

THE UKRAINIAN CRISIS: A TEST FOR INTERNATIONAL LAW?

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ABSTRACT: The ongoing conflict in Ukraine raises significant questions related to the fundamental features of international law. The chief concern is the efficacy of the said legal order as well as territorial integrity and right to self determination. Since the political crisis has led to a military clash, so-called hybrid warfare and the rules on occupation are also discussed. It seems the current geopolitical scene has led to what some perceive as a watering down of the rules of international law and further exposure of the flaws of the UN. International law, however, despite its shortcomings and limitations, still offers valid solutions to the international community as a way to solve not only the discussed conflict, but also many others.

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The paper was completed on 31.05.2016. In this paper the International Humanitarian Fact-Finding Commission is referred to as IHFFC.

1. Introduction

The ongoing humanitarian crisis and armed conflict in Ukraine, started in 2014, raises important issues related to the current state of international law, such as, chiefly, the effectiveness of international law itself¹. The aim of this article is to contribute to the continuing discussion on this subject². Issues discussed in the present article respectively refer to the legal assessment of the type of intervention in Ukraine, determination whether an armed conflict in Ukraine may be called a “hybrid warfare”, analysis of whether the Crimean peninsula is being occupied by the Russian Federation, the role the UN plays in the Ukrainian crisis and the general repercussions on international law resulting from this conflict. The analysis, however, is preceded by brief characteristics of legal and international relations that, in view of treaties and conventions in force (but also customary international law), currently bind Russia and Ukraine.

2. International legal background of the Russia-Ukraine relations

Looking at the very core of international law, i.e. *jus cogens*, it is clear that acts of aggression are prohibited by these peremptory norms. It is notable that *jus cogens* norms are applicable to all states irrespective of any specific treaty obligations, without any possibility of derogation³.

Apart from the most basic rules of *jus cogens*, one should note both Russia and Ukraine are bound by the Charter of the United Nations,

¹ *United Nations for the Coordination of Humanitarian Affairs, Ukraine – 10 things you need to know*, 22.12.2014, <http://www.unocha.org/top-stories/all-stories/ukraine-10-things-you-need-know> (accessed: 26.12.2014). See also: *United Nations Meetings Coverage and Press Releases, Humanitarian Conditions Will Continue to Deteriorate if Crisis in Eastern Ukraine Persists, Senior Official Tells Security Council*, 7233rd SC’s Meeting, SC/11508, <http://www.un.org/press/en/2014/sc11508.doc.htm> (accessed: 27.12.2014).

² See, e.g.: *Debate Map: Ukraine Use of Force, Oxford Public International Law (OPIL)*, <http://opil.ouplaw.com/page/ukraine-use-of-force-debate-map> (accessed: 30.8.2014)

³ M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligation Erga Omnes*, ‘Law and Contemporary Problems’ 1996, vol. 59, p. 63, at pp. 63-66.

as members of the UN⁴. The Charter includes, in particular, important provisions on obligations concerning respect for sovereignty (in particular – Article 2.1), self-determination (Article 1.2), the principle of non-interference (Article 2.7). Moreover, Article 2.3 contains the following obligation: “All members shall settle their international disputes by peaceful means (...)”, and Article 2.44 obliges states to “refrain in their international relations from the threat or use of force”. Additionally, under modern international law, forcible acquisitions of territory are prohibited, as it has been stated in the Friendly Relations Declaration: “The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal”⁵.

Furthermore, Ukraine and Russia are signatories of specific legal instruments (which are also relevant in the present context), in which Russia has expressly recognized Ukraine and its territorial integrity, i.e. in particular:

- the Alma-Ata Declaration⁶;
- the Agreement between the Russian Federation and Ukraine on the Status and Conditions of the Russian Federation Black Sea Fleet on Ukrainian Territory (in particular Article 6 item 1 and Article 8 item 2 – on the obligation of Russian military units to respect Ukrainian sovereignty)⁷;
- the so-called Kharkiv Pact of 2010, which prolonged the lease of the naval facilities in Crimea⁸;

⁴ *Charter of the United Nations*, San Francisco, 26.6.1945, 1 UNTS 16. As regards the UN members – see: *Members of the United Nations*, <http://www.un.org/en/members/> (accessed: 7.12.2014)

⁵ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV), 24.10.1970. See also: R. Geiss, *Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind*, 'International Law Studies' 2015, vol. 91, at p. 425, pp. 432-433.

⁶ Alma-Ata Declaration, 21.12.1991, 'International Legal Materials' 1992, vol. 31, at p. 149.

⁷ Agreement between the Russian Federation and Ukraine on the Status and Conditions of the Russian Federation Black Sea Fleet's on Ukrainian Territory, Agreement ratified by the Ukrainian Law N 547-XIV (547-14) of 24.3.1999, http://zakon4.rada.gov.ua/laws/show/643_076 (accessed: 23.7.2015).

⁸ The agreement between Ukraine and the Russian Federation concerning stay of the Black Sea fleet of the Russian Federation in the territory of Ukraine, Agreement

– Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation of 31.5.1997, in particular Articles 3 and 6⁹.

Moreover, in the Budapest Memorandum on Security Assurances of December 1994, its signatories – Russia, the US, and the UK – provided a non-binding political confirmation of Ukraine’s sovereignty and integrity, in exchange for Ukraine giving up the nuclear weapons in its possession at the time (strictly speaking – Ukraine’s accession to the Treaty on the Non-Proliferation of Nuclear Weapons).

The regulations associated with the OSCE system are also of particular relevance here, as the OSCE is a regional security arrangement, under Chapter VIII of the UN Charter, active *inter alia* in Eastern Europe. The roots of the OSCE, i.e. the Helsinki Accords¹⁰ have envisaged basic rules which particularly pertain to the issue at hand, this includes the following principles:

- II) refraining from the threat or use of force,
- III) inviolability of frontiers,
- IV) territorial integrity of States,
- VI) non-intervention in internal affairs,
- VII) respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief (especially with respect to the right of the minorities),

The Accords, given their non-binding character, constitute only a moral obligation for their signatories, but have a significant value. In particular, the signatories, including the USSR (Russia’s predecessor), pledged to respect the territorial integrity and political independence of all nations and to refrain from threatening or using force against other countries. What is particularly significant was the fact that the USSR, albeit under much different political circumstances, insisted on introducing provisions on respecting existing borders – in the hope of securing its post WWII

ratified by the Ukrainian Law N 2153-VI (2153-17) of 27.4.2010, http://zakon4.rada.gov.ua/laws/show/643_359 (accessed: 23.7.2015).

⁹ A. D. Sorokowski, *Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation*, ‘Harvard Ukrainian Studies’ 1996, vol. 20 – Special Issue: Ukraine in the World: Studies in the International Relations and Security Structure of a Newly Independent State, at pp. 319-329.

¹⁰ The Final Act of the Conference on Security and Cooperation in Europe, 1.8.1975, ‘International Legal Materials’ 1975, vol. 14, at p. 1292.

territorial gains¹¹. Therefore, it is obvious that Russia is bound, in multiple ways, to respect the sovereignty and the territorial integrity of Ukraine.

On the contrary, there are several arguments which seem to favour the position of the Russian government and of the rebels in the East of Ukraine, regarding the principle of self-determination and of humanitarian intervention/protection of Ukrainian citizens who are of Russian ethnicity, following what Russia views as a coup in Kyiv¹². Not going into an extensive discussion on the legality of the ousting of President Yanukovich, who was indeed democratically elected, one can clearly see breaches of Ukraine's Constitution in the said process, despite subsequent parliamentary approval, (however, the ousting was legitimized by the elections of Petro Poroshenko to the presidential office – in elections widely perceived as free and democratic)¹³.

Do these occurrences give Russia the right to annex Crimea, even after a referendum (which was criticized by some as not fulfilling recognized standards) and (allegedly) support rebels in other regions of Ukraine? Does the UN system offer any help in the discussed crisis? What are the repercussions for wider international law?¹⁴

¹¹ J. Hiden, V. Made, D. J. Smith (eds.), *The Baltic Question during the Cold War*, Routledge, London-New York 2008, at p. 90.

¹² TASS Russian News Agency, *Putin's letter on use of Russian in Ukraine goes to upper house*, <http://en.itar-tass.com/russia/721586> (accessed: 18.1.2015). See also: The Military Doctrine of the Russian Federation approved by Russian Federation presidential edict on 5 February 2010 [English translation by the Carnegie Endowment], http://carnegieendowment.org/files/2010russia_military_doctrine.pdf (accessed: 31.8.2014).

¹³ Organization for Security and Co-operation in Europe, Statement of preliminary findings and conclusions on the 17 January 2010 presidential election in Ukraine, 18.1.2010, <http://www.osce.org/odihr/elections/41156?download=true> (accessed: 18.1.2015). See also: Organization for Security and Co-operation in Europe, Ukraine: Early Presidential Elections 25 May 2014: Final Report, 30.6.2014, <http://www.osce.org/odihr/elections/ukraine/120549?download=true> (accessed: 18.1.2015).

¹⁴ Organization for Security and Co-operation in Europe, OSCE Chair says Crimean referendum in its current form is illegal and calls for alternative ways to address the Crimean issue, <http://www.osce.org/cio/116313> (accessed: 25.1.2015). See also: Press Release 24.01.2015, North Atlantic Treaty Organisation, Secretary General statement on the attack on Mariupol, http://www.nato.int/cps/en/natohq/news_116852.htm (accessed: 25.1.2015)

3. The (supposed?) intervention in Ukraine

One of the basic rules of international law, the above mentioned rule of non-interference, whilst not directly enclosed in the UN Charter, can be interpreted from it (Article 2 item 7 in particular). The UN System further defines non-interference in the Friendly Relations Declaration:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law¹⁵.

It seems both the Western block as well as Russia did not respect the discussed rule in the recent years. The US and EU have openly supported the *Maidan* movement and the so-called Orange Revolution in 2004, whereas Russia supported President Yanukovich, especially in 2004, and was accused of using natural resources as a means of influencing policy. It is however notable that “the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against control over the matter in question. Interference pure and simple is not intervention”¹⁶.

There is an interesting argument which is worth considering – the toppling of Yanukovich occurred, as it seems, in breach of Ukraine’s internal laws. The former Ukrainian leader “invited” Russian troops to his country, although retracted the invitation later on¹⁷. However, assuming the change of government in Ukraine could be indeed classified as a *coup d’état*, it does not seem in breach of international law. *Coup d’états* are not forbidden by international law, although there is a tendency of penalizing

¹⁵ Declaration on Principles of International Law concerning Friendly Relations... op. cit.

¹⁶ R. Jennings, A. Watts (eds.), *Oppenheim’s International Law*, vol. I, Oxford University Press, Oxford 1992, at p. 432.

¹⁷ BBC News Europe, *Ukraine’s Yanukovich asked for troops, Russia tells UN*, <http://www.bbc.com/news/world-europe-26427848> (accessed: 1.1.2015); see also: C. Kriel, V. Isachenkov, *Ousted Ukrainian president Viktor Yanukovich: I was wrong to invite Russian into Crimea*, ‘The Sydney Morning Herald World’, 3.4.2014, <http://www.smh.com.au/world/ousted-ukrainian-president-viktor-yanukovich-i-was-wrong-to-invite-russia-into-crimea-20140402-zqpxa.html> (accessed: 1.1.2015)

such changes as a threat to democracy¹⁸. On the other hand, there were precedents in the past, such as the 1990 Liberia and 1997 Sierra Leone interventions, based on invitations by ousted democratic governments¹⁹.

One should consider the conditions for humanitarian intervention (and the related concept of Responsibility to Protect) – as a justification for the use of force, while taking into account its questionable validity as an institution of international law, the chief concern being the possibility of its abuse²⁰. It seems that there is much legitimacy for humanitarian interventions in cases of gross human rights violations, genocide, uncontrollable economic and social chaos and a lack of internal security, combined with a lack of political will in the UN Security Council. However, there is an important issue of proportionality and thresholds, in other words – when does a given situation warrant an intervention? Who is to decide? Examples of such operations happening without the approval of the UN Security Council are the aforementioned Operation “Iraqi Freedom” and the 1999 NATO bombings in Kosovo, which on one hand were not in conformity with the UN use of force rules (the Charter in particular), but on the other hand, had a varying degree of legitimacy²¹.

In this context, the question of a benchmark for undertaking the said intervention became crucial. This issue was discussed by the UN’s General Assembly in 2009. The discussion was started by remarks of the GA’s president Miguel d’Escoto Brockmann, who identified four benchmark questions pertaining to the concept of Responsibility to Protect (R2P):

¹⁸ J. d’Aspremont, *Responsibility for Coups d’Etats in International Law*, ‘Tulane Journal of International & Comparative Law’ 2010, vol. 18, no 2, at p. 451, pp. 473-474.

¹⁹ Z. Vermeer, *Intervention with the Consent of a Deposed (but Legitimate) Government? Playing the Sierra Leone card*, ‘EJIL Blog’, 6.3.2014, <http://www.ejiltalk.org/intervention-with-the-consent-of-a-deposed-but-legitimate-government-playing-the-sierra-leone-card/> (accessed: 25.12.2014).

²⁰ 2005 World Summit Outcome, GA Res 60/1, 16.9.2005. See also: M. Shaw, *Prawo międzynarodowe [International Law]*, Książka i Wiedza, Warszawa 2011, at pp. 708-709. See: Case concerning military and paramilitary activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment of 27.06.1986, ICJ Reports 1986, at para. 206.

²¹ A. de Zayas, *Peace as a human right: the jus cogens prohibition of aggression*, ‘Alfred de Zayas’ Human Rights Corner’, 8.9.2013, http://dezayasalfred.wordpress.com/2013/09/08/peace-as-a-human-right-the-jus-cogens-prohibition-of-aggression/#_ftnref11 (accessed: 15.1.2015). See also: R. Goodman, *Humanitarian Intervention and Pretexts for War*, ‘American Journal of International Law’ 2006, vol. 107, at p. 107, pp. 107-112, 141.

- 1) do the rules apply in principle, and is it likely that they will be applied in practice equally to all nation-states, or, in the nature of things, is it more likely that the principle would be applied only by the strong against the weak?
- 2) will adoption of the R2P principle in the practice of collective security more likely enhance or undermine respect for international law? To the extent that the principle is applied selectively, in cases where public opinion in SC's permanent five Member States supports intervention, as in Darfur, and not where it is opposed, as in Gaza, it will undermine law.
- 3) is the doctrine of R2P necessary and, conversely, does it guarantee that states will intervene to prevent another Rwanda?
- 4) do we have the capacity to enforce accountability upon those who might abuse the right that R2P would give nation-states to resort to the use of force against other states?²²

The importance of the questions raised by Mr. d'Escoto Brockmann are at the very core of international law – as it seems R2P and humanitarian interventions, though noble in their principles, can easily lead to chaos. The demonstrating meeting of the conditions of humanitarian intervention in the discussed Ukrainian case (and all other one) is a mostly factual matter. Only in some rare cases, such as the tragic case of Rwanda, is the matter clear from the get go.

Moving to the next issue, one should analyze the notion of aggression as understood by international law. This prohibition of the use of force has been addressed in many resolutions of the SC and of the GA. The most significant is the GA Resolution 2625 (XXV) of 24.10.1970, namely, the Resolution on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. It stated that:

Every State has the duty to refrain in its 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. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of

²² M. d'Escoto Brockmann, *Statement at the Opening of the Thematic Dialogue of the General Assembly on the Responsibility to Protect*, 23.7.2009, <http://www.un.org/ga/president/63/statements/openingr2p230709.shtml> (accessed: 31.1.2015).

settling international issues. A war of aggression constitutes a crime against the peace, for which there is responsibility under international law. In accordance with the purposes and principles of the United Nations, States have the duty to refrain from propaganda for wars of aggression²³.

Looking at the 1974 Definition of Aggression, which has since been part of customary international law and a statement by government officials, some scholars may argue there might have been breach of international law in the present case²⁴. In particular, the usage of armed forces on the territory of Crimea also seems to be in breach of the Black Sea Fleet Partition Treaty and other important international norms, such as the non-interference rule and infringement upon territorial integrity. As to the secessions of Crimea and the two “people’s republics” in the east of Ukraine, it should be noted that general international law does not prohibit secessions, as the International Court of Justice ruled in its famous advisory opinion on Kosovo’s independence²⁵. That given, the Kosovo case, in a way, served as an incentive for further secessions and similar occurrences. Moreover, some of the rationale of the separatists, i.e. persecution by the Ukrainian government was highly contested, although there were some undisputed moves limiting the rights of ethnic Russians on the part of the new Ukrainian government. That being said – there is one factual important matter – would the Ukrainian authorities allow referenda in Crimea or in the eastern provinces? The UK government did so recently in the case of Scotland – but would that be the case in Ukraine as well, especially in a time of such an upheaval?²⁶

The references given by the Russian government to fairly recent precedents, as a way to provide legitimacy to its activities in Ukraine are not entirely baseless. In both cases, without a UN SC’s approval, we had

²³ United Nations, General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Res 2625 (XXV), (24.10.1970), available from <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf?OpenElement>.

²⁴ United Nations, General Assembly, Definition of Aggression, Res. 3314 (XXIX), (14.12.1974).

²⁵ Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion, 22.7.2010, ICJ Reports 2010, at para. 84.

²⁶ See: R. Müllerson, *Ukraine: Victim of Geopolitics*, ‘Chinese Journal of International Law’ 2014, vol. 13, at p. 133, pp. 138-142.

a unilateral action of the US and its allies and of NATO aimed at sovereign territories. Thus, if the “West” bends the law to serve its purposes, why should other powers follow international law in its classical form? However, it should be noted in cases of Iraq and Kosovo that the US was not seeking territory for itself and both aforementioned countries more or less function on their own now (albeit with huge problems). Moreover, Kosovo declared its independence only after some years after the intervention, whereas Crimea did so only after some weeks. What were confirmed to be Russian troops seized its territory, only to join the Russian Federation shortly afterwards. Furthermore, there was credible evidence of atrocities happening in Kosovo (whereas the WMD’s threat in Iraq proved to be untrue). Regarding the breach of the Ukrainian constitution, one should note secessions, as a way to exercise the right to self-determination, should be not constrained by domestic law and there does not seem to be a need or a rule requiring a UN presence in the process. However, one can question the authority of a referendum held in the presence of overwhelming military force. Moreover, the legitimacy of the referendum was further weakened by the questions posed to the voters – there was no choice to maintain the *status quo*, the voters were given the possibility to support reunification with Russia or to restore the 1992 Constitution of the Republic of Crimea (which gave far more powers to the Crimean parliament, which in turn would likely result in a *de facto* separation of the peninsula from Ukraine)²⁷.

Furthermore, even though international law does allow unilateral declarations of independence, the ICJ, in the aforementioned advisory opinion pertaining to Kosovo, noted such declarations might be considered illegal if they are associated with an unlawful use of force, such as the use of military force on the territory of another country without its consent²⁸. What is more, it was Russia itself which was critical of the legality of unilateral declarations of independence, in the Kosovo proceedings before the ICJ²⁹.

²⁷ BBC News, *Ukraine crisis: Crimea parliament asks to join Russia* <http://www.bbc.com/news/world-europe-26465962> (accessed: 31.05.2016).

²⁸ ICJ, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, op. cit., para. 81.

²⁹ Written statement of the Russian Federation, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, request for advisory opinion, 16.4.2009, VII. Conclusions point 4, <http://www.icj-cij.org/docket/files/141/15628.pdf> (accessed: 31.5.2016).

The secession of Crimea could however be deemed legal if it would be accepted in future by Ukraine³⁰. It could be also argued that the dispute over the legality of the recent happenings in Crimea and other parts of Ukraine is, to some degree, possesses more of a factual character than a legal one. One of the parties claimed up to a point the exceptional condition for self-determination, and, perhaps, humanitarian intervention had been met, whether the other says that was not the case. This shows the degree of uncertainty of the practice of international law in the discussed area. Nevertheless, fairly recently top officials of the Russian government seemed to have changed their stance, by admitting in a direct fashion the “spontaneous” uprising in Crimea was in fact a pre-planned event, directly supported by the Russian military³¹. In this way, a clear path towards a complete abandonment of international law was opened, leaving us with an unclear notion of legitimacy.

4. Armed conflict in Ukraine – a “hybrid war”?

Regardless of one’s opinion whether what we are witnessing now on the territory of Ukraine is an act of aggression and armed intervention or mere “humanitarian assistance”, the fact remains that as a result of the incidents in question, the Crimean Peninsula and eastern Ukraine faced the hostilities escalating into combat operations during which the parties to the conflict (belligerents), both the regular armed forces and insurgents should be enforced to observe the principles and standards of international humanitarian law. Significantly, the assessment of the conduct of the parties involved in the conflict, from the point of view of humanitarian law, must refer both to the aggressor’s state as well as the targeted state; thus, no references are being made to “just” or “legitimate war”, and infringement of laws and customs of war may not be justified by simply invoking “good cause” or the right to self-determination in other aspects, not matter how humanitarian they may appear.

International humanitarian law is a branch of international law which regulates the conduct of armed conflict seeking to protect and respect

³⁰ R. Geiss, *op. cit.*, at pp. 435-436.

³¹ RT, *Putin acknowledges Russian military servicemen were in Crimea*, <https://www.rt.com/news/crimea-defense-russian-soldiers-108/> (accessed: 31.5.2016).

the rights of civilians and combatants who have ceased participating in military operations (e.g. due to inflicted wounds or when captured as prisoners-of-war); IHL also attempts to mitigate the effects of warfare by restricting and regulating the means and methods of any such warfare. It is of great importance in the case of the Ukrainian conflict because this particular conflict is being perceived as a “hybrid war” which denotes a specific military strategy that combines conventional warfare, the use of most modern and advanced technology (e.g. precision targeting in critical infrastructure, operations undertaken by the intelligence services) and irregular warfare (no formal declaration of war, employing armed civilians, propaganda warfare, avoiding open confrontation with regular forces in battlefield)³². Generally speaking, in so-called hybrid wars “actors use a variety of tactics, techniques, and procedures that fit their goals and to decide a conflict successfully”³³. In a wider perspective, hybrid wars

involve multilayered efforts designed to destabilize a functioning state and polarize its society. Unlike conventional warfare, the centre of gravity in hybrid warfare is a target population. The adversary tries to influence influential policy-makers and key decision makers by combining kinetic operations with subversive efforts. The aggressor often resorts to clandestine actions, to avoid attribution or retribution³⁴.

In truth, when taking a closer look at the doings of the “little green men” and separatist forces in Ukraine it would not be difficult to point at a number of features characteristic of such warfare: the use of regular and irregular forces, the unclear distinction between civilians and soldiers, and military activities in the situation when war is actually not declared³⁵.

³² P. Szymański, J. Gotkowska, *The Baltic states' Territorial Defence Forces in the face of hybrid threats*, 'OSW Commentary' 2015, no 165, at p. 1, <http://www.osw.waw.pl/en/publikacje/osw-commentary/2015-03-20/baltic-states-territorial-defence-forces-face-hybrid-threats> (accessed: 23.6.2015)

³³ R. De Wijk, *Hybrid Conflict and the Changing Nature of Actors*, [in:] Y. Boyer, J. Lindley-French (eds.), 'The Oxford Handbook of War', Oxford Handbooks Online, 2012, <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199562930.001.0001/oxfordhb-9780199562930-e-25> (accessed: 29.1.2014).

³⁴ P. Pindják, *Deterring hybrid warfare: a chance for NATO and the EU to work together?*, 'NATO Review Magazine', 2014, <http://www.nato.int/docu/review/2014/also-in-2014/Deterring-hybrid-warfare/EN/index.htm> (accessed: 22.6.2015).

³⁵ M. Seselgyte, *Can Hybrid War Become the Main Security Challenge for Eastern Europe?*, 17.10.2014, <http://www.europeanleadershipnetwork.org/>

According to some reports, which were partially confirmed by the Russian authorities³⁶, Russian forces deployed to Crimea and acting under the disguise of local self-defence forces, without insignia, blockaded the Ukrainian military personnel in military bases and other selected military objects. Subsequent acts of capturing or taking over any such objects required only to defeat the passive resistance of the Ukrainian troops (such actions were handled in almost a bloodless manner). During the operation of taking over the Crimean peninsula radio silence was imposed (therefore it was impossible to determine troop positions, executive centres and communications networks). Self-defence forces had various uniforms without rank insignia or badges which presented a major difficulty and hindered the identification of independent formations and troops. Insurgent vehicles moved freely around Crimea without registration plates; furthermore, civilian vehicles, used to protect the local inhabitants, were repainted for military purposes³⁷.

The supposed Russian offensive in eastern Ukraine, after the proclamation of the establishment of the contested Donetsk and Luhansk People's Republics, has taken on a more direct course. According to some reports, on 24.8.2014, regular units of the Russian army crossed the border into eastern Ukraine, as a reaction to the threat of the effective collapse of the above-mentioned republics.

can-hybrid-war-become-the-main-security-challenge-for-eastern-europe_2025.html (accessed: 22.6.2015). See also: S. Jones, *Ukraine: Russia's new art of war*, www.ft.com/cms/s/2/ea5e82fa-2e0c-11e4-b760-00144feabdc0.html#axzz3dyxAt9Xo (accessed: 22.6.2015)

³⁶ On 17.04.2014, Russian President Vladimir Putin confirmed the involvement of Russia with regard to the actions in Crimea – he stated that “Russian servicemen backed the Crimean self-defense forces”, but he denied using Russian military personnel in eastern Ukraine stating “that all of this is being done by local residents” (see: K. Lally, *Putin's Remarks Raise Fears of Future Moves against Ukraine*, ‘Washington Post’, 17.4.2014, http://www.washingtonpost.com/world/putin-changes-course-admits-russian-troops-were-in-crimea-before-vote/2014/04/17/b3300a54-c617-11e3-bf7a-be01a9b69cf1_story.html (accessed: 30.5.2016).

³⁷ M. Wrzosek, *Konflikt rosyjsko-ukraiński a zmiany w teorii prowadzenia działań militarnych [Russian-Ukrainian Conflict vs. Changes in Theory of Military Operation Conduct]*, Bellona 2014, vol. 4, no 679, at p. 11, p. 12. See also: R. Heinsch *Conflict classification in Ukraine: The Return of the “Proxy War”?*, ‘International Law Studies’ 2015, vol. 91, at p. 323, pp. 352-354; S. R. Reeves, D. Wallace, *The Combatant Status of the “Little Green Men” and Other Participants in the Ukraine Conflict*, ‘International Legal Studies’ 2015, vol. 91, at p. 361, pp. 367-368.

The main objective of the Russian offensive [was] to demonstrate to the government in Kyiv that it cannot resolve the conflict through military means, and that it is necessary to start talks with the separatists (and *de facto* with Russia) on the political and geopolitical status of Ukraine. This would lead to a political agreement which creates the mechanisms for making Ukraine dependent on Russia³⁸.

It seems that Moscow decided to back up separatists not only by abundant supplies of armaments, ammunition and sending fresh volunteers (including troops from Russia-based units who are nominally “on leave”), but also by the direct contribution of Russian troops in warfare as well as artillery support. It should be noted that Russian soldiers were fighting without insignia, which resembles the situation observed in Crimea. Furthermore, the strike by Russian troops was accompanied by the intensification of fighting by the separatist forces in other areas, gradually receiving support from troops of the Russian Airborne Forces³⁹.

What we can observe in Ukraine is simultaneously occurring guerrilla and conventional fighting, together with economic, cyber and information war⁴⁰ – but should we really call these activities a “hybrid war”? As rightly noted by Damien Van Puyvelde,

any threat can be hybrid as long as it is not limited to a single form and dimension of warfare. When any threat or use of force is defined as hybrid, the term loses its value and causes confusion instead of clarifying the reality of modern warfare⁴¹.

Besides, “[m]ost, if not all, conflicts in the history of mankind have been defined by the use of asymmetries that exploit an opponent’s

³⁸ M. Menkiszak, R. Sadowski, P. Żochowski, *The Russian military intervention in eastern Ukraine*, ‘OSW Analyses’, 3.9.2014, <http://www.osw.waw.pl/en/publikacje/analyses/2014-09-03/russian-military-intervention-eastern-ukraine> (accessed: 22.6.2015).

³⁹ Ibid. See also: R. Heinsch, at op. cit., pp. 354-357; S. R. Reeves, D. Wallace op. cit., at pp. 369-371.

⁴⁰ M. Seselgyte, op.cit. Compare: J. Berzins, *Russian New Generation Warfare: Implications for Europe*, 14.10.2014, http://www.europeanleadershipnetwork.org/russian-new-generation-warfare-implications-for-europe_2006.html (accessed: 22.6.2015).

⁴¹ D. Van Puyvelde, *Hybrid war – does it even exist?*, ‘NATO Review Magazine’ 2015, <http://www.nato.int/docu/review/2015/Also-in-2015/hybrid-modern-future-warfare-russia-ukraine/EN/index.htm> (accessed: 22.6.2015).

weaknesses, thus leading to complex situations involving regular/irregular and conventional/unconventional tactics”⁴².

In fact, from the point of view of the application of IHL standards, it makes no difference whether an armed conflict in Ukraine is classified as “hybrid” warfare and whether any other non-military measures, say, propaganda war, are involved. Under art. 2, which is common to four Geneva Conventions on the Protection of War Victims of 1949, the aforementioned conventions apply both in the case of declared war as well as armed conflicts continuing without the formal declaration of war being made⁴³. What is really important for international law experts is to focus on and answer the question whether Ukrainian warfare meets the criteria of international conflict (where at least two opposing states are engaged) or rather a non-international one (which is defined as an armed confrontation occurring within the territory of a single State and in which, in simple terms, rebellious armed forces are engaged against the central government). Though it may appear that both in Crimea and eastern Ukraine the government of Ukraine was engaged in actions aiming at defeating the separatist forces and so this conflict bears the hallmarks of non-international confrontation, nevertheless, taking into the activity of the “little green men” in Crimea and the reported decisive Russian military involvement in maintaining and backing the separatist forces and the overall regular character of warfare including the whole assortment of heavy weaponry involved, the discussed war deserves to be called the Russian-Ukrainian armed conflict⁴⁴.

Although Moscow consequently rejects its military engagement in Ukraine, the above-mentioned facts do not leave any room for doubt that Russia actively participated in the organization and coordination of

⁴² Ibid.

⁴³ See: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12.8.1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12.8.1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12.8.1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12.8.1949, 75 UNTS 287.

⁴⁴ A. Wilk, W. Konończuk, *Ukrainian-Russian war under the banner of anti-terrorist operation*, ‘OSW Analyses’, 6.8.2014, www.osw.waw.pl/en/publikacje/analyses/2014-08-06/ukrainian-russian-war-under-banner-anti-terrorist-operation (accessed: 22.6.2015). Compare: S. R. Reeves, D. Wallace, op. cit., at pp. 378-383.

separatist operations and during the escalation of conflict enhanced military aid for the self-declared republics providing them with weaponry, tanks, armoured personnel carriers and other equipment. A significant number of volunteers joining the separatist forces was blatantly recruited in Russia⁴⁵. Another fact which must be strongly emphasized is the fire support provided in favour of separatists by long range artillery and tactical missiles from Russian territory without crossing the state border⁴⁶.

Furthermore, as time passed, the stage that might be termed “limited semi-covert guerrilla movement” smoothly developed into regular military clashes between land force formations (equipped with artillery and armour) one of which (the Russian side) claims to act for the benefit and under the label of the Luhansk and Donetsk republics, and the other side (Ukrainian) attempts to keep up legal appearances that it is not engaged in an armed conflict in defence of its own territory against the neighbouring state⁴⁷. Under such circumstances, IHL (including the above-referred art. 2) leaves, however, no doubt: any hostilities between the armed forces of two or more states constitute an international armed conflict, even if one or both states deny the existence of an armed conflict⁴⁸. As Remy Jorritsma notices,

[w]hether a State [...] wages inter-State conflict by using its regular forces or indirectly by using non-State actors as proxies to act on its behalf, the legal result is the same. Any hostile action undertaken by organized armed non-State groups [in Ukraine] is imputable to Russia if and to the extent that Russia exercises the required degree of operational control⁴⁹.

In conclusion, both Ukraine and Russia should observe and adhere to IHL principles and norms (included in customary law and in the relevant

⁴⁵ B. Balcerowicz, *Konflikty zbrojne: Ukraina, wojny talibów [Armed Conflicts: Ukraine, Taliban Wars]*, ‘Rocznik Strategiczny’ 2014/15, vol. 20, at p. 130, pp. 135-136.

⁴⁶ M. Wrzosek, *op.cit.*, at p. 12.

⁴⁷ A. Wilk, W. Konończuk, *op.cit.*

⁴⁸ L. Blank, *The Continuing Importance of a Low Threshold for LOAC Application in International Armed Conflict*, 19.3.2014, <http://justsecurity.org/8348/guest-post-continuing-importance-threshold-loac-application-international-armed-conflict/> (accessed: 23.6.2015).

⁴⁹ R. Jorritsma, *Ukraine Insta-Symposium: Certain (Para-)Military Activities in the Crimea: Legal Consequences for the Application of International Humanitarian Law*, <http://opiniojuris.org/2014/03/09/ukraine-insta-symposium-certain-para-military-activities-crimea-legal-consequences-application-international-humanitarian-law/> (accessed: 23.6.2015).

treaties applicable to international armed conflicts) once the warfare, both in Crimea and eastern Ukraine, had begun.

As a side note, it is notable that none of the parties involved have addressed the much disputed facts (such as various forms of Russian involvement) by way applying to the IHFFC to verify the claims of both Ukraine and Russia. This is despite both of the countries accepting the competences of the IHFFC. There remains some doubt over the factual background of the conflict, which makes legal assessment less reliable⁵⁰.

5. Crimean Peninsula and eastern Ukraine – territories under occupation?

Taking the above into account, one should consider the role of Russia as an occupying power in Ukraine in light of international law. As a preliminary statement one should recall the basic customary law rule regarding occupation under international law according to which sovereignty may not be alienated through the use of force. This is confirmed in the Hague Regulation on Laws and Customs of War on Land, annexed to the Hague Convention of 1907, e.g. in Articles 43 and 45 and in the Fourth Geneva Convention of 1949, as well as in its 1977 Protocol⁵¹. The main purpose of the law of occupation is to address humanitarian concerns and provide governance rules, for the temporary period of occupation, whilst respecting the rights of the ousted state. Subsequently, the occupying powers are forbidden from not only annexing the occupied territory, but also from changing its political structure⁵². Considering the legal aspects of what may be deemed as a military occupation of Crimea and, to a lesser extent, of eastern parts of Ukraine, it should be also clearly stated that the rules regarding the occupation apply regardless of the legality or illegality of the

⁵⁰ Compare: R. Heinsch, *op. cit.*, at p. 360.

⁵¹ See: Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18.10.1907, 36 Stat. 2227, T.S. no 539, and its Annex: Regulations concerning the Laws and Customs of War on Land, 36 Stat. 2295; Fourth Geneva Convention, *op. cit.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I, Geneva, 8.6.1977, 1125 UNTS 3).

⁵² D. Sheffer, *Beyond Occupation Law*, 'The American Journal of International Law' 2003, vol. 97, at p. 842, pp. 847-851, p. 859.

given military presence. That given the occupations resulting from both the activities of NATO in Afghanistan, which are deemed to have been legal from the get-go in the light of international law, as well as from the Operation Iraqi Freedom, which is at present viewed as illicit, need to adhere to the same rules⁵³.

There is a difference between *occupatio pacifica* (non-hostile/consensual occupation) and *occupatio bellica* (military seizure), the first being occupation of one country or part of it, perpetrated by another country, which is not a direct consequence of an armed conflict, e.g. the agreed temporary occupation of a part of the Ruhr area after WWI and the second one being a result of hostilities, e.g. the occupation of Japan after WWII. Despite the lack of any substantial military skirmishes during the seizure of Crimea, the occupation of the peninsula should be considered to have constituted a military occupation, such as the occupation of Denmark in 1940, as there was no agreement between the Ukrainian and Russian authorities on the seizure.

Putting the question of self-determination aside, the sheer presence of Russian forces in Crimea before the annexation (which seems to be at least indirectly admitted by the Russian authorities)⁵⁴, allowing Russia to gain factual military and administrative power over the area at hand and the lack of consent of Ukraine's authorities led to a state of military occupation of the peninsula. Assuming the above reasoning is right, the next step is to go to the basic rule which forbids the annexation of the territory at hand and the rule according to which the legal status of the occupied territory should be maintained⁵⁵. As a result, under international law, Crimea could be considered not to be a part of the Russian Federation,

⁵³ R. Kwiecień, *Okupacja wojenna w świetle prawa międzynarodowego: natura, skutki, nowe tendencje* [*Beligerent Occupation Under International Law: Legal Nature, Consequences, New Tendencies*], *Annales Universitatis Mariae Curie-Skłodowska* 2013, vol. 60, at p. 71.

⁵⁴ RT, Putin acknowledges..., op. cit.

⁵⁵ Doradczy Komitet Prawny przy Ministrze Spraw Zagranicznych [Advisory Legal Committee of the Minister of Foreign Affairs], *Opinia Doradczego Komitetu Prawnego przy Ministrze Spraw Zagranicznych RP w sprawie przyłączenia Półwyspu Krymskiego do Federacji Rosyjskiej w świetle prawa międzynarodowego* [Opinion of the Advisory Legal Committee of the Minister of Foreign Affairs of the Polish Republic regarding the annexation of the Crimean Peninsula to the Russian Federation in light of international law], <http://www.msz.gov.pl/resource/382f0629-a114-442a-9cf4-6456ca7b80c1:JCR> (accessed: 16.7.2015).

but, legally speaking, an occupied territory, despite any assertions of legitimacy of the annexation by the Russian speaking majority. Moreover, after the annexation no doubt remains that Russia could be treated as an occupying power in Crimea under international law⁵⁶.

One should consider the possibility of holding the occupying power responsible under the rules of state responsibility, possibly through the countermeasure specified in Article 41(2) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts⁵⁷, i.e. not recognizing the new *status quo*⁵⁸. Moreover, taking into account the precedent set in the *Loizidou* case, one could argue the occupying party could be held responsible for any human rights violations from the outset of the changes in Crimea, even before the formal annexation, given the factual control over the territory at hand. Otherwise we would be working in a vacuum, in which no entity or state could be held responsible⁵⁹.

The assessment of the issue of occupation seems to be more complicated in the case of the two republics in eastern Ukraine. The two people's republics which claim the eastern regions, according to some reports, are under indirect control or at least the influence of Russia. Given the uncertain character and scope of control, one cannot precisely determine whether the eastern regions are actually occupied, as understood by international law. In a way, the situation of the two republics is similar to the position of Nagorno-Karabakh, which even though is not recognized by Armenia, seems to be a beneficiary of its support or, similarly, the legal standing of Northern Cyprus, which enjoys the support of Turkey.

Coming back to the important rule forbidding occupation leading to substantial changes in the occupied territory, one should consider the

⁵⁶ See, e.g.: R. Heinsch, op. cit., at pp. 353-354; S. R. Reeves, D. Wallace, op. cit., at pp. 378-380.

⁵⁷ Draft Articles on Responsibility of States for Internationally Wrongful Acts, Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session, A/56/10, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed: 16.6.2015).

⁵⁸ Doradczy Komitet Prawny przy Ministrze Spraw Zagranicznych, op.cit.

⁵⁹ *Loizidou v Turkey*, Application no. 15318/89, Judgment of 18.12.1996, ECHR 1996-VI, at para. 56. See also: A. Tancredi, *The Russian annexation of the Crimea: questions relating to the use of force*, 'Questions of International Law', 11.5.2014, <http://www.qil-qdi.org/the-russian-annexation-of-the-crimea-questions-relating-to-the-use-of-force/> (accessed: 16.7.2015).

cases of post-WWII Germany and Iraq. In both instances, the occupying powers orchestrated very substantial (and much needed) changes in the structure of the government and of the society, which were mostly supported by the international community. In the case of Iraq, there was a vast array of SC's resolution specifying the character of the occupation and providing at least partial legitimacy to the changes. This shows even the gist of the law of occupation is subject to change when needed. However, in the case of Crimea, there was no major international support for any changes, in particular by the UN. In some cases however, strictly following the law of occupation might not be beneficial for the population, say in a case similar to Germany after WWII (massive human rights violations, a dictatorial regime etc.), where a dramatic change was more than needed. On the other hand, however, should even the mandated intervening powers be empowered to ignore the basic rules of occupation law, if the proposed changes are deemed to be legitimate? International law, in fact, is largely indifferent to issues such as the democratic or non-democratic character of a given regime, giving nevertheless some consideration to issues such as human rights violations⁶⁰.

6. What about the UN and the OSCE?

Going back to the UN Charter, more specifically its first Article, one can see one clear issue – the stated purpose of the UN is to maintain peace and security, however in a way people's rights to self-determination are respected. In the present conflict the UN did not, unfortunately, realize its key goals (so far!).

At the outset of the discussed conflict, in March 2014 the Security Council, during an urgent meeting held at the request of Ukraine⁶¹, failed to adopt a US-sponsored resolution proposed by a number of countries. This resolution entailed the UN SC calling for a peaceful solution to the crisis and for Ukraine to continue to respect the rights of the minorities,

⁶⁰ D. Sheffer, *op. cit.*

⁶¹ Letter dated 28.2.2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council, UN S/2014/136, available from http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/136.

but also proclaimed the then-upcoming referendum to be illegal⁶². The said resolution failed, because of a veto of one of the permanent members of the SC – i.e. Russia⁶³. Of course, the UN was, and still is, active on various other fronts of the conflict, in particular the humanitarian aspects of it. The fact of the matter still remains – the UN SC was unable to adopt a substantial resolution pertaining to Ukraine for a long period of time (with the exception of the tragic downing of a Malaysian civil airplane – however, note the other proposed resolution on establishing an international tribunal having the aim of prosecuting those responsible for the downing was vetoed)⁶⁴ and consequently, take more significant action. Only in February 2015 the UN SC adopted another resolution – this time pertaining to Minsk II⁶⁵. However, the said resolution merely reaffirmed the already agreed measure⁶⁶.

The above shows, the oldest (and of course valid) accusation in the book against the UN, i.e. the voting system and the veto rules. The UN SC's veto rules block taking substantial actions in case the interests of one of the permanent members are threatened. The way the UN SC operated during the discussed conflict shows the SC is not able to address key security concerns. It is notable that the UN's GA, which is not constrained by the UN SC's blocking rules, has called to respect the territorial integrity

⁶² United Nations Security Council draft resolution vetoed by the Russian Federation, SC Report S/2014/189 (15.3.2014), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/266/57/PDF/N1426657.pdf?OpenElement> (accessed: 29.5.2016).

⁶³ United Nations – Meetings coverage and press releases, Security Council fails to adopt text urging member states not to recognize planned 16 March Referendum in Ukraine's Crimea Region, SC/11319, 15.3.2014, <http://www.un.org/press/en/2014/sc11319.doc.htm> (accessed: 29.5.2016).

⁶⁴ United Nations Security Council Resolution SC Res 2166 (2014) (21.7.2014), available from [https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2166\(2014\)](https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2166(2014)). See also: United Nations Security Council draft resolution, to establish a tribunal for prosecution of those responsible for the downing of flight MH17, S/2015/562 (20.7.2015), available from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/236/82/PDF/N1523682.pdf?OpenElement>.

⁶⁵ Package of Measures for the Implementation of the Minsk Agreements agreed by the Trilateral Contact Group at the Summit in Minsk on 12.2.2015, 'United Nations Peacemaker', <http://peacemaker.un.org/ukraine-minsk-implementation15> (accessed: 30.5.2016).

⁶⁶ United Nations Security Council resolution, UN SC Res. 2202 (2015), (17.2.2015), available from [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2202%20\(2015\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2202%20(2015)).

of Ukraine⁶⁷. It should be noted that events underlying (such as civil upheaval, security threats etc.) the Libyan, Iraqi and Kosovo operations were deeply embedded in the UN system, whereas there were no such efforts on the part of Russia pertaining to the east of Ukraine and Crimea. On the other hand, there have been some valid accusations of overstepping the lines drawn by the UN SC in these three cases, particularly pertaining to Libya and Kosovo. Operation “Iraqi Freedom”, regardless of the varying assessment of its legitimacy, seems to have occurred in a clear breach of international law.

As regards the OSCE, it is also engaged in trying to bring about an end to the present conflict. It has established a special monitoring mission in Ukraine, whose general aim is to reduce tensions, foster peace, stability and security, monitor and support the implementation of OSCE principles and commitments⁶⁸.

It is notable that according to the wording of the decision establishing the mission, even though OSCE deployed observers to Ukraine, monitors were initially positioned in Kherson, Odessa, Lviv, Ivano-Frankivsk, Kharkiv, Donetsk, Dnepropetrovsk, Chernivtsi, Luhansk – thus leaving Crimea outside monitoring activities⁶⁹. The respective governments (Ukraine, Canada, US, Russia) were however careful enough to assert their positions on the status of Crimea in the interpretative statements attached to the said decision⁷⁰. The mission’s particularly important task is fact-finding – to facilitate international dialogue on the matter – which is particularly significant for the realization of the obligations under the Minsk agreements⁷¹. The mandate of the said mission has been extended several times now⁷². Furthermore, the OSCE has contributed significantly

⁶⁷ United Nation General Assembly’s resolution, on the territorial integrity of Ukraine, Res 68/262 (2015), 1.4.2014. available from https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/262.

⁶⁸ Decision no 1117, Deployment of an OSCE special monitoring mission to Ukraine, PC.DEC/1117, 21.3.2014, PC Journal no 991, Agenda item 1, <http://www.osce.org/pc/116747?download=true> (accessed: 31.5.2016).

⁶⁹ Decision no 1117, above, paras 1 and 6.

⁷⁰ Ibid. See attachments 1-4.

⁷¹ OSCE Annual Report 2015, Special Monitoring Mission to Ukraine, at p. 68, <http://www.osce.org/annual-report/2015?download=true> (accessed: 31.5.2016).

⁷² Decision no 1199, Extension of the mandate of the OSCE Special Monitoring mission to Ukraine, PC.DEC/1199, 18.2.2015, PC Journal no 1090, Agenda item 2, <http://www.osce.org/pc/223926?download=true>, (accessed: 31.5.2016).

to the conclusion of the two Minsk agreements as it facilitates contacts between the parties involved in one or another scope in the conflict and works on the implementation of the agreed solutions⁷³.

7. Minsk agreements – a failure of diplomatic solution?

After several months of armed conflict in eastern Ukraine, it seems that a political, rather than a military solution seems to be the only way to achieve peace. Indeed, the first ceasefire agreements were signed after 27.8.2014, when insurgents – allegedly supported by Russian troops and heavy armour – opened a new front on the southeast portion of the border and pushed back Ukrainian forces from Donetsk⁷⁴. Thus, the Russian government demonstrated that Ukraine could not resolve the conflict in its favour by purely military means. For its part, Moscow decided to agree to a truce as it had the tactical initiative and the military advantage⁷⁵.

The diplomatic process was launched in September 2014 in Minsk, and was intended to regulate the conflict within the so-called Trilateral Contact Group: Ukraine, Russia, and the OSCE⁷⁶, negotiating together with representatives of the separatists⁷⁷. On 5 and 19 September, the Group and separatists signed a protocol and a memorandum, respectively⁷⁸. These

⁷³ See for instance: OSCE, Press Statement by the Trilateral Contact Group, Minsk, 31.7.2014, <http://www.osce.org/home/122142> (accessed: 31.5.2016).

⁷⁴ A. E. Kramer, M. R. Gordon, *Ukraine Reports Russian Invasion on a New Front*, 'New York Times', 27.8.2014, http://www.nytimes.com/2014/08/28/world/europe/ukraine-russia-novozovsk-crimea.html?_r=0# (accessed: 30.5.2016).

⁷⁵ M. Menkiszak, W. Konończuk, *Russia sabotages the Minsk agreement on the Donbas*, 'OSW Analyses', 4.2.2015, <http://www.osw.waw.pl/en/publikacje/analyses/2015-02-04/russia-sabotages-minsk-agreement-donbas> (accessed: 31.5.2016).

⁷⁶ A ceasefire agreement was signed after extensive talks under the auspices of the OSCE.

⁷⁷ See: T. Iwański, *Still together, but apart? Kyiv's policy towards the Donbas*, 'OSW Commentary' 2015, no 160, at p. 1.

⁷⁸ Protocol on the results of consultations of the Trilateral Contact Group, Minsk, 5.9.2014, English version available at: <http://mfa.gov.ua/en/news-feeds/foreign-offices-news/27596-protocolon-the-results-of-consultations-of-the-trilateral-contact-group-minsk-05092014> (accessed: 30.5.2016); Memorandum outlining the parameters for the implementation of commitments of the Minsk Protocol of 5.9.2014, Minsk, 19.9.2014, English version available at: <https://slavyangrad.org/2014/09/23/minsk-memorandum-sept-19-2014/> (accessed: 30.5.2016).

documents provided for, among others, the introduction of a ceasefire; monitoring and verifying by the OSCE of the regime's non-use of weapons; the release of both sides' unlawfully detained persons and hostages; the withdrawal of armed separatist troops, mercenaries and military equipment from the territory of Ukraine; permanent monitoring on the Ukrainian-Russian state border and verification by the OSCE; the establishment of a 30-kilometre buffer zone to separate the warring parties. The documents also included provisions for enacting the Law on the Special Status of the Donetsk and the Luhansk regions and organizing early local elections on the separatist-controlled territories in December 2014, in accordance with Ukrainian domestic law⁷⁹.

Generally speaking, the ceasefire led to the separatists (supported by Russian military units) suspending their offensive, and genuinely decreased intensity of military operations. However, the ceasefire was immediately ignored as the separatists refused to disarm or abandon disputed areas to the Ukrainian government⁸⁰. As regards OSCE tasks, it has been unable to check the many convoys of Russian trucks that have entered rebel-held areas of eastern Ukraine⁸¹. Furthermore, the Minsk agreements failed to have any political effects, and attempts at regulating the political situation were additionally complicated by the illegal "elections" of the leaders of the two separatist regions (Donetsk and Luhansk) on 2 November⁸². It should be also noted that on its side, and despite its official rhetoric, Moscow was not interested in fully implementing the provisions of the Minsk Protocol, including the withdrawal of heavy weapons by the separatists, and creating a buffer zone on both sides of the Ukrainian-Russian

⁷⁹ See: R. Sadowski, A. Wierzbowska-Miazga, *The ceasefire in eastern Ukraine*, 'OSW Analyses', 10.9.2014, <http://www.osw.waw.pl/en/publikacje/analyses/2014-09-10/ceasefire-eastern-ukraine> (accessed: 30.5.2016). See also: BBC News, *Ukraine and Pro-Russia Rebels Sign Ceasefire Deal*, 5.9.2014, <http://www.bbc.com/news/world-europe-29082574> (accessed: 30.5.2016).

⁸⁰ V. Verbyany, I. Arkhipov, *Ukraine Truce Wobbles as Poroshenko Visits Frontline City*, 'Bloomberg', 8.9.2014, <http://www.bloomberg.com/news/articles/2014-09-06/ukraine-sees-cease-fire-holding-as-russian-troops-poised> (accessed: 31.5.2016).

⁸¹ BBC News, *Ukraine Ceasefire: The 12-Point Plan*, 9.9.2015, <http://www.bbc.com/news/world-europe-29162903> (accessed: 30.5.2016).

⁸² T. Iwański, op. cit., at p. 1. See also: T. A. Olszański, *Illegal elections in Donbas*, 'OSW Analyses', 5.11.2014, <http://www.osw.waw.pl/en/publikacje/analyses/2014-11-05/illegal-elections-donbas> (accessed: 30.5.2016). Russia appeared to back the elections, saying it respected "the will of the people of the south-east" (BBC News, Ukraine..., above).

border and arranging international monitoring for it⁸³. In brief – the Minsk ceasefire did not meet Kremlin’s expectations⁸⁴.

Fortunately, there are some positive outcomes of the implementation of the Minsk Protocol: hundreds of prisoners have been exchanged by both sides, which was probably the most tangible positive result to have stemmed from the ceasefire. Concerning humanitarian aid, Ukraine has been sending aid to the parts of the east that it controls, and Russian aid convoys in the winter helped to ease the humanitarian crisis in Luhansk and other rebel-held areas⁸⁵.

Nevertheless, at the beginning of January 2015, the separatist forces began a new offensive on Ukrainian-controlled areas, resulting in the complete collapse of the ceasefire and a return to open hostilities (including the battle for Donetsk airport). The upsurge in activity by the separatist troops (under Russian command) took place after it became clear that the peace negotiations scheduled for 15.1.2015 in Astana in the framework of the so-called “Normandy format” (the leaders of Ukraine, Russia, Germany and France) would not happen⁸⁶. The situation prompted Ukrainian Prime Minister Arseniy Yatsenyuk to announce a “state of emergency” in the Donetsk and Luhansk oblasts⁸⁷. However, on 12.2.2015, after a week of very

⁸³ W. Konończuk, A. Wilk, *Escalation of clashes in the Donbas*, ‘OSW Analyses’, 21.1.2015, <http://www.osw.waw.pl/en/publikacje/analyses/2015-01-21/escalation-clashes-donbas> (accessed: 30.5.2016).

⁸⁴ See: M. Menkiszak, W. Konończuk, op. cit. (“Moscow demanded a de facto recognition of the separatists’ new territorial gains, a unilateral ceasefire and the withdrawal of heavy military equipment by the Ukrainian side, as well as a high degree of autonomy for the separatist Donbas within a framework of constitutional regulations that would ensure Russia’s influence on the policy of Ukraine (this included granting Ukrainian regions the right to pursue independent foreign economic policies, and to block the Kyiv government’s decisions on foreign and security policy”). Compare: T. Iwański, op. cit., at p. 9.

⁸⁵ BBC News, *Ukraine...*, above.

⁸⁶ W. Konończuk, A. Wilk, op. cit.

⁸⁷ See: OSCE Chairperson-in-Office gives full backing to Minsk package, OSCE Press release, 12.2.2015, <http://www.osce.org/cio/140196> (accessed: 30.5.2016). In fact, two documents were adopted: a set of actions concerning the implementation of the Minsk agreements (signed by members of the Trilateral Contact Group) and a Declaration on action to implement the Minsk agreement, adopted by the leaders of Germany, France, Ukraine and Russia, emphasising their support for a truce based on the sovereignty and territorial integrity of Ukraine (S. Kardaś, W. Konończuk, *Minsk 2 – a fragile truce*, ‘OSW Analyses’, 12.2.2015, <http://www.osw.waw.pl/en/publikacje/analyses/2015-02-12/minsk-2-a-fragile-truce> (accessed: 31.5.2016)).

intense negotiations (overseen by the OSCE), the Presidents of Ukraine, Russia and France and the Chancellor of Germany signed a document, with a view to resolve the armed conflict in the east of Ukraine.

This new package of peace-making measures, called Minsk II⁸⁸, was intended to revive the Minsk Protocol of 5.9.2014⁸⁹. Indeed, the set of actions of Minsk II covered similar issues to the Minsk Protocol, but its provisions were more specific. It included, among others: a ceasefire monitored by the OSCE; withdrawal of heavy military equipment and all illegal military formations, militants and mercenaries from Ukrainian territory (under OSCE supervision); unconditional release of all hostages and illegally held persons; restoring full control over the state border by Ukrainian government in the whole conflict zone; constant monitoring of the Russian-Ukrainian border by the OSCE, along with setting up a security zone in the frontier regions of Russia and Ukraine. Moreover, Minsk II obliged Ukraine to carry out political changes – the adoption of a new constitution, based on decentralization and including the special status of the Donetsk and Luhansk oblasts, with some autonomous, although quite unclear, rights: the right to linguistic self-determination, the right to create their own police units, and the right to establish cross-border cooperation with regions of the Russian Federation⁹⁰. It should be highlighted that on 17.2.2015 the UN Security Council (unanimously) adopted a resolution 2202 (2015)⁹¹, supporting the Minsk II agreement and annexed it to the text of the resolution. The Council called on “all parties to fully implement

⁸⁸ Package of Measures for the Implementation of the Minsk Agreements, Minsk, 12.2.2015, <http://www.osce.org/cio/140156> (accessed: 31.5.2016). English translation available at: <http://www.ft.com/cms/s/0/21b8f98e-b2a5-11e4-b234-00144feab7de.html#axzz4AyHn4IHu> (accessed: 31.5.2016).

⁸⁹ See: OSCE Chairperson-in-Office gives full backing to Minsk package, OSCE Press release, 12.2.2015, <http://www.osce.org/cio/140196> (accessed: 30.5.2016). In fact, two documents were adopted: a set of actions concerning the implementation of the Minsk agreements (signed by members of the Trilateral Contact Group) and a Declaration on action to implement the Minsk agreement, adopted by the leaders of Germany, France, Ukraine and Russia, emphasising their support for a truce based on the sovereignty and territorial integrity of Ukraine (S. Kardaś, W. Konończuk, *Minsk 2 – a fragile truce*, ‘OSW Analyses’, 12.2.2015, <http://www.osw.waw.pl/en/publikacje/analyses/2015-02-12/minsk-2-a-fragile-truce> (accessed: 31.5.2016)).

⁹⁰ Ibid.

⁹¹ United Nations Security Council resolution, UN SC Res. 2202 (2015), 17.2.2015, available from [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2202%20\(2015\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2202%20(2015)).

the ‘Package of measures’, including a comprehensive ceasefire”. Although the resolution was not adopted under Chapter VII of the UN Charter (so, legally, it is non-binding), participants of the UN SC meeting agreed that “non-compliance with the [Minsk] agreements had ruined the prospect for peace” and the resolution should be implemented fully and appropriately⁹².

However, the facts tell a rather different story. Ukraine sees Minsk II as confirmation of the provisions of 2014 Minsk agreements and tries to avoid the introduction of federalization and broad autonomy for the Donbass, whereas for Russia the most important part of Minsk II is Kyiv’s commitment to undertake constitutional reform, in accordance with the demands of the separatists in the Donbass. Additionally, neither of the parties to the conflict considers the ceasefire as permanent, and each is blaming the other for its violation⁹³. Ukrainian officials argue that the separatists and Russians have failed to withdraw foreign forces and military equipment from Ukraine, grant access to the OSCE to the Donbass, release all illegally-detained persons and restore Ukrainian control over the border. The separatists claim that Ukrainian government has not yet granted amnesty and has not enacted constitutional reforms to provide for decentralization, they also stated that they would not accept a restoration of Ukrainian sovereignty, which is the ultimate objective of Minsk II⁹⁴.

To sum up, it seems that Minsk II turned out to be only partially effective, which means another solution is needed or, alternatively, stricter enforcement measures need to be introduced. In particular, there are continued (but limited) military clashes (the full ceasefire never took place)⁹⁵, heavy weaponry have not been removed completely, the OSCE Special Monitoring Mission’s mandate has not been and cannot be fully effectively

⁹² See: Unanimously Adopting Resolution 2202 (2015), Security Council Calls on Parties to Implement Accords Aimed at Peaceful Settlement in Eastern Ukraine, UN SC 7384th Meeting, SC /11785, 17.2.2015, <http://www.un.org/press/en/2015/sc11785.doc.htm> (accessed: 31.5.2016).

⁹³ W. Rodkiewicz, R. Sadowski, A. Wilk, “Hybrid” truce in the Donbas, ‘OSW Analyses’, 18.2.2015, <http://www.osw.waw.pl/en/publikacje/analyses/2015-02-18/hybrid-truce-donbas> (accessed: 30.5.2016).

⁹⁴ S. Pifer, *Letting go, but not giving up: Implementation of Minsk II*, February 2016, <http://www.brookings.edu/research/articles/2016/02/eu-us-minsk-ii-provisions-pifer> (accessed: 31.5.2016).

⁹⁵ As R. Heinsch rightly noticed, “the fighting has continued (...) at a level of intensity that falls within the definition of protracted armed violence” (R. Heinsch, op. cit., at p. 360).

exercised (because parties to the conflict have hampered OSCE representative inspections, preventing them from entering particularly sensitive areas under various pretences), the decentralization reforms in Ukraine have not been completed and Kyiv has not regained control over its borders⁹⁶. At the same time, the escalation of hostilities is unlikely, but this danger still cannot be completely dismissed (taking into account the low prospect for any new diplomatic initiatives) – at present, however, we are dealing with a so-called frozen or semi-frozen conflict, with no clear end on the horizon⁹⁷.

8. Repercussions for international law

The general aims of modern international law are specified concisely in the preamble of the Charter of the United Nations, “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”⁹⁸. It is different from domestic law in many fundamental respects, i.e. the law seen by most as a format or paradigm of how a legal system should work. The crucial characteristics of international law is that it does not have a central legislator, there is also a limited global authority as well as limited enforcement possibilities. Moreover, to add another “special” feature – the main actors of international law are states, which are sovereign. As a result, more powerful states are able to influence the content of international law and its reality⁹⁹.

Given the above features, there is a surprising level of compliance with the discussed legal order. There is a vast array of international law treaties which help the world function, pertaining to areas as varied as humanitarian law, human rights, aviation, sports, peace and conflict termination, intellectual property and many others. Furthermore, over history,

⁹⁶ A. Wilk, T. A. Olszański, W. Górecki, *The Minsk agreement: one year of shadow boxing*, ‘OSW Analyses’, 10.2.2016, <http://www.osw.waw.pl/en/publikacje/analyses/2016-02-10/minsk-agreement-one-year-shadow-boxing> (accessed: 31.5.2016).

⁹⁷ Ibid.

⁹⁸ UN Charter, Preamble.

⁹⁹ See: J. Goldsmith, D. Levinson, *Law for states: international law, constitutional law, public law*, ‘Harvard Law Review’ 2009, vol. 122, no 7, at p. 1791, pp. 1793-95, 1861, 1867-68.

a number of permanent and temporary tribunals have brought a further degree of compliance with international law, the ICJ, being the chief example. IGOs play a similar, mostly positive role.

However, in the context of the present article, one may even question the validity of international law. Does this system work only in peaceful circumstances and can it be easily disregarded in times of conflict, especially in the current multipolar world, as some claim? Has a period of a unilateral US policy led to the diminished role of international law? Perhaps events such as the NATO intervention in Kosovo and its recognition as an independent state later on or the *de facto* unilateral American intervention in Iraq has led other countries, wielding substantial power, to “think” they are empowered to perform some acts they see as “legitimate”, but not necessary legal? However, accepting the notion that “all options are on the table” for the powerful is a *de facto* abandonment of international law and leaving it all to pure geopolitics, which, in the authors’ opinion, would lead only to chaos.

There is a need for a discussion regarding the shape of international law, effectiveness being the chief concern. The world is too complex for a uniform set of rules. There is also a need to take into account the actual power play in the world, as international law does not exist in a vacuum. This goes to the inherent characteristic of international law, namely, the lack of a global police/enforcement service and the already mentioned fact that the one institution capable of a somewhat similar function (i.e. the UN SC) can be easily blocked. However, one should not forget, even though the UN SC failed to react directly, the US, the EU, and other countries and organizations have imposed sanctions¹⁰⁰. By way of an indirect effective cooperation, these sanctions led to a substantial economic effect, thus, very likely, achieving its goal of acting as a deterrent, at least to some degree. However, it is also notable that the Russian government issued counter-sanctions, aimed at the aforementioned states and political blocks, which raise the issue of sanctions being a double-edged sword. Nevertheless, international law should not be reduced to occasional issuing of sanctions as a way to force compliance. The preferred usage of this legal system’s

¹⁰⁰ US Department of State, Diplomacy in Action, *Ukraine and Russian sanctions*, <http://www.state.gov/e/eb/tfs/spi/ukrainerussia/> (accessed: 15.1.2015); see also: European Union Newsroom, *EU sanctions against Russia over Ukraine crisis*, http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm (accessed: 5.4.2015)

mechanisms is to resolve disputes peacefully and ensure compliance in this way.

The age-old accusation against international law is its particular character and lack of 100-percentage compliance. However, does any legal system have a perfect compliance rate? It is definitely not the case with criminal law or even corporate tax law (e.g. big TNC's using legal mechanisms in order to minimize their effective tax burden). It seems in the world of domestic law, the biggest players find ways to circumvent rules deemed by to be unfavourable, whilst however, trying to at least achieve an appearance of conformity of law¹⁰¹.

One cannot effectively argue with the fact that international law was and sometimes is ignored by the major powers. The great powers always find ways to navigate through the sometimes muddy waters of international law in order to secure their interests. One particular example of that is the veto mechanism of the UN's Security Council, making any action against its permanent members impossible or at least very difficult. However, there is an indirect effect of international law in this respect: regardless of the legitimacy of the accusations against Russia in the conflict at hand, the Russian authorities came up with a substantial line of defence of their supposed activities on Ukrainian soil. Moreover, a single violation or even several violations do not mean the entire international legal system is ignored¹⁰².

It can be said the classical rules of international law have been watered down in the recent two decades, by the very critics of Russia, in particular the US and NATO, i.e. by the Iraq intervention lacking the consent of the UNSC. Seeing the problematic legality of such interventions, the world powers try to shift the discussion to the issue of legitimacy, rather than legality¹⁰³.

¹⁰¹ P. Spiro, *Ukraine, International Law, and the Perfect Compliance Fallacy*, 'Opinio Iuris', <http://opiniojuris.org/2014/03/02/ukraine-international-law-perfect-compliance-fallacy/> (accessed: 15.12.2014). See also: E. Posner, *Russia's military intervention in Ukraine: international law implications*, <http://ericposner.com/russias-military-intervention-in-ukraine-international-law-implications/> (accessed: 15.12.2014).

¹⁰² Ibid.

¹⁰³ J. Goldsmith, *The Precedential Value of the Kosovo Non-Precedent Precedent for Crimea*, 17.3.2014, 'Law Fare: Hard National Security Choices', <http://www.lawfareblog.com/2014/03/the-precedential-value-of-the-kosovo-non-precedent-precedent-for-crimea/> (accessed: 10.1.2015).

With all that being said – international law should not be abandoned, especially now, in a world which is increasingly interconnected. It contains multiple instruments which might and should be used to end the present conflict in Ukraine as quickly as possible, in order to save lives and provide a compressive solution for Ukraine, securing the long-term peace. International law was developed as a system of rules, the aim of which is to organize the international community. Although from the get-go, it was lacking a central law-giver or enforcement measures, typical for inter-state law, it had other instruments and measures – this specifically pertains, *inter alia*, to the role of IGO's as facilitators of peace negotiations and peace builders as well as humanitarian law, which mitigates the violence in armed conflicts.

9. Conclusion

One of the key aims of all legal systems, to ensure “survival of the fittest”, is not the governing rule, especially in a world of weapons of mass destruction. Accepting pure geopolitics, so-called legitimacy, not legality, will lead to the demise of international law, which would be horrific for the international community. Force as a policy measure must only be exercised on the basis of SC's authorization, in the event that all peaceful ways of settlement have been exhausted. In short, there is no valid alternative to the rule of law and no country can exist in isolation.

There are other lessons to be learned from the current conflict in Ukraine. Firstly, international law can be uncertain at times. It seems, however, that it is an inherent characteristic. Secondly, a disregard for international law, justified by the “special” character of the given situation, has led to the deterioration of the discussed legal order. Furthermore, so-called proxy wars contribute to the said deterioration, given the problematic accountability they cause, and give the appearance of compliance. What is more, the deficiencies in the UN system need to be finally addressed in a way which will enhance compliance and conclusively set the conditions for a humanitarian intervention. Last but not least, the present considerations should not necessarily lead to lowering expectations for the efficacy of international law. Even though total compliance is not to be expected, a violation of the said legal order does not make it invalid as a whole. To lessen the degree of violations, the participants of the international law process should not base their actions on “murky waters” type of arguments, possibly favouring their allies or interests, but rather focus on applying uniform rules universally.

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