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CLASSIFICATION OF THE CONFLICT BETWEEN UKRAINE AND RUSSIA IN INTERNATIONAL LAW (*IUS AD BELLUM AND IUS IN BELLO*)

Abstract:

The aim of this article is to classify the armed conflict between Ukraine and Russia in light of international law. Firstly, the Russian armed activities are qualified through the lens of use of force and it is shown that Russia committed an aggression. Secondly, the Russian-Ukrainian conflict is qualified according to the law of armed conflict, not only identifying the applicable norms of law of armed conflict but examining whether atrocities have been committed and whether they are war crimes or mere crimes or acts of terror. The article posits that there is an international armed conflict between Russia and Ukraine and in addition a non-international one between Ukrainian insurgents and governmental forces. The methodology used in the article is legal analysis of documents and international law doctrine.

Keywords: aggression, armed conflict, Crimea, Donetsk, international conflict, Russian Federation, self-determination, Ukraine

INTRODUCTION

Decision of Ukrainian president Viktor Yanukovich not to sign a European Union association agreement in November 2013, and the subsequent clashes between governmental forces and the Euromaidan protesters in January and February 2014, led to the one of the biggest political crisis in the history of Ukraine.¹ The danger of civil war appeared to have been defused when the president announced on 21 February 2014 that he had reached an agreement with the opposition. But immediately after this announcement Yanukovich escaped from Kiev and the very

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¹ See D. R. Marples, F. V. Mills (eds.), *Ukraine's Euromaidan: Analyses of a Civil Revolution*, Columbia University Press, New York: 2015.

next day the Ukrainian parliament removed him from the post in violation of the Ukrainian Constitution.² This provided fertile ground for Russia to question the legitimacy of the actions of the transitional authorities.³ When it became apparent that Ukraine was on the path toward establishing new democratic authorities and integrating with the Western structures, Russia decided to take control over the Crimean Peninsula and the Eastern part of Ukraine (it was essential to seize the latter in order to secure the transport of, e.g., energy, water and other supplies to Crimea and Sevastopol).

At the end of February 2014 armed forces without a state insignia, in cooperation with Crimean self-defence units formed by separatists, began to take control of the main points in the Crimean Peninsula and engage in some raids in neighbouring regions. They met with almost no resistance. On 16 March 2014 the Crimean authorities organized a referendum in which, allegedly, the overwhelming majority (96.8%) voted for accession to the Russian Federation. Their expressed “will” resulted in a declaration of independence by the Crimean authorities and the signing of an agreement on the accession of Crimea and Sevastopol to the Russian Federation on 18 March 2014.⁴ By the end of March Russia controlled the whole Crimean peninsula and secession was thus effective. Simultaneously, riots began in Eastern Ukraine, allegedly inspired

² Art. 111 of the Ukrainian Constitution of 1996 (available at: faolex.fao.org/docs/pdf/ukr127467E.pdf, accessed 30 March 2015) states as follows: “The President of Ukraine may be removed from the office by the Verkhovna Rada of Ukraine in compliance with a procedure of impeachment if he commits treason or other crimes. The issue of the removal of the President of Ukraine from office in compliance with the procedure of impeachment shall be initiated by the majority of the constitutional membership of the Verkhovna Rada of Ukraine. The Verkhovna Rada of Ukraine shall establish a special ad hoc investigating commission, composed of special prosecutor and special investigators to conduct an investigation. The conclusions and proposals of the ad hoc investigating commission shall be considered at the meeting of the Verkhovna Rada of Ukraine. On the basis of evidence, the Verkhovna Rada of Ukraine shall, by at least two-thirds of its constitutional membership, adopt a decision to bring charges against the President of Ukraine. The decision on the removal of the President of Ukraine from office in compliance with the procedure of impeachment shall be adopted by the Verkhovna Rada of Ukraine by at least three-quarters of its constitutional membership upon a review of the case by the Constitutional Court of Ukraine, and receipt of its opinion on the observance of the constitutional procedure of the investigation and consideration of the case of impeachment, and upon receipt of the opinion of the Supreme Court of Ukraine to the effect that the acts of which the President of Ukraine is accused contain elements of treason or other crimes.” In the vote of 22 February 2014, 328 out of 450 members of Verkhovna Rada of Ukraine voted in favour of removal of Yanukovich from his post, so the required majority of 338 members was not reached, not to mention that the procedure described above was totally ignored. In addition, the Chairman of the Verkhovna Rada of Ukraine (at that time Serhiy Arbutov) should have been assumed power after Yanukovich’s removal (Art. 112). However, the Ukrainian parliament elected Oleksandr Turchynov as the new Chairman of the Ukrainian Parliament and the acting President of Ukraine.

³ See Vladimir Putin answered journalists’ questions on the situation in Ukraine, 4 March 2014, available at: <http://eng.kremlin.ru/news/6763> (accessed 30 March 2015).

⁴ T. A. Olszański, A. Sarna, A. Wierzbowska-Miazga, *The consequences of the annexation of Crimea*, The Center of Eastern Studies, Analyses, 19 March 2014, available at: <http://www.osw.waw.pl/en/publikacje/analyses/2014-03-19/consequences-annexation-crimea> (accessed 30 March 2015).

by Russian agents.⁵ In April 2014 the Donetsk and Lugansk People's Republics were proclaimed and then, after taking control over the main cities of the Donbas region, the establishment of the Federal State of New Russia was announced.⁶ On 11 May 2014 the separatists announced that the people of the Donetsk and Lugansk regions had voted in the referenda in favour of independence. The Ukrainian government began its offensive only after the presidential elections which took place on 25 May 2014. Despite a cease-fire agreement of 12 February 2015 (the Minsk accords) hostilities continue to take place in Eastern Ukraine.⁷

The aim of this article is to classify the armed conflict between Ukraine and Russia in the light of international law. Firstly, the Russian armed activities will be examined through the lens of the principles concerning use of force in order to answer the question whether there was an aggression. Secondly, the Russian-Ukrainian conflict will be examined from the point of view of the law of armed conflict (LOAC) and international criminal law in order to identify norms which should be applied to the conflict and in order to determine whether the atrocities committed constitute war crimes, mere crimes, or acts of terror. The methodology used in the article is a legal analysis of documents, including Security Council (SC) decisions and the international law doctrine.

1. IUS AD BELLUM

1.1. Crimea

Russia denies its direct involvement in the Crimean crisis and emphasizes that the Crimean case is an example of execution by the Crimean people of their right to self-determination, which it argues is the same right Ukraine exercised when separating itself from the USSR, additionally justified by the Kosovo precedent.⁸ In addition Russia justified the annexation of Crimea by execution of its right to self-defence, which encompasses the right to defend its own citizens, the prevention of human rights violations in light of the violent situation in Ukraine and the activities of the *Nationalists, neo-Nazis, Russophobes and anti-Semites* who executed the coup, the consent of the legitimate authorities of Ukraine (president Yanukovych and Crimean authorities), and the need to prevent NATO forces deployment near Russian borders.⁹

⁵ G. Hughes, *Ukraine: Europe's New Proxy War?*, 1(2) Fletcher Security Review 106 (2014), p. 114.

⁶ *Donetsk, Lugansk People's Republics unite in Novorossiya*, 24 May 2014, available at: http://sputniknews.com/voiceofrussia/news/2014_05_24/Donetsk-Lugansk-Peoples-Republics-unite-in-Novorossiya-1012/ (accessed 30 March 2015).

⁷ See SC/11784, 17 February 2015.

⁸ *Vladimir Putin's address to the State Duma deputies, Federation Council members, heads of Russian regions and civil society representatives in the Kremlin*, 18 March 2014, available at: <http://eng.kremlin.ru/news/6889> (accessed 30 March 2015).

⁹ *Ibidem* ("It would have meant that NATO's navy would be right there in this city of Russia's military glory, and this would create not an illusory but a perfectly real threat to the whole of southern Russia. These are things that could have become reality were it not for the choice the Crimean people made, and I want to say thank you to them for this").

Before addressing the grounds used by Russia which allegedly justify its intervention in Crimea, some fundamental principles of law on the use of force must be recalled. Firstly, it must be emphasized that any use of force, or even a threat to use force, against another state is prohibited by the UN Charter (Art. 2(4)), and in particular the alteration of international borders by force is considered inadmissible in light of international law.¹⁰ Definitely the deployment of soldiers and using “those who were stationed in Crimea as a part of the Black Sea fleet members in order to take control” over the main positions in the Autonomous Republic of Crimea and the city of Sevastopol was an example of the use of force. In doing so Russia violated not only the UN Charter, but also several bilateral treaties: the Agreement between Ukraine and the Russian Federation on the Status and Conditions of Presence of the Black Sea Fleet of the Russian Federation in the Territory of Ukraine of 28 May 1997 (extended in 2010), the Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation of 31 May 1997, the Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on the Use of Airspace of Ukraine and of Airspace Over the Black Sea, Where Ukraine is Responsible for Security of Flights and Organization of Servicing of Air Traffic, by the Forces and Resources of the Black Sea Fleet of the Russian Federation of 16 July 1999.¹¹ All of these treaties stress the importance of the obligation to respect the sovereignty and territorial integrity of Ukraine.

The actions of Russia can be qualified as an aggression.¹² In light of the definition of aggression contained in UN General Assembly (GA) resolution 3314 of 14 December 1974, the customary character of which was confirmed by the International Court of Justice,¹³ in order to qualify the use of armed force as an aggression it is necessary to prove that this force was used “against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations” (Art. 1). The annexation of part of Ukrainian territory by Russia confirms that the military actions in the Crimean Peninsula had as their aim the violation of sovereignty and territorial integrity and reached the sufficient level of gravity. The fact that Russian operations were advancing without a fight does not

¹⁰ GA resolution 2625, 24 September 1970.

¹¹ See Ministry of Foreign Affairs of Ukraine, *On Violations of Ukraine's Laws in Force and of Ukrainian-Russian Agreements by Military Units of the Black Sea Fleet of the Russian Federation in the Territory of Ukraine*, 3 March 2014, available at: <http://mfa.gov.ua/en/news-feeds/foreign-offices-news/18622-shhodo-porusheny-chinnogo-zakonodavstva-ukrajini-ta-ukrajinsyko-rosijsykih-ugod-viislykovimi-formuvannymi-chf-rf-na-teritoriji-ukrajini> (accessed 30 March 2015).

¹² See *Opinia Doradczego Komitetu Prawnego przy Ministrze Spraw Zagranicznych RP w sprawie przyłączenia Półwyspu Krymskiego do Federacji Rosyjskiej w świetle prawa międzynarodowego* (Advisory Opinion of the Legal Committee of the Ministry of Foreign Affairs of the Republic of Poland on accession of Crimean Peninsula to Russian Federation in light of International Law), 22 June 2014, reprinted in this volume of the Yearbook.

¹³ See ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, ICJ Rep. 1986, para. 195.

impact this qualification, as it is incontrovertible that in a situation when one state uses force to take a position and waits for the reaction of the state whose territory was invaded, the former must be labelled as an aggressor not the latter.¹⁴ Russia first used armed force which, by the principle introduced in GA resolution 3314 on USSR's request, should be considered as *prima facie* evidence of an act of aggression. Resolution 3314 defines (in non-exhaustive way) acts which can be qualified as acts of aggression, some of which can be directly applied to the situation in Ukraine. Firstly: "the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof" (Art. 3(a)). It should be stressed that this act requires invasion or attack on a territory, and it says nothing about the necessity of attacking the armed forces of another state. In consequence, such an aggression can be committed without a single bullet being fired or a drop of blood being shed. Invasion means a situation in which a state sends its troops into the territory of another state and maintains them there for an extended period of time,¹⁵ thus a crossing of frontiers and physical entering of troops into at least a part of a state's territory is therefore required.¹⁶ This was clearly the case in Crimea. The definition contained in Resolution 3314 considers as aggression any military occupation resulting from an invasion or attack on a territory, and undoubtedly the territory of the Autonomous Republic of Crimea and of the city of Sevastopol was occupied. The question of annexation is also beyond discussion. This separation was done against the will of Kiev, in violation of the Ukrainian Constitution and with the use of armed forces.

Secondly, Resolution 3314 defines "the blockade of the ports or coasts of a State by the armed forces of another State" (Art. 3(c)) as an act of aggression. Ukrainians emphasize that the missile boat Ivanovets of the Black Sea Fleet of the Russian Federation blocked the Balaklava Bay.¹⁷ In addition, the sinking by the Russians of their own anti-submarine vessel Ochakov in the straits that connect the Black Sea with Donuzlav Lake should be considered as a part of the blockade as it prevented Ukrainian navy ships from leaving a nearby base and going to sea.¹⁸

Thirdly, Resolution 3314 considers as an act of aggression "[t]he use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any

¹⁴ Y. Dinstein, *War, Aggression and Self-Defence*, Fourth edition, Cambridge University Press, New York – Cambridge: 2005, pp. 188-189.

¹⁵ O. Solera, *Defining the Crime of Aggression*, Cameron May, London: 2007, p. 67.

¹⁶ A. Constantinou, *The Right of Self-defence under Customary International Law and Article 51 of the UN Charter*, Ant. Sakkoulas, Bruylant, Athènes – Bruxelles: 2000, p. 67.

¹⁷ Ministry of Foreign Affairs of Ukraine, *supra* note 11.

¹⁸ Ch. K. Chumley, *Russia accused of sinking own cruiser to block Ukrainian navy*, The Washington Times, 7 March 2014, available at: <http://www.washingtontimes.com/news/2014/mar/7/russia-accused-sinking-own-cruiser-block-ukrainian/> (accessed 30 March 2015).

extension of their presence in such territory beyond the termination of the agreement” (Art. 3(e)). Art. 6(1) of the above-mentioned agreement on the status and conditions of stay of the Black Sea Fleet provided that “[m]ilitary units shall conduct their operations in the areas of disposition in accordance with the legislation of the Russian Federation, respect Ukraine’s sovereignty, obey its legislation and refrain from interference with Ukraine’s domestic affairs.” In addition Art. 8(2) stresses that “[m]ilitary units shall conduct exercises and other combat and operative training within the limits of training centers, training areas, positioning and dispersal areas, firing ranges, and, except for forbidden zones, within the designated airspace as agreed with Ukraine’s competent authorities.” The undeniable moves of the soldiers of the Black Sea fleet outside the agreed-upon zones was in contravention of the aforementioned provisions and constitutes an act of aggression. It is in fact a variation of an invasion, but the purpose behind its enumeration among acts of aggression was to emphasize that aggression can be committed without the violation of frontiers, from within the victim state. Fourthly, as Russia has denied any connections to the so-called “green people” (armed forces without state insignias on their uniforms), it is worth recalling that an act of aggression is also committed by the “sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein” (Art. 3(g) of GA resolution 3314). In consequence, if it is proven that Russia had effective control over those groups, the operations conducted by them can be attributed to Russia and thus constitute the commission of another act of aggression.

The chapeau of the definition of aggression emphasizes that the use of force in contravention of the UN Charter should be considered as an aggression. The UN Charter allows for the use of force only when there is an authorisation on behalf of the UN Security Council (Art. 42) or in case of self-defence in response to an armed attack (Art. 51). There was no such authorisation in the Crimean case, but Russia attempted to justify its actions towards Crimea and Sevastopol through its right to defend its citizens. This kind of defence is in fact admissible, but only in specific situations such as a case when there was an attack (e.g. on its armed forces, diplomatic premises) or imminent threat of attack on its nationals, they were taken as hostages, and when the hosting state was unwilling or unable to protect those nationals.¹⁹ In case of Crimea, there was

¹⁹ See J. Kranz, *Kilka uwag na tle aneksji Krymu przez Rosję* (Some remarks on the annexation of Crimea by Russia), 8 Państwo i Prawo 23 (2014), p. 33. In the context of Russian intervention it should be recalled that the Independent International Fact-Finding Mission on the Conflict in Georgia stated: “There is probably not one single instance in state practice where a state invoked an independent, stand-alone entitlement to rescue its nationals, without relying on one of the classic grounds of justification. In state practice, none of the arguments advanced by states in order to justify military interventions in favour of their nationals has been accepted by the entire community of states. The prevailing reactions were rather reprobation, e.g. in the case of the Congo, Grenada and Panama” (pp. 286-287). Independent International Fact-Finding Mission on the Conflict in Georgia, *Report*, vol. II, September 2009, available at: <http://rt.com/files/politics/georgia-started-ossetian-war/iiffmcg-volume-ii.pdf> (accessed 30 March 2015).

no attack on Crimean people, not even the slightest threat of an attack. The Russian allegation that the Ukrainian authorities were working on the adoption of new law revising the language policy, which would thus be directed against ethnic minorities, definitely does not constitute a reason justifying the use of force in defence of those minorities. The lives and health of members of those minorities were not endangered and the Russian reaction was excessively disproportional. For the same reasons, the argument about the need for humanitarian intervention (i.e. responsibility to protect) is invalid. In addition, it should be stressed that the concept of responsibility to protect has been limited only to situations of genocide, war crimes, crimes against humanity, and ethnic cleansing. The argument about cultural genocide, which is raised by some Russian scholars,²⁰ certainly has as its purpose to put the Russian intervention within the framework of a responsibility to protect exception, but it should not be forgotten that the cultural aspect of genocide was purposefully eliminated from the definition of genocide. In addition, analysis of the judgments of, e.g. the Polish Supreme National Tribunal concerning the cultural dimension of genocide committed against Jews and Poles clearly demonstrates that only the most severe violations of cultural rights, equal to an annihilation of the culture of a particular group (e.g. burning libraries or a ban on education) could be labelled as some sort of genocide, which was clearly not the case in the Crimean conflict.²¹

Two other justifications, which are not directly mentioned in the UN Charter, were raised by Russia: the consent of legitimate authorities and the right to self-determination. With respect to them, it must be stressed that they are allowed according to international law, but only under certain conditions.²² In case of consent, there must be a clear request issued by constitutional authorities. Russia has used the argument that Yanukovich was still president as he was toppled in violation of the Ukrainian Constitution. However, Russia did not reveal any document which would confirm that such a request was made by Yanukovich.²³ It has happened in history that the head of a state has asked for help in regaining power (e.g. Haitian president Jean-Bertrand Aristide in 1994),²⁴ or to stop riots and calm a situation, but the international community has responded to these calls only when there was an authorization of the UN Security Council (SC), otherwise such “help” would constitute an interference into a state’s domestic affairs (Art. 2(7) of the UN Charter). It must be stressed that according to Russia, Yanukovich

²⁰ V. Tolstykh, *Reunification of Crimea with Russia: A Russian Perspective*, 13(4) Chinese Journal of International Law 879 (2014), p. 884.

²¹ See more P. Grzebyk, *The Role of the Polish Supreme National Tribunal in the Development of Principles of International Criminal Law*, [in:] M. Bergsmo, Ch. Wu Ling, Y. Ping (eds.), *Historical Origins of International Criminal Law: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels: 2014, pp. 624 ff.

²² See more Ch. Marxsen, *The Crimea Crisis – An International Law Perspective*, 74(2) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law) 367 (2014).

²³ S/PV.7125, 3 March 2014.

²⁴ See more Ch. Gray, *International Law and the Use of Force*, 3rd edition, Oxford University Press, Oxford: 2008, pp. 84 ff.

asked for intervention not to restore his position, secure territorial integrity and/or calm the situation in the state, but to give the part of his country to another state, in other words to carry out an act of secession in contravention of the Ukrainian Constitution.²⁵ This is a clear example of a request which raises major doubts about the intentions of the intervening power, so it cannot be considered as a legal justification for the use of force.²⁶

The fact that such a request was also issued on behalf of Crimean authorities²⁷ has no legal meaning, as international law does not allow intervention on behalf of insurgents,²⁸ even in a situation of self-determination. GA resolution 2626 stressed that

[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour,

and also that “[e]very State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.” It would seem that the GA resolution could not have more clearly expressed the prohibition of intervention into the internal affairs of another state under the pretext of self-determination. The people of Crimea have no right to external self-determination, as this right was attributed only to people of a colony or Non-Self-Governing Territory, and the so-called “secession remedy” would be allowed only if there was no other way to secure its self-determination within the Ukrainian state and the rights of Crimean inhabitants were violated in such extent that, e.g., crimes against civilians were committed.²⁹ None of these conditions were fulfilled in the Crimean case. The right of self-determination does not give rise to a right of secession.³⁰

²⁵ According to Art. 73 of the Ukrainian Constitution: “Alterations to the territory of Ukraine shall be resolved exclusively by the All-Ukrainian referendum.”

²⁶ United Nations, *Report of the Special Committee on the Problem of Hungary*, General Assembly Official Records: Eleventh Session Supplement no. 18, A/3592, New York 1957, para. 266, available at: <http://mek.oszk.hu/01200/01274/01274.pdf> (accessed 30 March 2015).

²⁷ Премьер Крыма попросил Путина обеспечить мир на полуострове, 1 March 2014, available at: www.vesti.ru/doc.html?id=1334804 (accessed 30 March 2015).

²⁸ ICJ, *Military and Paramilitary Activities in and against Nicaragua*, para. 246.

²⁹ Kranz, *supra* note 19, p. 26; *see also* Supreme Court (Canada), *Reference re secession of Quebec*, Judgment, 20 August 1998, 2 SCR 217, paras. 126, 138. For more treatment of this issue, *see* Th. Christiakis, *Les conflits de sécession en Crimée et dans l’Est de l’Ukraine et le droit international*, 3 *Journal du droit international* 737 (2014).

³⁰ *See more* C. Mik, *Opinia prawna w sprawie statusu prawnomiedzynarodowego przestrzeni powietrznej nad Półwyspem Krymskim po zajęciu Krymu przez Federację Rosyjską (ze szczególnym uwzględnieniem kompetencji ICAO)* (Legal opinion on international status of airspace over Crimean Peninsula after the seizure of Crimea by the Russian Federation (with particular focus on competences of the ICAO)), 3 (43) *Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu* 86 (2014).

1.2. Eastern Ukraine

The same mechanism of intervention as in Crimea was used in the case of Eastern Ukraine. But in this case the victim state decided to respond militarily, and not just through diplomatic channels.

As in the case of Crimea, so too in Eastern Ukraine Russia committed aggression. Apart from attack and invasion of the territory of Ukraine and sending in groups controlled by it, the following acts of aggressions can be mentioned: “use of any weapons by a State against the territory of another State” (Art. 3(b)) and “an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State” (Art. 3(d)), as the fight about control over this territory has been anything but bloodless and the hostilities between armed forces of both states took place, including the usage of heavy weapons by both states.³¹ There is no legal justification for the use of force by Russia against Ukraine in the Donbas region as there was no authorization on behalf of the UN SC (in fact Russia blocked any action by the SC in order to prevent any involvement of other states), and there was no armed attack against Russia by Ukraine which would have entitled Russia to use force. No human rights were violated in the Donbas territory, so the issue of humanitarian intervention or the need to protect Russian citizens could not be raised and the support of rebels is prohibited by international law. The Russian rhetoric about the need to answer the Western transfer of weapons to Kiev or the training of its army is incomprehensible, as according to international law support for the legitimate authorities of a state (and definitely the current Ukrainian powers have legitimacy after the elections) is legal.³²

From the very beginning of the Crimean crisis Russia has amassed major armed forces near the Ukrainian border. This could be considered as a threat to use of force, as could the authorization by the Council of Federation of the Federal Assembly of the Russian Federation to use force against Ukraine,³³ and although the mere threat to use force cannot be considered as aggression,³⁴ it is prohibited in light of Art. 2(4) of the UN Charter.

For the sake of clarity, it must be noted that the qualification of the use of force by Russia or Ukraine as aggression or self-defence does not have any impact on the application of the LOAC,³⁵ but this issue is crucial for four other reasons. Firstly, the

³¹ See e.g. *Ukraine accuses Russia of shooting down jet*, The Telegraph, 17 July 2014, available at: <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10973212/Ukraine-accuses-Russia-of-shooting-down-jet.html> (accessed 30 March 2015).

³² A. C. Arend, R. J. Beck, *International Law and the Use of Force*, Routledge, London: 2003, pp. 84 ff.

³³ *Vladimir Putin submitted an appeal to the Council of Federation of the Federal Assembly of the Russian Federation*, 1 March 2014, available at: <http://eng.kremlin.ru/news/6751> (accessed 30 March 2015).

³⁴ The Soviet Union was strongly opposed to including the threat of force in the definition of aggression, since it would go against the “first shot principle” that is so strongly endorsed (Solera, *supra* note 15, p. 129); see also P. Grzebyk, *Criminal Responsibility for the Crime of Aggression*, Routledge, New York: 2013, p. 54.

³⁵ See the preamble of the First Additional Protocol of 8 June 1977 relating to the Protection of Victims of International Armed Conflicts: “Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are

assessment of the Russian actions as aggression, and thus as a violation of international law attributable to it, results in international responsibility on the part of Russia (the obligation to cease the act, to offer appropriate assurances and guarantees of non-repetition, and to make a full reparation).³⁶ Secondly, aggression, being the most severe example of violation of the prohibition of the use of force, is considered as a peremptory norm,³⁷ which entitles or even obliges other states and international organizations to react (i.e. to cooperate to bring to an end, through lawful means, the serious breach of this norm, as well as the obligation to not recognize as lawful a situation created by a serious breach, nor to render aid or assistance in maintaining that situation).³⁸ Thirdly, an act of armed aggression (*aggression armée*) or armed attack is required to justify the use of force in self-defence, hence Russia's use of force justifies the steps undertaken by Ukraine in order to protect its territorial integrity. Fourthly, if Russia committed aggression, then theoretically individuals responsible for the crime of aggression can be prosecuted before Ukrainian and Russian courts, inasmuch as the criminal codes of both states penalize the crime of aggression.³⁹

2. IUS IN BELLO

2.1. Crimea

According to the law of armed conflict (LOAC) in order for an armed conflict to classify as an international armed conflict it is sufficient to find that there is an armed conflict between two or more states.⁴⁰ A declaration of war or any other formal recognition of a state of war by either side of an armed conflict is not necessary in order to apply the Geneva Conventions of 12 August 1949 on the protection of victims of war (GC) and their First Additional Protocol of 8 June 1977 relating to the Protection of Victims of International Armed Conflicts (AP I).⁴¹ It is sufficient to verify if the situation is characterized by hostility between parties and that the use of armed force

protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.”

³⁶ See Arts. 30-31 of the International Law Commission (ILC), *Articles on Responsibility of States for Internationally Wrongful Acts 2001*, GA resolution 56/83, 12 December 2001.

³⁷ See Commentary of the ILC on Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission 2001, vol. II, part 2, p. 112; C. Mik, *Ius cogens in Contemporary International Law*, 33 Polish Yearbook of International Law 56 (2013).

³⁸ Arts. 40-41 of the International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001).

³⁹ Art. 437 of the Criminal Code of Ukraine of 2001; Art. 353 of the Criminal Code of Russian Federation of 1996, both available at <http://legislationline.org> (accessed 30 March 2015).

⁴⁰ Common Art. 2 of the Geneva Conventions, 12 August 1949, 75 UNTS 287.

⁴¹ Art. 1(3), 1125 UNTS 3. AP I broadens the concept of international armed conflict to include “armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination” (Art. 1(4)).

has as its purpose to harm the enemy⁴² (thus eliminating the situation of an erroneous incursion into the territory of another state, as in the case of Swiss soldiers who in 2007 entered Liechtenstein's territory by mistake).⁴³ Consequently, the threshold of international armed conflict is extremely low as any recourse to armed force by one state against another state triggers application of the LOAC.⁴⁴ The commentary to the Geneva Conventions of 1949 further emphasizes that, in order to classify an armed conflict as an international one: “[i]t makes no difference how long the conflict lasts, or how much slaughter takes place.”⁴⁵ As a result, in case of engagement of armed forces of one state against another the LOAC must be applied from the very first bullet shot, the first detention of person, or occupation of the smallest part of the territory of another state.⁴⁶ However, it must be noted that the International Criminal Tribunal for the former Yugoslavia has suggested that requirements of intensity also apply to international armed conflicts.⁴⁷ In case of the Crimean Peninsula, it could be argued that despite the fact that about 25,000 members of armed forces were engaged in armed activities on behalf of the Russian and Crimean authorities, there was no kinetic violence, or that there were just some minor isolated incidents with few victims,⁴⁸ thus direct hostilities between two states practically did not take place and, because of the lack of armed conflict, the LOAC is not applicable.⁴⁹ Nevertheless, the Geneva Conventions

⁴² S. Vité, *Typology of armed conflicts in international humanitarian law: legal concepts and actual situations*, 91(873) *International Review of the Red Cross* 69 (2009), pp. 72-73.

⁴³ M. Oliver, *Liechtenstein: no retaliation for Swiss 'invasion'*, *The Guardian*, 2 March 2007, available at: <http://www.theguardian.com/world/2007/mar/02/markoliver> (accessed 30 March 2015). There have been other similar incidents like, e.g., the invasion of British marines in Spain in 2002 (G. Tremlett, *Tell it to the marines... we've invaded the wrong country*, *The Guardian*, 29 February 2002, available at: <http://www.theguardian.com/uk/2002/feb/19/gibraltar.world> (accessed 30 March 2015)).

⁴⁴ See the International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70, where the ICTY stated: “an armed conflict exists whenever there is a resort to armed force between States.”

⁴⁵ J. Pictet (ed.), *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, International Committee of the Red Cross, Geneva: 1952, p. 32.

⁴⁶ M. Sassòli, A. A. Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, Volume I, 2nd ed., International Committee of the Red Cross, Geneva: 2006, p. 116; R. Kolb, R. Hyde, *An Introduction to the International Law of Armed Conflicts*, Hart Publishing, Oxford: 2008, p. 101.

⁴⁷ See ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (“These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts”). See also A. Paulus, M. Vashakmadze, *Asymmetrical war and the notion of armed conflict – a tentative conceptualization*, 91(873) *International Review of the Red Cross* 95 (2009), p. 101.

⁴⁸ A. Wilk, *Russian military intervention in Crimea*, *The Centre for Eastern Studies: Analyses*, 5 March 2014, available at: <http://www.osw.waw.pl/en/publikacje/analyses/2014-03-05/russian-military-intervention-crimea> (accessed 30 March 2015).

⁴⁹ As Vladimir Putin emphasized in its address of 18 March 2014 to State Duma deputies, Federation Council members, heads of Russian regions and civil society representatives in the Kremlin: “I cannot

are clear that even in “cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation *meets with no armed resistance*” [emphasis added] the Geneva Conventions are still applicable.⁵⁰ The underlying rationale of the afore-mentioned provision was to eliminate any possible gap which would result in deprivation of protection of people *hors de combat* and also to encompass such situations as the German annexation of Czechoslovakia prior to World War II.⁵¹

The Hague Regulation of 18 October 1907 states that “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”⁵² Three conditions therefore must be fulfilled. Firstly, the occupant must take effective control over the territory against the will of the state to which the territory belongs. Secondly, this control must have been gained or be maintained due to the use of the army. Thirdly, the occupant must have established its authorities on the occupied territory and is able to exercise its powers. It is sufficient to have overall control over a proxy executing the authority in the field.⁵³ The Geneva Conventions broaden the concept of occupation in order to also cover those situations in which armed force was not used.⁵⁴ In case of Crimea it is undeniable that from March 2014 Russia has had and still has effective control over the Crimean Peninsula. It gained its control by sending thousands of soldiers and using those who were based in Crimea. Ukraine decided not to carry out armed actions, but it has not accepted the loss of Crimean territory.⁵⁵ In consequence Crimea has the status of an occupied territory and Russia must be identified as an occupant. Since the LOAC clearly emphasizes that international armed conflict may take the form of occupation,⁵⁶ so it can be stated that

recall a single case in history of an intervention without a single shot being fired and with no human casualties”, available at: <http://eng.kremlin.ru/news/6889> (accessed 30 March 2014).

⁵⁰ Common Art. 2 of the GC.

⁵¹ See D. Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, [in:] Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford: 2012.

⁵² Art. 42, 205 C.T.S. 305.

⁵³ See ICTY, *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment (Trial Chamber), 3 March 2000, para. 149 (“The occupied territory was the part of BH territory within the enclaves dominated by the HVO, namely Vitez, Busova and Kiseljak. In these enclaves, Croatia played the role of occupying Power through the overall control it exercised over the HVO, the support it lent it and the close ties it maintained with it”). See also Akande *supra* note 51.

⁵⁴ See more E. Mikos-Skuza, *Koncepcja okupacji w świetle prawa haskiego i genewskiego a współczesna praktyka okupacji* (The concept of occupation in light of the Hague and Geneva laws and contemporary practice of occupation), J. Nowakowska-Małusecka, *Międzynarodowe prawo humanitarne. Antecedencje i wyzwania współczesności* (International humanitarian law. Antecedents and challenges for the present time), Oficyna Branta, Bydgoszcz-Katowice: 2010, pp. 103-104.

⁵⁵ See Letter dated 28 February 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council, S/2014/136, 28.02.2014, in which the Ukrainian representative requested an urgent meeting of the SC due to “the deterioration of the situation in the Autonomous Republic of the Crimea, Ukraine, which threatens the territorial integrity of Ukraine.”

⁵⁶ Kolb, Hyde, *supra* note 46, p. 74; Vité, *supra* note 42, p. 73.

since March 2014 Ukraine and Russia are engaged in an international armed conflict and LOAC shall be applied in the whole territory of the belligerent states.⁵⁷

As Crimean annexation seems to be a *fait accompli* and the perspective of *restitutio quo ante* in the near future is highly improbable, it should be kept in mind that even if the situation lasts for decades (like in the case of Israel and the Palestinian territories), at least some provisions of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War must be applied at all times.⁵⁸ The “fact” of annexation cannot deprive protected persons of their protections under the LOAC.⁵⁹

2.2. The Eastern Ukraine case

The situation in Eastern Ukraine has been an evolving one, thus its legal classification according to the LOAC must also be considered as evolving. Initially, in Eastern Ukraine there were only riots and sporadic clashes between pro-Russian separatists and pro-Ukrainian fighters, so LOAC could not be applied as it does not apply “to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”⁶⁰ It is extremely difficult to determine at which moment this unrest evolved in an armed conflict, as according to the LOAC the threshold of a non-international armed conflict is paradoxically higher than that of an international one.⁶¹

There is no conventional definition of an armed conflict, but nonetheless the jurisprudence has attempted to define this term. According to the International Tribunal for the former Yugoslavia, a non-international armed conflict exists when there is “protracted armed violence between governmental authorities and organised armed

⁵⁷ Kolb, Hyde, *supra* note 46, p. 94. However, it must be noted that Marco Sassòli and Antoine A. Bouvier consider occupation which did not encounter an armed resistance as a situation in which law of international armed conflicts is applied, but there is no armed conflict (Sassòli, Bouvier, *supra* note 46, p. 187).

⁵⁸ Arts. 1-12, 27, 29-34, 47, 49, 51-53, 59, 61-77, 143 in connection with Art. 6 of the IV GC. For more about occupation, see Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge: 2009; R. Kolb, S. Vité, *Le droit de l'occupation militaire: perspectives historiques et en jeux juridiques actuels*, Bruylant, Brussels: 2009; Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff, The Hague: 2009; E. Benvenisti, *The International Law of Occupation*, Oxford University Press, Oxford: 2012. See also R. Kwiecień, *Okupacja wojenna w świetle prawa międzynarodowego: natura, skutki, nowe tendencje* (Belligerent occupation in light of international law: its nature, results, and new tendencies), 60(1) *Annales Universitatis Mariae-Curie Skłodowska Lublin Polonia* 65 (2013).

⁵⁹ Art. 47 of the IV GC.

⁶⁰ Art. 1(2) AP I. See also Art. 8(2)(f) of the Rome Statute of the International Criminal Court, 2187 UNTS 90.

⁶¹ However, there were situations in which armed violence was not protracted and yet the existence of armed conflict was established, like in the Tablada case (on 23 and 24 January 1989 an armed confrontation took place at the La Tablada base between attackers and Argentine armed forces for approximately 30 hours), see Organization of the American States, Inter-American Commission on Human Rights, Case 11.137, *Juan Carlos Abella v. Argentina*, 18.11.1997, OEA/Ser.L/V/II.98, doc. 6 rev., 13 April 1998, para. 156.

groups or between such groups within a State.”⁶² This statement allows for making four findings. Firstly, non-international armed conflict exists not only in a situation of hostilities between governmental forces and some organized armed group, but also in situation where there are hostilities only between organized armed groups without any engagement of governmental forces. This finding matters in assessment of the first phase of the conflict in Eastern Ukraine (from March till June 2014) when there were sporadic clashes between so-called separatists and pro-Ukrainian volunteers (territorial defence battalions which at the beginning of the conflict were not always controlled by the Ukrainian Ministry of Defence), with little or no engagement of the state’s armed forces. Secondly, in order to classify a situation as an internal armed conflict a minimum level of intensity, including duration (as the ICTY’s definition stresses that the conflict must be *protracted*) must be achieved in order to distinguish armed conflict from isolated acts of violence. Such factors like the deployment of armed forces instead of police, number of armed forces and partisans involved in hostilities, collectiveness and frequency of fighting, number of casualties, displacement of civilians, detention of fighters, usage of heavy weaponry, and a relatively wide geographical scope of hostilities are all indicators of an armed conflict.⁶³ Thirdly, non-state actors involved in the conflict should be organized to such an extent that they can be considered as a party to the conflict (the common Art. 3 of the Geneva Conventions of 1949 refers to “each Party to the conflict”), thus they must have organized armed forces with a command structure, and be able to conduct military operations. The presence of a clear command structure, launching operations involving several units, recruitment and training of fighters, control over a territory, issuing non-contradictory statements in the name of the entire armed group, and adoption of internal rules can indicate that a non-state actor is organized to a sufficient extent to be labelled “a party to the conflict.”⁶⁴ Fourthly, a non-international armed conflict must occur in the territory of a state which is a party to the GC (Ukraine ratified the GC in August 1954 and both AP in January 1990; Russia ratified the GC in May 1954 and the AP in September 1989).

Similarly as in international armed conflicts, the subjective opinion of parties to the conflict about its intensity and thus the existence of an armed conflict is not decisive.⁶⁵ However, taking into account the need to weigh up all the indicative factors in every case,

⁶² ICTY, *The Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70.

⁶³ See e.g. *Prosecutor v. Ljube Bošković, Johan Tarčulovski*, Judgment, IT-04-82-T, 10 July 2008, paras. 177-178.

⁶⁴ E.g. *ibidem*, paras. 199-203. In addition, the ICRC Commentary stresses that in order to classify a situation as a non-international armed conflict such indicators as e.g. level of organization of the insurgents (purporting to have the characteristics of a State), recognition of insurgents as belligerent by the state, dealing with the situation in the agenda of the UN Security Council or the General Assembly as a threat to international peace, a breach of the peace, or an act of aggression, may be taken into account, see J. S. Pictet (ed.), *Commentary: I Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field*, International Committee of the Red Cross, Geneva: 1952, pp. 49-50.

⁶⁵ ICTR, *Prosecutor v. Akayesu*, Judgment, ICTR-96-4, 2 September 1998, para. 603.

and the blurred line between violent riots and an armed conflict, the trigger system for the application of the law of non-international armed conflict is not as effective as that of international armed conflict, as it leaves a broad gap of doubt about the classification of the situation. In such a situation the opinion of the engaged parties to the conflict has some value. However it is stressed in the literature and in the jurisprudence that the purpose underlying the carrying out of military actions and the motivations of the fighters should not impact the application of LOAC.⁶⁶ As a result, the fact that actions of non-state actors will be labelled as, e.g., terrorism or organized crime does not impact classification of the situation from the point of view of the LOAC.

In case of Eastern Ukraine, from March until June 2014 separatists were taking control over consecutive cities and villages with little resistance.⁶⁷ Even the announcement by the Ukrainian President on 13 April 2014 of the commencement of anti-terrorist operations did not change this situation much.⁶⁸ Analysts emphasize that during the above-mentioned period there were only some minor clashes resulting in few casualties, which were exaggerated by both sides due to the upcoming presidential elections.⁶⁹ The major fights commenced in July with the launch of the governmental offensive.⁷⁰ From that moment on thousands of soldiers and partisans began taking part in hostilities in the Donbas region, which is the most densely populated region of Ukraine (apart from the capital city of Kiev).⁷¹ One of the biggest battles was over the Donetsk Airport and lasted

⁶⁶ Vité, *supra* note 42, p. 78. See also ICTY, *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, IT-03-66-T, 30 November 2005, para. 170.

⁶⁷ A. Szeptycki, *Europa Wschodnia i Kaukaz Południowy – pomiędzy hard power Rosji i soft power UE* (Eastern Europe and Southern Caucasus – between Russian hard power and EU soft power), 20 *Rocznik Strategiczny* (2014/2015).

⁶⁸ See A. Wilk, *Ukraińska operacja antyterrorystyczna w Kramatorsku i Słowiańsku – gra pozorów?* (Ukrainian anti-terror operation in Kramatorsk and Sloviansk – game of pretence?), The Centre for Eastern Studies: Analyses, 8 May 2014, available at: <http://www.osw.waw.pl/pl/publikacje/analizy/2014-05-08/ukrainska-operacja-antyterrorystyczna-w-kramatorsku-i-slowiansku-gra> (accessed 30 March 2015); P. Żochowski, A. Wilk, W. Konończuk, *The conflict in the Donbas – forced de-escalation?*, The Centre for Eastern Studies: Analyses, 11 June 2014, available at: <http://www.osw.waw.pl/en/publikacje/analyses/2014-06-11/conflict-donbas-forced-de-escalation> (accessed 30 March 2014).

⁶⁹ A. Wilk, *supra* note 68; W. Konończuk, *Eastern Ukraine: the separatists' offensive in anticipation of the 'referendum'*, The Centre for Eastern Studies: Analyses, 8 May 2014, available at: <http://www.osw.waw.pl/en/publikacje/analyses/2014-05-08/eastern-ukraine-separatists-offensive-anticipation-referendum> (accessed 30 March 2015); W. Konończuk, *Ukraine closer to losing the eastern part of the country*, The Centre for Eastern Studies: Analyses, 16 April 2014, available at: <http://www.osw.waw.pl/en/publikacje/analyses/2014-04-16/ukraine-closer-to-losing-eastern-part-country> (accessed 30 March 2015); Human Rights Watch, *Compare with Eastern Ukraine: Questions and Answers about the Laws of War*, 11 September 2014, available at: <http://www.hrw.org/news/2014/09/11/eastern-ukraine-questions-and-answers-about-laws-war> (accessed 30 March 2015).

⁷⁰ R. Sadowski, *The separatists are yielding to Kyiv*, The Centre for Eastern Studies: Analyses, 9 July 2014, available at: <http://www.osw.waw.pl/en/publikacje/analyses/2014-07-09/separatists-are-yielding-to-kyiv> (accessed 30 March 2015).

⁷¹ A. Wilk, W. Konończuk, *Ukrainian-Russian war under the banner of an anti-terrorist operation*, The Centre for Eastern Studies: Analyses, 6 August 2014, available at: <http://www.osw.waw.pl/en/publikacje/analyses/2014-08-06/ukrainian-russian-war-under-banner-anti-terrorist-operation> (accessed 30 March 2015).

from September 2014 till January 2015. Artillery, tanks, combat helicopters and other heavy weaponry were used during these operations.⁷² The number of civilian casualties increased enormously, especially at the beginning of 2015.⁷³ The Office of the UN High Commissioner for Human Rights (OHCHR) assessed that from mid-April 2014 until mid-February 2015 the overall death toll exceeded 5,358 people, with another 12,235 wounded.⁷⁴ Civilians were dying on a daily basis, as was emphasized by the UN Secretary General.⁷⁵ The Internal Displacement Monitoring Centre estimated that there are at least 1,116,618 internally displaced persons (IDPs) in Ukraine as of March 2015.⁷⁶ The insurgents have had a clear command structure from the very beginning of the establishment of the so-called “South-East Army” (Lugansk) and “Donetsk People’s Army” in April 2014.⁷⁷ The duration of, for example, the battle over the Donetsk Airport also proved that they were able to sustain major military operations over an extended period of time.

Taking into account the size of territory on which fighting has taken place, the size of the engaged forces, their military character, the number of casualties, the weaponry used, and the clearly distinct parties to the conflict, it is incontrovertible that in Eastern Ukraine, at least from July 2014, there was and continues to be (as of March 2015) an armed conflict.⁷⁸ Statements and reports on behalf of the OHCHR on the commission

⁷² Examples include: on 24 January 2015 the eastern outskirts of Mariupol came under fire from BM-21 Grad missile launchers (according to Ukrainians, 120 rockets were fired at the city), see K. Frymark, W. Konończuk, W. Rodkiewicz, A. Wilk, *The Donbas conflict after the Mariupol shelling*, The Centre for Eastern Studies: Analyses, 28 January 2015, available at: <http://www.osw.waw.pl/en/publikacje/analyses/2015-01-28/donbas-conflict-after-mariupol-shelling> (accessed 30 March 2015); on 17 July 2014 MH17 was hit by a rocket from a Buk-M1, see T. Iwański, P. Żochowski, K. Jarzyńska, *The conflict in the Donbas after the shooting down of the Malaysian plane*, The Centre for Eastern Studies: Analyses, 23 July 2014, available at: <http://www.osw.waw.pl/en/publikacje/analyses/2014-07-23/conflict-donbas-after-shooting-down-malaysian-plane> (accessed 30 March 2015); in May 2014 insurgents managed to shoot down in attack helicopters Mi-24, see Wilk, *supra* note 68. See also OHCHR, *Report on the human rights situation in Ukraine*, 15 November 2014, para. 27.

⁷³ Some incidents were noted by the UN SC in its press statements, such as fights in Debaltseve resulting in civilian losses, SC/11784, 17 February 2015; killing of civilians at a public transport stop in Donetsk, SC/11749, 22 January 2015; killing of bus passengers in Donetsk, SC/11733, 13 January 2015; killing journalists, SC/11442, 17 June 2014; the killing of ICRC Staff Member in Ukraine, SC/11588, 3 October 2014.

⁷⁴ OHCHR, *Ukraine: Dangerous escalation in conflict proving catastrophic for civilians*, 3 February 2015, available at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15532&LangID=E> (accessed 30 March 2015).

⁷⁵ Statement attributable to the Spokesman for the Secretary-General concerning Ukraine, New York, 4 February 2015, available at: <http://www.un.org/sg/statements/index.asp?nid=8377> (accessed 30 March 2015).

⁷⁶ See <http://www.internal-displacement.org/europe-the-caucasus-and-central-asia/ukraine/figures-analysis> (accessed 30 March 2015).

⁷⁷ Human Rights Watch, *supra* note 69.

⁷⁸ See also *Ukraine: ICRC calls on all sides to respect international humanitarian law*, 23 July 2014, available at: <https://www.icrc.org/eng/resources/documents/news-release/2014/07-23-ukraine-kiiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm> (accessed 30 March 2015). The above statement clearly confirms that the ICRC considered, at least from July 2014, the situation in Eastern Ukraine as an armed conflict.

of war crimes, i.e. crimes which by definition can only be committed within the framework of an armed conflict, confirm the above conclusion.⁷⁹ In the beginning (July-August 2014), this conflict could be classified as a non-international one to which not only the common Art. 3 of the Geneva Conventions of 1949 (as this is “the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”) should be applied, but also the Second Additional Protocol of 1977 relating to the protection of victims of non-international armed conflicts (AP II). AP II can be applied to armed conflicts which “take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” All the conditions cited in the above provision were met in the case of Eastern Ukraine. Firstly, the conflict took place (and continues to take place) between governmental forces and dissidents. Secondly those dissidents have, from the very beginning of the conflict, controlled a distinct part of Ukrainian territory, including the Russian-Ukrainian state border. The ICRC Commentary stresses that this control can be relative “for example, when urban centres remain in government hands while rural areas escape their authority.”⁸⁰ In consequence, the fact that the dissidents do not control every city and village in Donbas does not prevent the application of the AP II. Thirdly, they are able to conduct hostilities in an organized manner, which is confirmed by the simple fact of the relative long duration of the military clashes in Ukraine.

The Russian engagement in the conflict is not without an impact on the classification of the conflict in Eastern Ukraine. According to the LOAC, the engagement of a foreign state on the side of the rebels changes the qualification of the conflict in two situations: firstly when a foreign state sends its troops into the territory of another state to support a movement opposing the local government; or secondly if a foreign state intervenes by proxy, supporting and guiding the uprising from a distance.

At least from August 2014 (in response to the successes of the Ukrainian army in regaining control over different localities in Donbas), the Russian involvement was direct.⁸¹ There is convincing evidence that regular Russian armed forces participated in

⁷⁹ OHCHR, *Report on the human rights situation in Ukraine*, 17 August 2014, paras. 11, 177, available at: <http://www.refworld.org/docid/548ff2db4.html> (accessed 30 March 2015); OHCHR, *Report on the human rights situation in Ukraine*, 15 November 2014, paras 26, available at: <http://www.refworld.org/docid/546ef1a94.html> (accessed 30 March 2015); OHCHR, *Report on the human rights situation in Ukraine*, 15 December 2014, paras. 7, 11, available at: <http://www.refworld.org/docid/548ff3374.html> (accessed 30 March 2015).

⁸⁰ Y. Sandoz et al. (eds.), *Commentary on Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva: 1987, para. 4467.

⁸¹ R. Sadowski, *The ceasefire in eastern Ukraine*, The Centre for Eastern Studies: Analyses, 10 September 2014, available at: <http://www.osw.waw.pl/en/publikacje/analyses/2014-09-10/ceasefire-eastern-ukraine> (accessed 30 March 2015).

hostilities on the territory of Ukraine,⁸² which would mean that undoubtedly the conflict was internationalized. However, this internationalization could even have happened earlier if it were confirmed that the insurgents in Eastern Ukraine were from the very beginning inspired and supported by Russia to the extent that Russia had overall control over the dissident forces. The “overall control” test established by the ICTY (and adopted also by the International Criminal Court) does not require that specific orders relating to every military action must be issued by the foreign state. It is sufficient to establish that a foreign state’s organs were involved in the planning, coordinating, organizing and supervising of the entire military operation, as well as in financing, training and equipping, or providing operational support to it.⁸³ The ICTY identified some indicators based on which the overall control can be assessed, like e.g. sharing personnel, paying wages by the foreign state, coordination of actions, aiming at the same goals, a similar military structure, and some more obvious indicators like the issuance of orders by a foreign state.⁸⁴

From the very beginning of the conflict there was evidence that Russia provides the insurgents with weapons, shields them with its air-defense system, allows the flow of Russian volunteer fighters, that Russian agents are among the commanders of the insurgents’ armed forces, and what is most important, that the insurgents’ operations are consulted with the Russian command.⁸⁵ This allows to at least suspect that Russia has had overall control over the separatist armed groups.

⁸² See e.g. *Opening remarks by NATO Secretary General Jens Stoltenberg at the joint press point with the Latvian President*, 18 February 2015, available at: http://www.nato.int/cps/en/natohq/opinions_117517.htm?selectedLocale=en (accessed 30 March 2015); L. Smith-Spark, J. Sciuotto, A. Fantz, *‘It is crystal clear’ Russian military is on the ground, Ukraine PM says*, CNN 5 February 2015, available at: <http://www.cnn.com/2015/02/05/europe/ukraine-conflict/> (accessed 30 March 2015); A. E. Kramer, M. R. Gordon, *Ukraine Reports Russian Invasion on a New Front*, The New York Times, 27 August 2014, available at: http://www.nytimes.com/2014/08/28/world/europe/ukraine-russia-novozovsk-crimea.html?_r=2 (accessed 30 March 2015); *Ukraine crisis: ‘Column from Russia’ crosses border*, BBC, 15 August 2014, <http://www.bbc.com/news/world-europe-28924945> (accessed 30 March 2015); N. MacFarquhar, M. R. Gordon, *Ukraine Leader Says ‘Huge Loads of Arms’ Pour in From Russia*, 28 August 2014, available at: <http://www.nytimes.com/2014/08/29/world/europe/ukraine-conflict.html> (accessed 30 March 2015).

⁸³ ICTY, *The Prosecutor v. Dusko Tadic*, Appeal Judgment, IT-94-1-A, 15 July 1999, para. 137; *The Prosecutor v. Mladen Naletilic, Vinko Martinovic*, Judgment, IT-98-34-T, 31 March 2003, paras. 183-184; *The Prosecutor v. Tihomir Blaskic*, Judgment, IT-95-14-T, 3 March 2000, para. 100; ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, 14 March 2012, para. 541.

⁸⁴ ICTY, *The Prosecutor v. Tihomir Blaskic*, Judgment, IT-95-14-T, 3 March 2000, paras. 101-118; *The Prosecutor v. Dusko Tadic*, Appeal Judgment, para. 151; *The Prosecutor v. Mladen Naletilic, Vinko Martinovic*, Judgment, IT-98-34-T, 31 March 2003, para. 200.

⁸⁵ W. Konończuk, *Ukrainian statehood in the face of Russian aggression*, The Center of Eastern Studies, Analyses, 20 August 2014, available at: <http://www.osw.waw.pl/pl/publikacje/analizy/2014-08-20/panstwowosc-ukrainska-w-obliczu-rosyjskiej-agresji> (accessed 30 March 2015). See also records of the talks between dissidents and the Russian army which were revealed after the shooting down of MH17, available at: <https://www.youtube.com/watch?v=BbyZYgSXdyw> (30 March 2015). See also O. Zadorozhny, T. Korotkyi, *Legal Assessment of the Russian Federation’s Policy in the Context of the Establishment and Activities of Terrorist Organizations “Donetsk People’s Republic” (“DPR”) and “Lugansk People’s Republic” (“LPR”) in Eastern Ukraine*, 2(1) European Political and Law Discourse 8 (2015), pp. 11-12.

The International Court of Justice applied a different test of *an effective control*, according to which the dissidents should be dependent on a foreign state and fully controlled by it, which would mean be equated either with an organ of that state or as acting on behalf of its government.⁸⁶ The ICJ's test puts at a much higher level than the ICTY the degree of control which must be attained in order to trigger a state's responsibility. However, even if we agree that the overall control test cannot be applied to the issue of state responsibility, as it broadens it too much and was several times rejected by the ICJ,⁸⁷ the test of overall control still merits consideration in classification of a conflict as international or non-international in light of LOAC.⁸⁸

It is not agreed among scholars if a foreign engagement internationalizes the entire conflict,⁸⁹ or if it means that two types of conflicts – international and non-international – are taking place simultaneously, i.e. that there exists a mixed conflict.⁹⁰ The second option results in a complication of legal regimes applied in the case of Ukraine as it means, e.g., a necessity to distinguish between members of Russian armed forces – having combatant and prisoners of war rights – and dissident forces without any combatant privileges; and the application of different rules concerning the detention of civilians or fighters and separate regimes of responsibility for war crimes. Even if some standards (like the protection of civilians) of international and non-international armed conflicts are merging nowadays, still too many important issues are resolved in different ways depending on the classification of the armed conflict,⁹¹ thus the Ukrainian case is an excellent example that the call to establish one definition of an armed conflict must be finally answered positively.⁹²

⁸⁶ See ICJ, *Military and Paramilitary Activities in and against Nicaragua*, paras. 115-116.

⁸⁷ See e.g. ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, para. 160.

⁸⁸ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, paras. 404-405, See also A. Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18(4) European Journal of International Law 649 (2007).

⁸⁹ See e.g. I. Detter, *The Law of War*, Cambridge University Press, Cambridge: 2000, pp. 47-49. Sylvain Vité emphasizes although that the ICRC proposal made in the 1971 Report on the Protection of Victims of Non-International Armed Conflicts, according to which the whole conflict would be internationalized if there was external intervention, was rejected. Vité, *supra* note 42, p. 86.

⁹⁰ See ICJ, *Military and Paramilitary Activities in and against Nicaragua*, para. 219 (“The conflict between the Contras’ forces and those of the Government of Nicaragua is an armed conflict which is ‘not of an international character’. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts”). Compare the ICTY, *Prosecutor v. Dusko Tadić*, Appeal Judgment, para. 84.

⁹¹ See M. Milanović, V. Hadzi-Vidanovic, *A taxonomy of armed conflict*, [in:] N. White, Ch. Henderson (eds.), *Research Handbook on International Conflict and Security Law*, Edward Elgar Publishing, Cheltenham: 2012.

⁹² See J. G. Stewart, *Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict*, 85(850) International Review of the Red Cross 313 (2003).

The question of classification of the conflict between Ukraine and Russia can be also dealt from the point of view of international criminal law, particularly from the perspective of the Rome Statute, as it could potentially be of great relevance, taking into account the Ukrainian announcement of its willingness to make an Art. 12(3) Rome Statute declaration, which would give the ICC jurisdiction over the Ukrainian situation.⁹³ The Rome Statute does not create a separate definition of international armed conflict, but in case of a non-international armed conflict it differentiates between armed conflicts which are within the common Art. 3 of the GC⁹⁴ and those which are *protracted* (so the time factor is added in).⁹⁵ This distinction is incomprehensible taking into account, for example, the ICTY jurisprudence which added the time element to the general definition of a non-international armed conflict. However, taking into account the duration of the Ukrainian-Russian conflict it may be said that without doubt all articles concerning war crimes committed in a non-international armed conflict could be applied (under the condition that the ICC would have jurisdiction based on e.g. Ukraine's Art. 12(3) Rome Statute referral, or the SC's referral – Art. 13(b) of the Rome Statute).

However, it must be emphasized that the fact that some violent incidents resulting in many civilian losses took place during the conflict between Ukraine and Russia (including the shooting down on 17 July 2014 of MH17 with 298 passengers on board), this does not mean that those responsible for them (even if they are captured and evidence of their involvement is collected) could be sentenced for, e.g., war crimes or even crimes against humanity. Killing civilians not taking part in hostilities is obviously prohibited by the LOAC but in order to attach individual responsibility the appropriate *mens rea* must be proven.⁹⁶ In consequence, the attacker will be found guilty only if he was aware of all the circumstances of the attack (including the civilian status of the victims) and intended to commit a crime. Paradoxically, because in Eastern Ukraine there is an armed conflict, it is much easier to avoid responsibility, inasmuch as if the attack was performed in relation to the conflict it is sufficient to demonstrate that the perpetrator was convinced that he was targeting a military object (e.g. a military transport plane) in order to be found not guilty. In contradiction to ordinary crimes for which responsibility can be attached in cases of recklessness as well, those accused of war crimes (or crimes against humanity) can be sentenced only if the war crimes were

⁹³ See Ukrainian parliament recognizes Hague Court jurisdiction and proposes to charge Russian officials with war crimes, 4 February 2015, available at: <http://www.unian.info/politics/1040303-ukrainian-parliament-recognizes-hague-court-jurisdiction-and-proposes-to-charge-russian-officials-with-war-crimes.html> (accessed 30 March 2015). Ukraine has already submitted an Art. 12(3) of the Rome Statute Declaration on 17 April 2014 accepting the ICC's jurisdiction for events that occurred in Ukraine between 21 November 2013 and 22 February 2014 to the ICC, see: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/ukraine/Pages/ukraine.aspx (accessed 30 March 2015).

⁹⁴ See Art. 8(2)(c)–(d).

⁹⁵ See Art. 8(2)(f). See more on this distinction in Vité, *supra* note 42, pp. 81–82.

⁹⁶ See e.g. Art. 30 of the Rome Statute of the International Criminal Court, 2187 UNTS 90.

committed with *dolus directus* or *dolus eventualis*. A war crime cannot be committed by recklessness. In the case of insurgents, even if it is impossible to judge them for war crimes because of, e.g., a lack of *mens rea*, it is still possible to prosecute them for merely taking part in hostilities (unless it is determined that in Eastern Ukraine there is only an international armed conflict and all fighters, including Ukrainian insurgents, enjoy combatant immunity).⁹⁷

CONCLUDING REMARKS

The situation in Crimea and Eastern Ukraine can be qualified from the perspective of two separate branches of law, namely the LOAC and the law on the use of force. In light of the LOAC, there is definitely an international armed conflict between Russia and Ukraine as the territory of the Crimean Autonomous Republic and city of Sevastopol is occupied. Even if this occupation lasts for decades, Crimean territory cannot become a part of Russian state as *debellatio* is not legally possible, and thus at least some provisions of the GC IV will continue to be applied. The case of Eastern Ukraine should not be artificially separated from the Crimean one, thus from the point of view of LOAC it should be treated as a mere expansion of the geographic scope of the battlefield of an international armed conflict between two states, due to the direct and indirect involvement of Russia on that territory. In addition, it can be assumed that because of the Ukrainian insurgents' military actions, simultaneously with the international armed conflict there is also non-international one, to which not only is the common Art. 3 of the GC applied, but also the AP II, inasmuch as insurgents control a part of Ukrainian territory and have proven that are able to carry out sustained and concerted military operations.

From the point of view of the law on the use of force, undoubtedly in both cases – Crimea and Eastern Ukraine – Russia committed aggressions in light of the definitions contained in GA resolution 3314. The members of the UN SC are fully aware of this, as reflected in various statements made during SC meetings.⁹⁸ There is no legal justification for the Russia's use of force in light of the UN Charter. Russia's acts of aggression constitute armed attacks and entitle Ukraine to self-defence. In addition, Russia is responsible for the commission of an internationally wrongful act and, inasmuch as it violated a peremptory norm (prohibition of aggression) other states and international organizations are obliged to not recognize its unlawful annexation and undertake steps to bring to an end the serious breach of this norm.

⁹⁷ Protocol II encourages signatories "to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained" (Art. 6(5) AP II), which means that it does not prohibit the prosecution of insurgents with no combatant status for taking part in hostilities.

⁹⁸ SC/11375, 29 April 2014; SC/11417, 28 May 2014; SC/11488, 24 June 2014; SC/11645, 12 November 2014.

However, Russia's position as a permanent member of the SC prevents this body from any official condemnation of Russian actions.⁹⁹ It is significant that, despite the blatant violation of the prohibition of the use of force, the vote in the GA (concerning only Crimea) gathered a majority of only 52% of states.¹⁰⁰ This is proof that even in a situation when the law is clear, policy still matters more.

⁹⁹ See S/2014/189, 15 March 2014. The SC managed to adopt resolutions referring only to the downing of the MH17 airplane (S/RES/2166, 21 July 2014) and endorsing the Minsk Accords of February 2015 (S/RES/2202, 17 February 2015).

¹⁰⁰ See GA resolution 68/262, 27 March 2014. See also R. Goodman, *How "Overwhelming" was the UN General Assembly Vote on Crimea?*, 24 February 2014, available at: <http://justsecurity.org/9809/overwhelming-general-assembly-vote-crimea/> (accessed 30 March 2015).