintenance of the status quo leads to internal conflicts – as we can see in many cases.

How does the international community have to react to the violent change of borders?

The international community cannot recognize the violent change of borders. This principle appeared between the two world wars when the members of the League of Nations were not

willing to accept the Japanese occupation of Manchuria. That was the Stimson Doctrine proposed by the US Secretary of State. Eventually the Charter of the United Nations in 1945 declared the general prohibition of use of force.

The European Union has made a statement recently that any kind of Russian military intervention would be considered as the violation of international law – even if the Russian Federation is referring to humanitarian reasons. Is it the violation of the international law under any circumstances indeed?

That statement relies on the current international perception of humanitarian intervention. According to this tenet, humanitarian intervention cannot be exercised without UN Security Council authorisation.

What can be stated here as criticism is that earlier these states or some of them had launched military action against Yugoslavia in 1999, also without authorisation of the Security Council. Those countries tried to justify that humanitarian intervention (although they did not call it as an intervention) also by arguing to avoid humanitarian catastrophe in Kosovo. This can be interpreted as contradictory, since we know there is no humanitarian catastrophe in Ukraine right now.

Humanitarian principles are violated due to the belligerents – both the insurgents and the Armed Forces of Ukraine. The parties to the conflict do not duly respect humanitarian rules during their military operations nevertheless no genocide or crimes against humanity has taken place.

According to the international law, what kind of sanctions can the UN or the EU apply against Russia?

The UN cannot and will not apply any sanctions, since the decision of the Security Council would be necessary and Russia would veto even to put the issue on the agenda. It happened earlier that the General Assembly emerged as the leading UN body regarding Korea when the Soviet Union was absent from the Security Council, but the circumstances are different nowadays. The General Assembly alone could act if Russia is permanently absent from

Security Council meetings. Moscow will barely do so; therefore no UN sanction resolution is expected to be adopted.

The main question is whether the sanctions applied by the EU and the US are internationally legal or not. This is so because it is the Council's jurisdiction to adopt such sanctions. Putin supposedly had this in his mind when he said these sanctions were illegitimate. However, the prohibition of use of force is a fundamental international law principle that not only affects the assaulted country but the international community as well. If we accept that these kinds of actions have to be adopted by a centralised body such as the Security Council, Putin was right. But there is a different opinion according to which the Security Council is paralysed, thus sanctions should be adopted on a decentralised way. Presumably the United States and the European Union share this view, saying this is the reason they have to use assorted economic and political sanctions.

Similar or stricter sanctions during the 20th century seemed to be failed after all – due to different reasons. In some cases several members of the international community do not adhere to the sanctions, or in other cases the country being under embargo could predict and calculate the sanctions thereby mitigating the impact of the restrictions. During the past decades the Security Council has established a practice which aims that the political leadership should be sanctioned instead of the public. According to this concept the public is the hostage of the political leadership. For that reason the adoption of so-called *smart sanctions* is preferred. Many of the restrictions against Russia are such sanctions; however other types of coercive measures were also imposed such as the suspension of NATO-Russia political cooperation, omitted invitations to summits, imposition of entry bans, freezing of bank accounts and so on. Some people regard these measures peanuts, but others believe they deliver proper political message, mainly because the recent slowdown of Russian economy could worsen due to the investment restrictions. I cannot take a stand on this.

It is certain that without exemption every sanction is self-punitive, especially when it comes to economic relations. I think this is also the case here because Russia made counter-sanctions roughly equivalent to those the West had adopted against Russia. Although Russian distributors may import goods from outside the European Union or Russian companies registered in Belarus may import products from the EU and ship to Russia since Belarus is not affected by the sanctions. Therefore the key objective of the restrictions is the political message which I think has been delivered explicitly.

We cannot expect that the sanctions will make Russia leave everything behind immediately giving up the Crimea, and it is also unlikely that Moscow would apply a merely new policy regarding Eastern Ukraine. If we look beyond international law and consider political motivations, it is clear that the region will not be annexed to Russia. Moscow's aim is – as the Russian Foreign Minister said euphemistically recently – to help Ukraine to reach a settlement which recognises the rights of minorities without violating the territorial integrity of Ukraine. It is not easy to judge whether Russia's political interest regarding Eastern Ukraine is to achieve a resolution or not. One may think that Putin's aim is to maintain the tensions restraining Ukraine's momentum towards the West. However it can be also argued that Moscow prefers a settlement for the conflict in order to consolidate territorial control in the previously annexed Crimea.

What kind of solutions does the international law provide to settle this conflict?

In this case it could be the federalisation of Ukraine. The eastern part of the country might get broad autonomous rights whereas the residents accept this settlement. In this regard the central government has to accept that its authority would be limited due to territorial autonomy and the region would establish special relations with Russia, which are *de facto* established already. This could happen without any formal change in the borders. I would like to emphasise that this resolution is political of political nature reaching beyond international law, since international law has no tools to force any state to transform its system of government with more autonomy for the diverse regions. Such decision can be made under the constitution by domestic political powers.

In the same time Ukraine now refrains from violating minority rights and started to make legislations in line with general standards in cooperation with the Council of Europe. However, these international standards do not include the right to autonomy. If we look at the international treaties concerning minority rights, they do not contain any reference to territorial autonomy. Therefore the solution is beyond international law. Only if there is a settlement confirmed in an international treaty, it can be rendered legitimate by the international law. This would significantly decrease the tensions, however it would not lead to formal recognition of Crimea's annexation by Russia. The Eastern region will then still have a special status. To conclude, the Russian-Western relations may improve after the resolution of

the conflict in Eastern Ukraine, however it does not mean that the territory occupied by Russia will ever receive formal and official recognition.

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