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International Law as a Mean of ‘Reaction’ and ‘Creation’ – On the Path to Overcome the Consequences of Russia’s incursion into Ukraine

Book review: *The Use of Force against Ukraine and International Law. Jus Ad Bellum, Jus In Bello, Jus Post Bellum* by Sergey Sayapin, Evhen Tsybulenko (eds.)

The Use of Force against Ukraine and International Law. Jus Ad Bellum, Jus In Bello, Jus Post Bellum, eds. Sergey Sayapin, Evhen Tsybulenko, The Hague: T.M.C. Asser Press by Springer-Verlag, 2018, ISBN 978-94-6265-221-7; ISBN 978-94-6265-222-4 (eBook).

The Russian military incursion into Ukraine, supported by the means of hybrid warfare, commenced in the last days of February 2014 by the special operation leading to the unlawful annexation of the Crimean Peninsula and the outbreak of an armed conflict in Donbas later on, even though is still ongoing during the time of writing, undoubtedly already requires a holistic analysis. The volume reviewed in this paper, titled *The Use of Force against Ukraine and International Law. Jus Ad Bellum, Jus In Bello, Jus Post Bellum*, co-edited by Evhen Tsybulenko and Sergey Sayapin and published in late 2018, is one of the first academic monographs that in a comprehensive manner addresses the is-

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sue of the aggression of the Russian Federation against Ukraine in the light of international law.

Evhen Tsybulenko (Professor at the Tallinn University of Technology and Tallinn Law School in Estonia) and Sergey Sayapin (Professor at School of Law at the KIMEP University in Almaty, Kazakhstan) managed to gather (in total) 26 renown scholars in, notably, legal science (public international law, human rights, international humanitarian law or international criminal law), but also political science, coming from 15 different countries, such as, e.g., United Kingdom, the United States, Germany, South Africa, India, Estonia, Poland or Ukraine. The objective of the book is to present the three-fold approach to the issue of an use of force in international law with special reference to the case of Ukraine in the aftermath of the Revolution of Dignity (2013/2014). Firstly, by answering the question whether was it legal or not to enter into a war by both: Russia and Ukraine (*jus ad bellum* perspective), secondly, by putting the issue of ongoing hostilities under the scrutiny of international humanitarian law (*jus in bello*) and, lastly, by indicating a post-conflict (justice) tool-kit applied after the end of an armed conflict (*jus post bellum*). Therefore, the reviewed volume consists of 20 chapters divided into three parts.

As it was stated before, Part I of the book deals with the issue of *jus ad bellum*. In the chapter ‘The Legal Nature of States’ Obligations Towards Ukraine in the Context of Jus Contra Bellum’ Miras Daulenov emphasizes the international law regulations on the use of force, rightly underlining that with the exception of self-defense and a legal possibility to authorize a military operation by the UN Security Council (UNSC) under the United Nations Charter (and other exceptions on the basis of customary international law, however not fully approved by the whole international community), contemporary public international law is constantly moving towards the construction of *jus contra bellum*. Without a shadow of a doubt, by annexing Crimea and establishing two illegal state-like entities in the East of Ukraine (the so-called “Donetsk People’s Republic”, DPR and “Luhansk People’s Republic”, LPR), the Russian Federation violated numerous norms of international law (either treaty or customary law), including the principle of territorial integrity, sovereignty and the prohibition of use of force. Needless to say, Russia’s conduct infringed norms of the *jus cogens* character (in other words, the most fundamental norms of

international order) that impose an obligation on the international community to refrain from any form of formal recognition of unlawful actions (as a result, neither Crimea as a part of Russia, nor DPR/LPR as independent states, cannot be recognized).

Next few chapters of the book (written by Bill Bowring, Valentina Azarova, Sabine Hassler and Noëlle Quénivet) focus solely on the issue of Crimea and the “legality” of its annexation by the Russian Federation. First of all, the authors take into consideration whether any “nation” or “people” living on the Crimean Peninsula was entitled to exercise the right to self-determination in an external dimension, i.e. to create its own state and secede from Ukraine. The only possible answer is the Crimean Tatar People, however, this population did not call for independence, fully supporting the territorial integrity of Ukraine. Moreover, it cannot be proved that the Ukrainian authorities have systematically or in a structural manner violated rights and freedoms of Crimean Tatars (like any other national/ethnic minority, including ethnic Russians living in Ukraine), thus a construction of a “remedial secession” cannot be applied in the context of Crimea. As a consequence, the Russian presence on the Crimean Peninsula needs to be assessed as an ongoing state of occupation. Interestingly, what V. Azarova points out in her chapter, Kremlin’s conduct towards Ukraine in Crimea leads to the conclusion that Russian occupation of the Crimean Peninsula is a form of illegal territorial regime and shall not be named as an example of belligerent occupation under international humanitarian law.

Last three chapters of Part I take up the subject of the ongoing armed conflict taking place in a part of the Donets Basin. In his chapter *International Legal Aspects of Russia’s War Against Ukraine in Eastern Ukraine* Oleksandr Merezhko justly underlines that Russia’s military activities in the Donbas region shall also be legally assessed as an act of aggression against Ukraine (a combination of direct and indirect aggression, the later with the use of the so-called pro-Russian militants) – what is more, as exactly the same act that was commenced by the special operation on Crimea. Therefore, “Crimea” and “Donbas” events cannot be separated under international law, even though the means used by Kremlin in both situations are slightly different. Just to mention, Crimea was factually incorporated into the Russian Federation, while DPR/LPR are not even recognized by the authorities in

Moscow. Taking into account the issue of potential separatism in the East of Ukraine, E. Tsybulenko and J'moul A. Francis emphasize that, in fact, we talk about the artificial separatism since the support for "rebels" in Eastern Ukraine prior to the so-called "Russian Spring" in 2014 was rather low. Although, in its policy of disinformation Russia is constantly promoting the label of "separatism", since, as Tsybulenko and Francis state, "the use of 'rebels' and 'separatists' interchangeably translates into local collaborators being viewed as fighting for a political cause, rights and independence, premised upon the significance of the land in Donbas". On the contrary, from the legal point of view, an ongoing armed conflict in Donbas shall be evaluated as "international armed conflict" (definitely not a civil war) what can be proved by the direct presence of Russian troops and Russian military equipment on the territory of Ukraine, as well as Russian commanders – in most of the cases – exercising effective control over the units of pro-Russian militants and their concrete operations leading to the violations of international law. Last but not least, Tymur Korotkyi and Nataliia Hendel, analyze the status of DPR/LPR (the next examples of quasi-state entities in the post-Soviet space) under international law. They end up with a conclusion that both Kremlin-backed self-proclaimed "republics" shall be treated as illegal territorial regimes (with no chances of their further legalization), since they emerged as a result of the violation of the most fundamental norms of international law, e.g. the prohibition of use of force or infringement of the territorial integrity of Ukraine, being the products of Russia's aggression. What is necessary to add, like in the abovementioned case of Crimea, the concept of a "remedial secession" cannot be applied to DPR/LPR either.

Part II of the book takes a look at the *ius in bello* perspective of the ongoing armed conflict between Russia and Ukraine. In his chapter Gergely Tóth analyses the notion of hybrid warfare – that as such belongs rather to the field of security studies or political science than legal science *stricto sensu* – in the light of international law. The author emphasizes that a new type of warfare (in which strict military component is just one possible option, alongside such as information warfare, pressure in the energy sector or interference into domestic affairs, for instance, during elections) causes a huge challenge for an international legal system. The main factor of hybrid warfare that is "the blurring of lines between war (armed conflict) and peace, as well

as between combatants and civilians” results in a necessity of reviewing the legal framework, concerning armed conflicts. Next few chapters (of Jozef Valuch and Ondrej Hamulak; Anastasia Erolova; and Natalia Krestovska) also tackle very significant aspects of modern warfare, however not being analyzed so often in the context of Ukraine, i.e. the issue of cyber-attacks used within the conflict, the presence of foreign fighters and the use of children in the hostilities, both as perpetrators and victims of the most heinous crimes.

Moreover, Olga Butkevych writes about the continuity and validity of several international treaties between the Russian Federation and Ukraine in the aftermath of the Kremlin’s aggression on its western neighbor. As Butkevych underlines: “[M]any bilateral treaties are either affected by the conflict or not applicable. Ukraine should appeal to international judicial bodies and demand that the Russian Federation accepts responsibility for the violation of its treaties and contracts, as well as appropriate reparations”. With regard to this thought, we can point out the chapter prepared by Evhen Tsybulenko and Bogdan Kelichavyi (*International Legal Dimensions of the Russian Occupation of Crimea*). In this paper, the authors present the legal mechanisms of a state responsibility, concerning the unlawful Russia’s presence on the Crimean Peninsula, especially international courts and tribunals before which relevant applications or complaints are already brought by the authorities in Kyiv or concrete victims of violations (e.g. European Court of Human Rights, ECHR; International Court of Justice, ICJ; or International Criminal Court, ICC), alongside means of sanctions imposed on the Russian Federation.

Part II of the analyzed monograph is concluded by two interrelated chapters related to the issue of Russia’s policy of disinformation and propaganda in the field of politics of history and identity of people living in Ukraine. In the chapter *The Russian–Ukrainian War in Donbas: Historical Memory as an Instrument of Information Warfare* Sergii Pakhomenko, Kateryna Tryma and J’moul A. Francis analyze this topic from the point of view of political and social sciences. Needless to say, the main ideology of Kremlin in a foreign policy, i.e. the concept of *Russkiy mir* (“The Russian world” or “the Russian order”) is a mean of re-establishing the old Soviet propaganda in a new formula, attempted at “gathering” all “historical Russian territories” by the authorities in Moscow. DPR/LPR are examples of such tool-kit,

directed at discrediting the post-Maidan authorities in Kyiv (labeled by Kremlin as “fascist” or “Banderite” regime) and stimulating the on-going armed conflict in Donbas. In addition to that, what clearly emphasizes Sergey Sayapin in his chapter, the Russian Federation uses the means of domestic criminal law, investigating the alleged crimes of “genocide” committed by Ukrainians on the Russian-speaking persons (or ethnic Russians) in Donbas and Crimea. All of these inquiries have solely the political basis, with no legal grounds, concerning the UN Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.

Part III of the book deals with the *just post bellum* – the question of post-conflict reconstruction and accountability. Gerhard Kemp and Igor Lyubashenko focus on the issue of transitional justice applied in the aftermath of hostilities in Donbas. Both Authors rightly underline that transitional justice in post-Maidan Ukraine shall be construed as a two-fold strategy, at the same time directed at dealing with historical injustices (of USSR, for instance, by the means of decommunization) and post-conflict justice addressing retributive and restorative pillars in the context of the armed conflict in Donbas. Although, contrary to the traditional situation in which transitional justice means are implemented (mostly in a context of internal conflicts), the Ukrainian efforts in that direction shall be based on an existing precondition of external – Russian – aggression on Ukraine. Otherwise, a transitional justice strategy crafted by Kyiv may be used by Kremlin to support its propaganda on alleged “civil war” in Ukraine. Undoubtedly, one of the mechanisms of fostering the retributive justice is the ICC, involved in the “Ukrainian situation” through the two *ad hoc* resolutions issued by the Verkhovna Rada in 2014 and 2015 (Ukraine is still not the party to the Rome Statute). The interference of the Hague-Court in Ukraine (also potentially challenging the individual criminal responsibility of Russian nationals) is analyzed in two separate chapters prepared by Beatrice Onica Jarka and Rustam Atadjanov. Either the ICC, or (more probably) the domestic Ukrainian courts, shall address the international crimes that have been committed on the territory of Ukraine, what is also a significant factor of the effectiveness of post-conflict justice efforts and social reconstruction (on the issue of sexual violence we can read in the chapter written by Ioannis P. Tzivaras). Post-violence society such as Ukrainian one shall try to move towards the full

democratization based on the principle of rule of law, state and individual responsibility, likewise a growing trust in state institutions, including the public and private sector of media industry (the last issue is analyzed in the chapter of Katrin Nyman Metcalf) – as it seems, it might serve as an effective mean of non-recurrence.

To sum up, the ongoing act of aggression of the Russian Federation against Ukraine serves as one of the biggest threats and challenges to the regional and international security. Even though the possible means to solve this issue most probably would be a result of political negotiations, it is necessary to invoke the international legal background of Russia's incursion into Ukraine. A proper legal classification of an ongoing armed conflict (that is of international character), as well as setting the responsibility for an act of aggression and hostilities as such, shall be treated as a precondition of any peace process, including the "Normandy format" and two Minsk agreements (of 2014 and 2015). With no doubt, the reviewed monograph, co-edited by Evhen Tsybulenko and Sergey Sayapin, is an important contribution to the discussion on the post-2014 events taking place on the territory of Ukraine and the role of international law in international politics. First of all, international law shall be construed as an instrument of delivering justice in cases of infringements of the most fundamental norms of international order. Secondly, as a powerful weapon for those countries that are victims of such violations, trying to overcome the false propaganda and policy of disinformation. Moreover, international law should not be understood just as a mean of "reaction", but also "creation", which is especially visible in the context of crafting the post-conflict strategies by Kyiv. Therefore, in conclusion, it is worth giving the Authors just one suggestion to – in case of a second edition of the volume – include an additional chapter devoted solely to the issue of the "Normandy format" peace process and its implications for Ukraine at the end of hostilities and Russian aggression, analyzed strictly in the light of international law. Such a paper would complete this very valuable book.