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Ewa
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Russia's Aggression Against Ukraine

I dedicate this article to my Ukrainian Friends

Bartłomiej
ŻYŁKA

У статті висвітлено юридичні та політичні проблеми, які виникли внаслідок агресії Росії проти України, і які у подальшому будуть розглянуті авторами в наступних статтях. Ситуація «динамічна», тому діяти треба швидко, як через політичні, так і через судові органи ООН.

Ключові слова: Об'єднання заради миру, поправки, реформа, тимчасові заходи, геноцид, військові злочини.

This article will present the legal and political issues arising from Russia's aggression against Ukraine, which will be developed in subsequent articles. The situation is «dynamic» and therefore one should act quickly, both through political and judicial bodies of the UN.

Keywords: Uniting for Peace, amendment, reform, interim measures, genocide, war crimes.

INTRODUCTION

This article will present the legal and political issues arising from Russia's aggression against Ukraine, which will be developed in subsequent articles. The situation is «dynamic» and therefore one should act quickly, both through political and judicial bodies of the UN.

During this aggression, war crimes are being committed against civilians, including children.

On 27.02.2022, we learned that Ukraine has filed a case with the International Court of Justice to order interim measures of protection.

Unfortunately, due to the veto in the Security Council of one of the permanent members, Russia, no action under the aegis of the UN is possible except for condemnation in UN General Assembly resolutions. As a result of blocking the Security Council action in situations when one of the great powers, permanent members of the Security Council, should be condemned as a result of illegal actions, one should reconsider: 1. whether the UNGA could take over the UNSC initiative in this area (see Resolution Uniting for Peace in 1950) and 2. whether the composition of the permanent members of the UNSC should not be reformed and the UN Charter amended.

LEGAL ISSUES.

Legal issues include such matters as:

1. The request for provisional measures before the ICJ on 26 February 2022.
2. The action taken by the ICC.

3. Actions taken by the Prosecutor General in Poland on the basis of domestic criminal law.

Ad.1. Application instituting proceedings filed in the Registry of the Court on 26 February 2022, Dispute relating to allegations of genocide (Ukraine v. Russian Federation), the request for provisional measures before the ICJ.

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Ukraine filed the application instituting proceedings in the Registry of the International Court of Justice on 26 February 2022, dispute relating to allegations of genocide (Ukraine v. Russian Federation).¹ This Application concerns a dispute between Ukraine and the Russian Federation relating to the interpretation, application and fulfilment of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention"). The Russian Federation has falsely claimed that acts of genocide have occurred in the Luhansk and Donetsk oblasts of Ukraine, and on that basis recognized the so-called "Donetsk People's Republic" and "Luhansk People's Republic," and then declared and implemented a "special military operation" against Ukraine with the express purpose of preventing and punishing purported acts of genocide that have no basis in fact. On the basis of this false allegation, Russia started a military invasion of Ukraine involving grave and widespread violations of the human rights of the Ukrainian people. Ukraine denied the allegation of genocide and asked the ICJ to state that Russia has no lawful basis to take action in and against Ukraine for the purpose of preventing and punishing any purported genocide.

Jurisdiction of the Court relies on Article IX of the Genocide Convention, which says: "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute".

Ukraine and the Russian Federation are both parties to the Genocide Convention.² The dispute concerns the meaning of Article IX relating to the interpretation, application or fulfilment of the Genocide Convention.

Ad.2. The action taken by the ICC

Under the Rome Statute establishing the International Criminal Court, any Member State may lodge a complaint with the Public Prosecutor. The purpose of this procedure is to provide the available information for the prosecutor to verify and, if warranted, to open up the proceedings. At the same time, it helps the prosecutor gather information from different entities and sources. On 02.03.2022, the ICC prosecutor Karim Khan said, that the International Criminal Court (ICC) has announced an investigation into alleged war crimes being committed in Ukraine at the request of 29 countries.³ The ICC has jurisdiction to investigate any acts of genocide, war crimes or crimes against humanity committed in Ukraine since February 20, 2014. During the investigation stage, the prosecutor will gather and examine the evidence necessary to identify what crimes may have been committed and who allegedly committed them and question potential suspects, witnesses and victims. Doing so, the ICC prosecutor can send investigators to places of committed crimes and ask for assistance from different countries and international organisations. The investigation ends in either the issuance of arrest warrants against individuals suspected of committing crimes, or a decision not to prosecute due to lack of evidence. We should distinguished between the crime of genocide (committed with the purpose of destroying, in whole or in part, a national, ethnic, racial or religious group), war crimes⁴(attacks against civilians, their property, the towns and villages in which they live and against cultural or religious buildings) and crimes against humanity (against civilians and include murder, enslavement, rape, deportation and torture).

Although Russia's invasion of Ukraine was an act of aggression, ICC cannot hold Russia responsible for those acts, because both Russia and Ukraine are non-members of the ICC and jurisdiction over the crime of aggression is reserved for attacks committed by or against countries that are members of the ICC. Heads of state and senior political figures are not immune from prosecution at the ICC, that means that Putin and his political and military complices can be alleged suspects.

Ad.3. Actions taken by the Prosecutor General in Poland on the basis of domestic criminal law.

On the 1st March 2022, at the legitimate request of the Prosecutor General of Ukraine Iryna Venedytkova, the Mazovian Branch of the Department for Organized Crime and Corruption of the National Prosecutor's Office in Warsaw opened an investigation into the aggression war launched by the authorities of the Russian Federation against Ukraine. The investigation also covers the actions of Belarus making its territory available for armed aggression against Ukraine.

Minister of Justice Prosecutor General Zbigniew Ziobro at today's (March 1) said at the press conference, as part of the proceedings, the prosecutor's office will document all events that will later become the basis for

¹ <https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf>

² Genocide Convention, List of Contracting Parties, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=en.

³ <https://www.icc-cpi.int/Pages/item.aspx?name=2022-prosecutor-statement-referrals-ukraine>

⁴ International Conflict and Security Law, A research handbook, Asser Press, Sergey Sayapin, 2022, Chapter 11 War Crimes, Ewa Sałkiewicz-Munnerlyn* and Sergey Sayapin**

bringing those guilty of crimes to international criminal responsibility. He also said, that Poland shows the full support and solidarity with Ukraine

The Ministry of Justice has provided nearly 2 thousand places for refugees in centers subordinate to the ministry. All victims of crime, including victims of warfare fleeing Ukraine, can also count on immediate and free support from the Justice Fund. First of all, it is legal, psychological and material assistance, including food vouchers, shoes, clothes and the help of an interpreter. The Justice Fund website is already operational in Ukrainian. The Ministry has also begun working with local governments in southeastern Poland, which, because of their territorial location, are the first to provide assistance to people arriving from Ukraine. Prosecutor Dariusz Barski said that the investigation of the attack on Ukraine was initiated under Article 117 § 1 of the Polish Criminal Code. According to it, anyone who initiates or leads a war of aggression is punishable by up to life imprisonment. He also added, that the subject of this investigation will also be other crimes that occur in Ukraine such as attacking sanitary zones, killing of civilians, destruction, damage and taking of property. This investigation will collect, preserve and record evidence of the crime and comprehensively clarify its circumstances. During the investigation, the prosecutor's office will make its findings primarily based on personal sources of evidence, including witnesses who took refuge in the territory of Poland. During the investigation, close cooperation with law enforcement authorities and the administration of justice in Ukraine will be established. The Prosecutor's Office will also undertake activities aimed at obtaining evidence through international legal assistance from other countries, which may possess information essential for the investigation.

POLITICAL ISSUES.

Political issues:

1. Fake news – Russian justification.
2. The Uniting for Peace resolution and the Security Council veto
3. The credentials process of the General Assembly to effectively suspend a state from the UN.

Ad.1. Fake news- Russian justification.

The Russian Federation has undertaken military and other actions against Ukraine claiming that acts of genocide have occurred in the Luhansk and Donetsk oblasts of Ukraine and recognized independent states on Ukrainian territory, with the express purpose of preventing and punishing such alleged acts of genocide. In his address of 21 February 2022, the President of the Russian Federation on that ground recognised the independence and sovereignty of the Donetsk People's Republic and the Luhansk People's Republic.¹ The next day, during the extraordinary session of the United Nations Security Council on 23 February 2022, the Permanent Representative of the Russian Federation said that President Putin "decided to start a military operation in Donbas" and that "[t]he goal of this special operation is protection of people who have been victimized and exposed to genocide by the Kiev regime.". In order to do so: "we will seek demilitarization and denazification of Ukraine."² In his address to the Russian people on the morning of 24 February 2022, President Putin explained that the purpose of the military operation against Ukraine was "to stop that atrocity, that genocide of the millions of people who live there and who pinned their hopes on Russia."³ At a press conference on 25 February 2022, Russian Foreign Minister Sergey Lavrov also justified Russia's military actions against Ukraine as "preventing the neo-Nazis and those who promote methods of genocide from ruling this country."⁴ In an interview on 25 February 2022, the Russian Ambassador to the European Union was asked about President Putin's reference to genocide as justification for Russia's unlawful acts against Ukraine and said, "[w]e can turn to the official term of genocide as coined in international law. If you read the definition it fits pretty well."⁵ Ukraine denied such allegations and, the Ministry of Foreign Affairs of Ukraine issued a statement that Ukraine "strongly denies Russia's allegations of genocide and

¹ Address by the President of the Russian Federation of 21 February 2022, <http://en.kremlin.ru/events/president/transcripts/statements/67828>.

² Statement and reply by Permanent Representative Vassily Nebenzia at UNSC briefing on Ukraine, 23 February 2022, <https://russiaun.ru/en/news/230222un>.

³ Address by the President of the Russian Federation of 24 February 2022, <http://en.kremlin.ru/events/president/transcripts/statements/by-date/24.02.2022>.

⁴ TASS, Kiev regime controlled by West, neo-Nazis, Lavrov says, 25 February 2022, <https://tass.com/politics/1411139>.

⁵ Georgi Gotev, EURACTIV, Russian ambassador Chizhov: Nord Stream 2 is not dead, it's a sleeping beauty, 25 February 2022, <https://www.euractiv.com/section/globaleurope/interview/russian-ambassador-chizhov-nord-stream-2-is-not-dead-its-a-sleeping-beauty/>

denies any attempt to use such manipulative allegations as an excuse for Russia's unlawful aggression," saying that under the Genocide Convention, "Russia's claims are baseless and absurd."¹

Ad.2. The Uniting for Peace resolution and the Security Council veto.

General Assembly resolution 377(V) is known as the Uniting for peace. Adopted on 3 November 1950, during the course of the Korean War (25 June 1950 – 27 July 1953), the resolution resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility to act as required to maintain international peace and security, the General Assembly shall consider the matter immediately with the view to making recommendations to Members in order to restore international peace and security. If not in session, the General Assembly may meet using the mechanism of the emergency special session.²

11th Emergency Special Session met on 28th February 2022 and was fully dedicated to the situation in Ukraine. The resolution of the General Assembly A/RES/ES-11/1 adopted on 2 March 2022, was sponsored by 106 countries, and passed with 141 voting in favour of the assembly's 193 members, 5 against (Russia, Belarus, North Korea, Syria, and Eritrea), and 35 abstentions (including China). It demanded a cessation in the use of force and the withdrawal of all Russian forces from Ukraine. It points to the principles set forth in the Charter of the United Nations and the Declaration on Friendly Relations. It deplored Russia's invasion of Ukraine and demanded a reversal of its decision to recognise the self-declared People's Republics of Donetsk and Luhansk. While General Assembly resolutions are non-binding, they carry political weight. Even Serbia, Russia's traditional ally voted against it.

Before, on 25 February 2022, Russia vetoed a Security Council draft resolution "deploring, in the strongest terms, the Russian Federation's aggression", as expected. Eleven countries voted in favour, and three abstained, among them China, India, and the United Arab Emirates.

We should underline, that the International Court of Justice (ICJ) has implicitly affirmed the legality of the U4P Resolution. In its 2004 Wall Advisory Opinion³, requested by the General Assembly in an emergency special session 2/4 convened pursuant to the terms of the U4P Resolution, the ICJ did not question the validity of the U4P Resolution, but instead considered whether the preconditions described in the Resolution had been fulfilled. In the next case, in its 2010 Kosovo Advisory Opinion⁴, the ICJ described the U4P Resolution as 'provid[ing] for the General Assembly to make recommendations for collective measures to restore international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression and the Security Council is unable to act because of lack of unanimity of the permanent members'. The need to reform the Security Council stems from the fact, that the current composition of the Security Council reflects the geopolitical situation of 1945. Since 1945, 142 new countries join the United Nations and the Security Council's present composition is no longer representative of a world. Such big continents as Africa, Asia, Latin America and the Caribbean do not have the representation on the Council.

The Ukrainian government is calling on the United Nations to reconsider Russia's status as a permanent member of the UN Security Council, Foreign Minister Dmytro Kuleba said Wednesday 02.03.2022, questioning the legitimacy of Russia's position on the council. Speaking in televised address, Kuleba called for a "thorough and unbiased" legal review of Russia's permanent membership. "We are confident that when the analysis is complete, it will be evident that Russia's presence at the UN Security Council is illegitimate," Kuleba said. "Everything depends on readiness and determination of the legal team of the UN secretariat to investigate this," he added.

¹ Statement of the Ministry of Foreign Affairs of Ukraine on Russia's False and Offensive Allegations of Genocide As a Pretext For Its Unlawful Military Aggression, 26 February 2022, <https://mfa.gov.ua/en/news/zayava-mzs-ukrayini-shchodo-nepravdivih-ta-obrazlivih-zvinuvachenrosiyi-v-genocidi-yak-privodu-dlya-yiyi-protipravnoyi-vijskovoyi-agresiyi>.

² Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations.

Uniting for Peace, [https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/377\(V\)](https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/377(V))

³ <https://www.icj-cij.org/en/case/131>

⁴ <https://www.icj-cij.org/en/case/141>

Ad.3. The credentials process of the General Assembly to effectively suspend a state from the UN.

The question is if Russia can be suspended from the United Nations. Article 5 of the Charter says: "A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council." The UN Office of Legal Affairs has confirmed that the General Assembly may only exercise its power of suspension if: (a) preventive or enforcement action has been taken by the Security Council against that member; and (b) the Council has recommended the suspension. Article 5 does not provide a basis for Russia's suspension from the UN, because the Security Council hasn't taken preventive or enforcement action against Russia. In case it had, Russia would use a veto of the resolution recommending its own suspension.

The General Assembly's credentials process, which is the process by which the Assembly assesses the eligibility of individual delegates to represent their states at the Assembly's annual sessions is essentially procedural. This process is regulated not by the UN Charter but by the Assembly's rules of procedure, which state that '[t]he credentials of representatives ... shall be submitted to the Secretary General if possible not less than one week before the opening of the session', and that they shall be 'issued either by the Head of the State or Government or by the Minister for Foreign Affairs.' Sometimes the General Assembly is making a judgment regarding the legitimacy of the government (or regime) that a delegate represents. In 2021 it happened twice (Afghanistan (Taliban vs deposed government in exile) and Myanmar (Junta vs National Unity Government)). Russia has no yet two legitimate representative of the state but their authorities seriously violate peremptory norms of international law as well as the principles of the UN. Using the credentials process in such circumstances, a state can be suspended from the UN. It happened in case of the South Africa in 1974 and in case of Cambodia in 1997. The credentials of Russia's current representative to the UN were accepted by the General Assembly last year, but under the Assembly's rules of procedure it is open to any member state to raise an objection to that representative, in which case he would remain seated provisionally, 'until the Credentials Committee has reported and the General Assembly has given its decision'.

CONCLUSIONS.

The current situation, resulting from Russia's attack on Ukraine, is a result of not only a lack of action on the part of the West to stop Putin's neo-imperialist tendencies by not conducting business as usual (vide Nordstream I and II), but also through certain loopholes in international law, which makes Ukraine fight alone, while the West, although united, is still considering the introduction of even tougher sanctions than before.

The Russian aggressor violated not only *jus cogens* concerning war crimes, aggression, the UN Charter, but also does not care about universal jurisdiction, hoping to avoid punishment.

The important thing is that the ICC is investigating and the evidence of these crimes should now be secured. Likewise, the ICJ is likely to order interim safeguards when it sits on March 7-8, 2022.

What is happening now during the war in Ukraine is also a crime of genocide, violated all principles of humanitarian law.

In this situation, first of all, we should use diplomatic means to end the conflict, but it seems that it will not be possible. That is why it is necessary to help Ukraine militarily, because if Russia is not stopped militarily, it can stop only at the Berlin Wall. Does Europe really want this?

Certainly, the resolutions of the UNGA or UNSC, even if they were unanimous, will not stop Putin. Nevertheless, we should consider how to "bypass" the veto of the great powers in favor of decisions taken by a majority vote of the UNGA, which is the only democratic body of the UN, one vote, one country.

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