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Russia, Ukraine and International Law

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Abstract:

Due to Russia's intervention interpreting recent events in Ukraine has led to real confusion which has far too often enabled propaganda, inaccuracy and references to the past to prevail over a rational analysis. In a bid to provide a better understanding of the issues at stake this paper will restrict itself to the legal aspects only of the question, which is also an eminently political one.

It does not aim to ignore Russian resentment or the Ukrainians' will to free themselves of the tutelage of their powerful neighbour or the national interests in question, it simply analyses the impact on international law.

Indeed Russian diplomacy has been committed to the strict and formal respect of the rules of international law, and they have sometimes "clung to it" in defiance of claims made by certain populations. Even in the post-USSR period this constant was adhered to. But Russian Foreign Minister S. Lavrov's discourse at the Munich Security Conference – its provocative aspects aside, which are of the political domain, mark a deep break with traditional Russian diplomacy.

Since the Second World War the continent of Europe has not experienced as dramatic a challenge as Russia's questioning of the borders defined post 1945, which were notably confirmed by the Final Act of the Helsinki Conference in 1975. Neither the collapse of the Soviet Union, nor the German reunification – two events of capital importance – caused a Russian turnaround like the one we are seeing now.

Infringements of international law, the treaties and agreements signed by Russia, implied by the annexation of Crimea on 21st March 2014, then the war in the East of Ukraine following the conflict in Georgia in 2008, have led to a deep change in paradigm for the European Union and its Member States' external policy. For whatever reasons, the recurrence in 2008 and 2014 on the European Union's periphery of the use of armed force and methods that have been outlawed on the continent was an extremely violent warning, since the latter has been built according to the law and by the law. Europe functions, including in times of difficulty, thanks to the law, which is accepted and respected. And this has enabled it to enjoy exceptional stability in view of its painful past.

By annexing Crimea, Vladimir Putin has violated the fundamental texts of the United Nations, the statutes of the Council of Europe of which Russia is a member, at least two regional treaties that established peace in Europe and two bilateral treaties signed with Ukraine, as well as the Constitutions of Ukraine and Crimea.

THE CHARTER OF THE UNITED NATIONS

Article 2 §4 of the Charter of the United Nations founds the principles of the inviolability of the States' territorial integrity and the prohibition of the use of force [1].

Several acts, declarations and agreements concluded within the Organisation's framework recall the imperative of the peaceful settlement of disputes, non-interference and the ban on using threats in international relations.

We might notably quote resolution 2625 "*Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*" [2] adopted on 24th October 1970 by the General Assembly. This text even anticipates the "*hybrid war*" in quite precise terms [3]. On 14th December 1974 by way of a resolution the UN defined the concept of aggression,

1. *"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."*

2. *http://www.un.org/en/documents/charter/chapter1.shtml*

3. *"Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."*

including in this several acts which Russia has evidently committed in Crimea and in the East of Ukraine [4] (military occupation, invasion, bombardments, the dispatch of armed bands). On reading this document we also understand why Russia, a member of the Security Council refuses to admit the presence of several thousand of its troops in Ukraine, which would inevitably lead to condemnation by the UN in virtue of the number of texts it has signed. But these precautions were not even enough for Crimea whose occupation will, in all likelihood, never been recognized by the UN, nor by most of its members.

THE FINAL ACT OF THE HELSINKI CONFERENCE

The Helsinki Conference (1st August 1975) [5] established the respect of the borders in Europe and gave rise to the OSCE, of which Russia is a member. Its Charter confirmed the principles mentioned above. It laid them out and matched them against Europe's specific situation at the time, that of Cold War, which became a balance of terror followed by détente. This is a regional agreement expounding the Charter of the United Nations and designed to provide real content to détente between the two blocks. It enshrines the inviolability of the borders, States' territorial integrity, the peaceful settlement of disputes, non-intervention in domestic affairs, but also the respect of Human Rights and of minorities, sovereign equality and peoples' right to self-determination and the fulfilment in good faith of obligations under international law. It is supported by confidence-building measures such as the obligation to give notification of any military manœuvres, and also statements of general intent to cooperate in a series of areas including the freedom of information.

With its interventions in Crimea and in Ukraine Russia has violated all of the elements of this treaty, which already targeted problems that apply in Ukraine today – for example:

"*They also have the right to belong or not to belong to international organizations, to be or not to be a party to bilateral or multilateral treaties including the right to be or not to be a party to treaties of alliance*" I §2.

And:

"*No consideration may be invoked to serve to warrant resort to the threat or use of force in contravention of this principle" and: "Likewise they will refrain from any manifestation of force for the purpose of inducing another participating State to renounce the full exercise of its sovereign rights*." II §1 and 2

"*Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State*" III

"*The participating States will likewise refrain from making each other's territory the object of military occupation or other direct or indirect measures of force in contravention of international law, or the object of acquisition by means of such measures or the threat of them. No such occupation or acquisition will be recognized as legal*." IV.

Invoking European and US interference in Ukraine's internal affairs, as S. Lavrov has done, unfounded in law but also false in fact, is a bid a dissimulate the total violation of all of the measures included in this text that was however signed during the Soviet period which recognised the acknowledgement of fragile borders resulting from the balance of power in the field at the end of the Second World War.

THE COUNCIL OF EUROPE

On 28th February 1996 Russia joined the Council of Europe whose statutes are defined by the Treaty of London [6]. On two occasions, and as recently as 26th January 2015, the Parliamentary Assembly of the Council of Europe deemed it necessary to suspend the Russian delegation's powers and its participation in the Assembly's various bodies [7]. "*On 26 January 2015, the still unratified credentials of the Russian delegation were challenged on the basis of Articles 8.1 and 8.2 of the Rules of Procedure of the Parliamentary Assembly on the grounds that the role and participation of the Russian Federation in the conflict in eastern Ukraine, as well as its continued illegal annexation of Crimea was in violation of the Statute of the Council of Europe (ETS No. 1) as well as its accession commitments to the Council of Europe, which, in general, brought into question the commitment of the Russian delegation to the principles and membership obligations of the Council of Europe.*"

4. http://www.un.org/french/documents/view_doc.asp?symbol=ARES/3314%28XXIX%29&Lang=F
5. http://www.osce.org/mc/39501?download=true
6. 5 May 1949 : http://conventions.coe.int/Treaty/fr/treaties/Word/001.doc
7. http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-fr.asp?fileid=21538&lang=fr

(On this occasion) the Assembly repeated that the illegal annexation of Crimea by the Federation of Russia was a serious violation of international law including the Charter of the United Nations, the Helsinki Final Act of the Organisation of Security and Cooperation in Europe (OSCE) and also the Convention of the Council of Europe and of the commitments made by Russia when it joined the Organisation.

The Council of Europe, which, since its inception, has embodied the Europe of Law and Human Rights has been concerned on many occasions regarding the way the rule of law has been developing in Russia, its repeated infringements of minority rights and the methods it has used both in Georgia in 2008 and in Crimea and Ukraine in 2014. The Assembly has issued no fewer than 17 requests [8] condemning its action in Ukraine, calling on the Federation to fulfil the commitments it willingly subscribed to when it joined.

THE GUARANTEES OFFERED TO A DENUCLEARISED UKRAINE

The Budapest Memorandum (5th December 1994) [9], concluded between Russia, the USA, the UK and Ukraine [10], of which France and China are also guarantors in their capacity as "witnesses", led to the denuclearisation of Ukraine, which held a most formidable nuclear arsenal (1, 800 nuclear heads), in exchange for the specific guarantee of its borders. The text that was signed by all permanent members of the Security Council and implemented at great cost, mainly financed by the USA [11]. In the context of that period it was also a message to States that might have been tempted by the use of nuclear weapons, and which, under the pressure of a united international community accepted to abandon these ideas during the 1990's. South Africa, Brazil, Libya and others gave up nuclear weapons. Whilst the same work is underway to convince Iran to follow their example, we can see the extent of the potential impact of the violation of this treaty by a Member State of the UN Security Council, which made bilateral and multilateral commitments to honour it.

Not only has the guarantee, the word and signature of Russia been durably weakened but the greatest powers and the United Nations itself are also concerned.

THE TREATY REGULATING THE POST- SOVIET UNION

The Constituent Act of the Community of Independent States (Minsk Treaty – 8th December 1991) which set out the post-USSR, an empire built by force and dismantled due to failure, guaranteed the new States the respect of their borders, with Russia relinquishing any challenge to them. Moreover Ukraine, unlike other countries in Europe, had always maintained the façade of independence and had a seat at the UN, even though it had no choice but to vote in line with the USSR.

TREATIES AND BILATERAL AGREEMENTS SIGNED WITH UKRAINE

The friendship agreement signed between Russia and Ukraine on 31st May 1997 specifically emphasised the respect of their borders proving that the signature was well-informed; since no one can ignore the history of Crimea's colonisation, which led to its annexation in 1783 and the decision of the Plenary of the Central Committee of the USSR in 1954, to return it to Ukraine "*because of their special economic links*."

The agreement on the presence of the Russian fleet, signed on 28th May 1997 and renewed in 2010, defined the distribution of the former USSR's ships, in exchange for compensation of 526 million $, and confirmed that this territory belonged to Ukraine, the naval facilities of which were being "leased" to Russia for an annual 97 million $. It stated the conditions of the stationing of Russian troops (25,000 men, 132 armoured vehicles, 24 artillery pieces).

THE CONSTITUTIONS OF UKRAINE AND CRIMEA

In addition both the Ukrainian Constitution (in articles 73 and 132) [12] and that of the Autonomous Republic of Crimea (articles 2 and 6) [13], provide for the respect of the legal rules of the Ukrainian fundamental

8. *http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-fr.asp?fileid=21538&lang=fr*
9. *https://www.msz.gov.pl/en/p/wiedenobwe_at_s_en/news/memorandum_on_security_assurances_in_connection_with_ukraine_s_accession_to_the_treaty_on_the_npt*
10. *http://www.un.org/french/documents/view_doc.asp?symbol=S/1994/1399*
11. *The denuclearisation Ukraine made this country the main destination for US foreign assistance for a time, which financed to a greater degree the destruction of these materials in Russia.*
12. *"The modification of the territory of Ukraine can only be decided by national referendum." Article 132: "The territorial structure of Ukraine is based on the principles of unity and territorial unity, the combination of centralisation and decentralisation in the exercise of the authority of the State, economic development and social balance of the regions, taking into account their specific historic, economic, ecological, geographical and demographic features, and ethnic and cultural traditions."*
13. *http://www.rada.crimea.ua/en/bases-of-activity/konstituciya-ARK*

text and notably the hypothesis of a modification to the borders which can only be decided by all Ukrainians.

Hence, at least two fundamental UN texts, five major treaties and two constitutions have been violated by the Russian annexation.

INVALID JUSTIFICATIONS

With unprecedented flippancy Russia has flouted many obligations implied by its membership of the United Nations, arguing that the liberties taken by other nations in Kosovo, Libya and Syria went beyond the UN's recently granted mandates designed to bring some serious crises to an end. However these comparisons are not justified.

On 22nd July 2010 the International Court of Justice [14], referred to for its opinion by the United Nation's General Assembly [15] deemed that the "*declaration of independence by Kosovo adopted on 17th February 2008 had not violated international law*."

In a 105-page judgment delivered 10 votes to 4, after hearings and contributions had been made by all States who wished to do so, the Court took note of the Security Council's involvement and the decisions it had made, within the framework of international law, as well as the series of events and the real, but vain quest by the international community to find other solutions (Ahtisaari Plan) to bring an ethnic and religious-based genocide to a halt. It also recognized the legal status of Kosovo placed under the supervision of the Council, in accordance with the objectives contained within the Charter of the United Nations.

It concluded that the "*declaration of independence has not violated the Security Council's resolution 1244 (1999)" and that the "declaration of independence has not violated the constitutional framework*."

In Libya, in virtue of chapter 7 of the Charter, the Security Council authorised the use of force to bring an immediate end to serious conflict that might have led to the extermination of entire populations. In no way did the "liberties" taken by the nations that brought down the Libyan dictator violate the law. They interpreted it under the supervision of the Secretary General and the Council. The same would have happened in Syria if it had not been for the repeated veto by Russia against proposals that aimed to bring the civil war to an end, the toll of which has continued to rise because of this. Lacking legal arguments Moscow went as far as exhuming the precedent of the independence of the Comoros, ratified by referendum, except in Mayotte, where over 98% voted in support of remaining a French territory. But the circumstances were not comparable since France had never tried to do anything to annex this territory, but responded rather more to a massive, democratic demand on the part of a threatened population.

These extremely serious violations by a permanent member of the Security Council have been supported by unacceptable arguments.

Put forward on several occasions they were solemnly taken up by the Russian president in a speech delivered on 18th March 2014 [16] at the Kremlin. He maintained "*in heart and mind Crimea has always been an inseparable part of Russia," thereby confirming Russia's determination to "protect its fellow countrymen*", as Moscow's diplomacy has asserted for years. These positions remind us almost word for word of those put forward to justify the splitting of Czechoslovakia in 1938 on the basis of cultural and linguistic considerations. They have brought Europe back to the trauma of nationality issues that led to two world wars in the 20th century.

These words therefore challenge the international order of the 21st century. They might indeed justify many counterclaims in Central Europe and even in Russia itself, in Chechnya, in the Caucasus and elsewhere in the world. As in Georgia in 2008 Russia is now taking territories as security, which is contrary to international law and comprise ominous threats of instability that might lead to a challenge of its presence in Kaliningrad, in the Kuril Islands and even on the borders of 1945 Europe, which have been mainly displaced to the West! On 7th February 2015, as S. Lavrov, the Russian Foreign Minister, spoke to the Munich Security Conference [17],

14. http://www.icj-cij.org/docket/files/141/15988.pdf#view=FitH&pagemode=none&search=%22ind%C3%A9pendance%20du%20kosovo%22
15. http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/63/3&Lang=F
16. http://eng.kremlin.ru/transcripts/6889
17. http://www.mid.ru/brp_4.nsf/0/4E7CDDD252FDEF1F43257DE60031E493

he tried to justify these violations on legal grounds. His outrageous speech triggered laughter (unusual at this venue) of incredulity; he was not convincing and one might imagine the despair of some Russian diplomats of whose professional qualities we are well aware. In line with Mr Putin's 2007 speech to the same assembly [18], which did indeed mark people's minds by its aggressive nature, he illustrated that Russia intends to transcend the law and continue towards its political goals.

This situation is therefore a warning to the European Union and also for the entire international community. All of the texts that have governed Europe to date have been weakened, likewise the international order and the patiently built legal structures, which have ruled over relations between States to date.

SERIOUS CONSEQUENCES

In terms of relations between States, as in civil life, failure to meet voluntarily accepted obligations, comprise a serious precedent.

As a result the U-turn in Russian diplomacy regarding the value of international commitments might directly impact several theatres and difficult cases in which the international community is involved.

The elimination or at least the reduction of the number of nuclear arms was a shared goal for a long time, including on both sides of the Iron Curtain. The case of North Korea even rallied the major Asian powers to this cause. Negotiations initiated with Iran and with the latter country have now obviously been undermined, even quite simply brought into question. Who can say and how can we say to a State which voluntarily relinquishes this type of arm, as South Africa, Brazil and Libya did in the past, that the respect of its basic sovereign rights – such as independence, equality, non-interference, and the inviolability of its borders – are guaranteed? In the case of Ukraine they were guaranteed by all of the permanent members of the Security Council and supported by bilateral treaties that committed its neighbours.

Russia's attitude may therefore revive the nuclearisation of international relations – in other words the acquisition by any State which has the means to do so of the nuclear arm - and there is an increasing number of them - the ultimate guarantee of its integrity. As a result it is the Treaty of Non-Proliferation that has already been weakened that has been destabilised.

Demands made by the minorities, the European nightmare par excellence, which unfortunately has spread the world over, might legitimately have been deemed to be progress after the horrors of the Second World War. The official use – with almost the same words, the same arguments that served as a political argument for the Anschluss, then the occupation of *Sudetenland* by the Nazi regime, the use of the same historic, cultural and linguistic reasons heralds a major regression in international relations at a time when identity issues are resurfacing again – even within democracies - which are fed by irrationality and resentment. This is extremely bad news for Europe, which has never really overcome the ghosts of the past. It is a hard blow to the rules of peaceful relations between States.

The law of war has been severely affected by the widespread use of the "*hybrid war*", by military masking their uniforms or mercenaries. Whilst since the start of the 20th century warfare law has constantly moved towards minimising the consequences of conflict [19] in a bid to attenuate the most reprehensible practices, the dissimulated use of armed forces and irregular bands is a challenge to the progress achieved, notably the ban on certain types of behaviour, the protection of prisoners and combatants, not to mention civilian populations. The entire structure of this complex law has been weakened by the widespread use of "*little green men*" who seized Crimea and triggered a civil war that Ukraine was incapable of starting on its own.

History will tell us if we should interpret this as weakness, a typically Russian response as it constantly bids to expand its already immense territory – but the unity of which is weak; is it the expression of a feeling of encirclement, of deep humiliation after the collapse of the communist dictatorship, the constant quest for new

18. *http://eng.kremlin.ru/transcripts/8498 https://www.securityconference.de/en/about/munich-moments/a-breeze-of-cold-war/*

19. *The Conventions of the Hague (1899,1907) and Geneva (1864, 1907, 1929, 1949) https://www.icrc.org/applic/ihl/dih.nsf/vwTreaties1949.xsp?redirect=0 et https://www.icrc.org/dih/INTRO/195*

horizons and, in this case, of warm seas or the nostalgia of empire? Europe must respond to the policy of *fait accompli* which is a challenge to the whole continent' stability.

European response has been guarded and has privileged diplomatic answers. The Minsk agreements show their good will and the role played by Germany and France to achieve a ceasefire in respect of the law has to be lauded. The quest for a settlement to the crisis is still a problem since after each commitment (Minsk I, Minsk II) the given word is immediately reneged in fact and Russia, the exclusive supplier of arms and camouflaged soldiers, orders neither their withdrawal nor the respect of the ceasefire.

However the issue of the "federalisation" of an already federal Ukraine which cannot be decided in Moscow or even in Washington masks the determination to neutralise and even dismember this country. The competences enjoyed by the Autonomous Republic of Crimea are already considerable (article 135 and thereafter of its constitution). And no imminent danger or spontaneous public disorder seems to justify separation from a weak central State that never "oppressed" its inhabitants.

The European Union and Russia's mutual interests are clear to any observer and at this stage of globalisation, they should be the focus of positive, more systematic development. No one wants an exacerbation of tension or a test of strength. But can Europe negotiate with a government partner that has so seriously violated the very principles on which it is founded and which is already directly responsible for over 5,500 deaths. We have to acknowledge this new danger in the East now – and learn the lessons from this so that peace and the rule of law can prevail. Europe's nascent common diplomacy, its timid attempts to build a joint defence tool will not survive if no response is made. But beyond this our States are under challenge in the absence of a credible Russian partner. Their silence would mean their long term exclusion from the right to regulate security on our continent and to be agents in the settlement of disputes which, because of the present crisis, will surely occur in Europe.

The response has to be European and defined autonomously. It cannot just be legal and political because Russian interventionism heralds a defeat in terms of the law. Europe's first lesson is to remember that active diplomacy cannot just content itself with the law and cannot be undertaken without "hard power". We know this already.

The latter demands that it define its own policy and not always in line with its alliances.

In all likelihood for the Europeans the annexation of Crimea implies that all the "dividends of peace" have been cashed in and a new challenge. This must not weaken their founding belief that the law is the best instrument to settle relations between States and men.

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