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THE EUROPEAN UNION'S DIPLOMATIC AND LEGAL EFFORTS IN THE LIGHT OF THE RUSSIAN-UKRAINIAN ARMED CONFLICT¹

Abstract: By attacking Ukraine, Russia violated the most basic rule of international law, the prohibition of aggression. Russia's legal arguments for attacking Ukraine are not new: similar legal arguments have already been used on other occasions, by other states. However, these arguments constitute an unprecedented violation of international law which fundamentally shook the existing world order: an order created in part with the participation of the Soviet Union. International law works well if its framework is clear, if it is not subjected to arbitrarily broad interpretation, and if the compromise made by the international community behind those rules still functions. Unfortunately, we have seen several examples of the opposite. The EU shows relatively strong cooperation and activity concerning criminal justice, diplomacy and sanctions. What role the EU can play in resolving the conflict and preserving the existing international legal order is still a question.

Key words: CONFLICT, WAR, INTERNATIONAL CRIMINAL JUSTICE, CFSP, DIPLOMACY, SANCTIONS, EU.

¹ The manuscript was finalized on 30 March 2023.

Introduction

The Russian-Ukrainian war is playing out our darkest fears: a war in Europe which, or the effects of which have a fundamental influence on us. In addition to the loss of our feeling of security, another important and even more frightening feature is that it raises fundamental questions regarding the existing international legal order, at a time when clear frameworks are more important than ever.

It should be noted that war can be discussed and analysed from many perspectives. Any analyst's assessment is influenced by their own field of expertise, experiences, and impressions. For the author of these thoughts, war is not just a horrible but distant event imagined based on photos or videos. Anyone who has seen war up close, talked to victims and their family members, will have a more direct impression of what war means to people, families, parents, children, and society, and better understands the humanitarian consequences for individuals and communities.

What does war mean to, for example, a family who rationally know that a loved one declared missing is actually dead, but since the body has not been located, burial (which is absolutely necessary to process the grief) is impossible? What does this mean for an amputee child injured by an unexploded shell and their family? What does this war mean for everyone, for every society involved? Communities are traumatized by war, and it takes at least a generation, or even more, to recover. At the same time, the reactions of states to war is fundamentally not humanitarian in nature. They are influenced by political, economic, security and other factors, and when considering these, the perspectives of the victims are often not sufficiently represented. This is reality, but at the same time it is important to emphasize that war is not an abstract problem: behind it lies real suffering, human lives, and trauma spanning generations. In addition to objective legal questions, subjective feelings and humanitarian aspects cannot be ignored: wars are inherently bad, including this one, and the best would be for it to come to an end as soon as possible. Unfortunately however, we all know that it's not that simple.

When it comes to the analysis of the Russian-Ukrainian conflict, many questions and much fewer answers are formulated in one's mind. Before 24 February 2022, few expected a full-scale attack on Ukraine. From the point of view of an international lawyer, it seemed unlikely simply because the prohibition of armed violence is such a fundamental principle of international law that no one thought that even a superpower or a great power would dare to break this rule so blatantly and so directly.

In the present study, the Russian-Ukrainian conflict and the ensuing questions will be discussed in relation to EU law and the international legal order, focusing on what room for manoeuvre the European Union has in this situation from a diplomatic and a legal perspective.

The European Union as the main player in the settlement of the conflict?

As a key participant in the international political scene, the European Union's common foreign policy seeks to achieve and maintain international peace and security. Thus, the EU takes on the necessary mediation tasks in order to avoid conflicts or settle them peacefully as soon as possible, in accordance with Article 3² and Article 21(2) point c)³ of the Treaty on the European Union (hereinafter: TEU) (TEU 2012).

The diplomatic toolbox of the European Union is basically determined by mediation, which is one of the most effective means for conflict prevention and peacebuilding, since mediation and dialogue can lead to the establishment of a consensus between the parties concerned. Consequently, mediation has been a cornerstone of the EU's preventive diplomacy since the adoption of the EU Concept on Strengthening EU Mediation and Dialogue Capacities (Concept on Strengthening EU Mediation and Dialogue Capacities 2009) in 2009 (hereinafter: 2009 Concept). Eleven years later, a new Concept on EU Peace Mediation (Concept on EU Peace Mediation 2020) (hereinafter: New Concept) was adopted that focuses on the lessons learned after the adoption of the 2009 Concept. The New Concept reaffirms the strategic solidarity between the EU and the UN, and seeks to strengthen the role of the EU in peace mediation. The New Concept also lists the EU's possible roles in mediation, such as leading or co-leading a mediation process, facilitating mediation and dialogue spaces, accompanying, coordinating, supporting, leveraging, funding, promoting mediation and supporting the mediation process through outcomes. Furthermore, the New Concept lays down the definition of mediation as being, among others, a way of assisting negotiations between parties to a conflict and of transforming conflicts with the support of an accepted third party. According to this definition, the third party managing the negotiations is essential in the process and must be accepted and agreed upon by the parties to the conflict in order for it to be possible to reach a solution.

When it comes to the relevance of diplomatic tools, especially mediation, in finding a solution for the conflict parties in the Russian–Ukrainian war is of utmost importance. Dialogue and mediation are crucial to enact a ceasefire and to come up with a political framework acceptable to both parties in order to save lives and to end the armed hostilities. The EU and several Member States have attempted to appear as key actors from the beginning of the conflict. Several states have

2 The Union's aim is to promote peace, its values and the well-being of its peoples.

3 The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to (...) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders.

offered to mediate and provide a venue for negotiations between the Russian and Ukrainian parties (Attempts to mediate in the Ukraine war 2022). However, all of the aforementioned attempts have failed, even if there seemed to be certain green lights in achieving temporary ceasefires to establish humanitarian corridors. It must be also highlighted that Russia does not accept the EU as a mediator (the EU is not accepted by Russia as mediator to end the war in Ukraine 2022), therefore the EU cannot play a direct mediation role in this conflict. However, as was underlined in the New Concept as well, the EU can support other parties who attempt to mediate between the conflict parties.

Nevertheless, the EU had to act in order to articulate its position concerning the Russian–Ukrainian war. In such a situation where mediation is not an option, the EU can respond to Russian aggression with sanctions, as a manner of expressing its opinion. Sanctions are considered key tools that promote the goals of the Common Foreign and Security Policy (hereinafter: CFSP). However, one must differentiate between the types of sanctions (Cardwell, Moret, 2023:4–5). On one hand, there are diplomatic sanctions, such as recalling diplomatic representatives or taking a more serious action when diplomatic relations with the country concerned are severed. On the other hand, there are restrictive measures in a more narrow sense, including arms embargoes, travel bans, freezing of assets and economic sanctions (how and when the EU adopts sanctions).

Another grouping of restrictive measures could be created depending on whether or not the EU has acted autonomously, semi-autonomously or multilaterally. Firstly, the autonomous sanctions are imposed by the EU outside the framework of the UN sanction's regime. Secondly, there are autonomous or unilateral restrictive measures based on the UN sanctions, and thirdly, there are multilateral sanctions passed by the UN but transposed into EU law (*ibid*).

The EU has been vocal about adopting restrictive measures against Russia over Ukraine since the Russian annexation of Crimea in 2014 and for the failure to implement the Minsk agreements (Minsk Agreements), which measures aim to weaken the economic base of Russia. It has imposed further sanctions since Russia invaded Ukraine on 24 February 2022 and annexed the Donetsk, Luhansk, Zaporizhzhia and Kherson regions – all unprecedented actions.

This international armed conflict continues to this day, and has since been legally merged into the events of February 2022 (Green, Henderson, Ruys. 2022:7). It must be highlighted that the occupation of Crimea is considered an international armed conflict, even though no active combat was involved.⁴ In the case of the conflicts in Donetsk and Luhansk Russia has denied its involvement since 2014, in claims seriously questioned by many (Grant, 2015: 87–89). The entry of Russian forces into the eastern Ukrainian regions on February 22 did not change the situation legally, nor did the invasion of the entire territory of Ukraine on February 24. Naturally, in terms of the volume of the aggression, it is obviously a big change. Based on all of

4 Qualifying the event.

this, it can be stated that Russia has been committing aggression against Ukraine since 2014, of which the events of February 2022 are a continuation. However, the severity of the military action that began in February far exceeds the previous events.

Since the Russian invasion of Ukraine on 24 February 2022, altogether ten packages of sanctions have been adopted against Russia. With these restrictive measures, the EU intends to express its opinion about the illegal annexation of Crimea, Russia's war of aggression against Ukraine and the illegal annexation of Ukraine's Donetsk, Luhansk, Zaporizhzhia and Kherson regions. The main purpose of the restrictive measures introduced since March 2014 against Russia is to limit its abilities to wage war by depriving it of critical technologies and markets (EU restrictive measures against Russia over Ukraine (since 2014)).⁵ Regarding the economic sanctions, it must be highlighted that the financial, energy, transport, defence and raw material sectors are all affected. In the financial sector targeted sanctions have been introduced, including the SWIFT ban for certain Russian banks, and restricted access to the EU's main capital markets for certain Russian banks and companies. Concerning the energy sector, to mention just a few restrictive measures, the EU enacted a price cap related to the maritime transport of crude oil and petroleum products, a prohibition on exports to Russia of goods and technologies in the oil refining sector, and a freeze on new investments in the Russian energy and mining sectors.

Furthermore, the restrictive measures also extend to some transportation aspects, such as the closure of EU ports to Russian vessels or the closure of EU airspace to all Russian-owned and Russian-registered aircraft. In connection with defence, the EU introduced a prohibition on exports to Russia of (among others) dual-use goods and technology items, drone engines, arms and civilian firearms and ammunition. Regarding raw materials and other goods, the EU prohibits exports to Russia of luxury goods, and also prohibits imports from Russia of iron, steel, wood, paper, plastics etc. However, there are certain aspects which can be considered as fault lines between the Member States when it comes to the question and the list of sanctions. One is the issue of Russian diamonds, which created political tension between Belgium and the European Union. The Belgian position is that Russian diamonds must be traceable, but should still be banned (Russian banks and exports set to be hit in new EU sanctions) or not to mention the issue of oil. Consequently, it must be mentioned that there is no consensus within the EU on the above-mentioned issue of sanctions related to Russia, and the positions seem to be increasingly diverging. When the sanctions packages were adopted, it became clear that Member States took different positions, largely commensurate with their various degrees of dependence on Russian energy, the availability of and available funding for alternative resources, their geographical conditions and other aspects. These positions seem to be increasingly diverging rather than converging (Melander, Siebold 2022) therefore creating rather fragmented positions between

5 In the following paragraphs, the above cited reference had been used.

the Member States.

Condemning aggression and holding the perpetrators accountable is a common cause. The Union has been very active in this field. The European Council expressed strong opinions in its several conclusions: it condemned the aggression and called on Russia to withdraw its troops from the internationally recognized borders of Ukraine. It assured the International Criminal Court and the Ukrainian Prosecutor General's Office of its support and encouraged the Member States to take steps towards ensuring accountability. All EU Member States supported the motion to initiate proceedings before the International Criminal Court.⁶

Due to the initiation of national proceedings, there has been a need for EU Member States to cooperate with one another, to share evidence and coordinate their proceedings to ensure efficiency and avoid making duplicate charges in the same cases. In this regard, it is important to note that since 2016, the number of investigations and indictments regarding genocide, crimes against humanity, and war crimes has increased rapidly in the EU. Between 2016 and 2021, the number of newly initiated cases by Member States increased by 44% overall. All of this is partly because events close to the borders of the EU (e.g., the current Russian–Ukrainian conflict or the Syrian civil war that broke out in 2015) caused waves of migration in the direction of the Member States (New investigations on core international crimes have increased by 44% since 2016).

A network was created with the support of the European Union's Agency for Criminal Justice Cooperation (hereinafter: Eurojust) to help Member States cooperate in their accountability efforts. Several EU Member States joined the so-called Joint Investigation Team (hereinafter: JIT), which investigates the most serious crimes together with the Ukrainian authorities.⁷ In March 2022, Poland, Lithuania, and Ukraine set up a JIT, which was later joined by Estonia, Latvia, Slovakia, Romania, and the ICC, creating a complex cooperation network (Romania becomes seventh member of joint investigation team on alleged core international crimes committed in Ukraine). The main purpose of this network is to collect and exchange evidence. The JIT is currently investigating the most serious crimes together with the Ukrainian authorities (Marchuk, 2022:801).

The International Criminal Court also joined the JIT, thus creating a complex network of cooperation. For Eurojust to assist prosecutions as effectively as possible, on 30 May 2022, an amendment to the previous EU regulation was adopted allowing Eurojust to fully coordinate investigations that have already been launched, by giving it the competence to store and analyse the collected evidence (Regulation (EU) 2022/838). Consequently, on behalf of the European Union, a very uniform and decisive action can be seen on the issue of accountability. This reinforces the relevant rules and the aim of 'no impunity' for international crimes. However, analysing earlier practice concerning accountability (Varga, 2014), state courts – especially in the case

⁶ In total, 43 states referred Ukraine's situation to the International Criminal Court.

⁷ It was established on March 25, 2022 with the participation of the Ukrainian, Polish and Lithuanian judicial authorities, after which four more EU Member States joined it.

of crimes in which they do not have 'normal' jurisdiction, but act on the basis of universal jurisdiction⁸ – take many aspects into account when deciding on initiating proceedings. Such aspects include political, legal and diplomatic considerations (Kress, 2006: 572).

Overall, it is in the interest of the EU and its Member States to maintain the current world order. International law-based relations are typically favourable for smaller states. Although from a global point of view, certain European states can be considered as important economic factors, they are not classified as great powers in the traditional sense. The EU, from a global point of view, does not represent such a level of cooperation that would make it a great power on its own. However, the EU traditionally tries to make its voice heard on international legal issues. Given that two of the Security Council's five permanent members are European states, European interests may appear in its decisions, but the United Kingdom's close relationship with the United States is another aspect. In the UN General Assembly, however, the EU and the European states are not considered determining powers, so they have less influence.

Concluding Remarks

The answer to the question as to whether and to what extent the EU will be able to play a major role in the settlement of the situation depends partially on whom we consider direct or indirect participants to the conflict. While views on this issue vary, it seems certain that there will be no settlement without the approval and participation of the United States.

In any case, it is certain that – due to its proximity to the EU, especially to Member States situated in the east – this is a particularly sensitive conflict. Concerning the actions of the EU, it can be concluded that there is joint action, however the efficiency of the cooperation and actions might be questionable.

Opinions are divided on the usefulness of the sanctions introduced by the EU. Together with the US sanctions, they can have an effect, and it is also true that the EU is the only international organization that has imposed sanctions on Russia. The EU's action in the field of accountability is also unprecedented. It seems that although the EU is trying to appear capable of influencing the conflict both economically and legally, it is still unclear what role it can play in the solution including the impact of the Russian–Ukrainian conflict on the international legal order.

8 In the case of certain international crimes (war crimes, crimes against humanity, genocide), international law requires universal jurisdiction. Based on this, a state may or must initiate proceedings in which it would not have jurisdiction on either a territorial or a personal basis. See e.g., For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Article 49 (Geneva Convention I).



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ДИПЛОМАТСКИ И ПРАВНИ НАПОРИ ЕВРОПСКЕ УНИЈЕ У СВЕТЛУ РУСКО-УКРАЈИНСКОГ ОРУЖАНОГ СУКОБА

Апстракт: Нападом на Украјину Русија је прекршила најосновније правило међународног права, забрану агресије. Правни аргументи Русије за напад на Украјину нису нови: сличне правне аргументе су већ користиле друге државе у другим приликама. Међутим, ови аргументи представљају кршење међународног права без преседана које је суштински уздрмало постојећи светски поредак: поредак створен делом уз учешће Совјетског Савеза. Међународно право добро функционише ако је његов оквир јасан, ако није подвргнут произвољно широком тумачењу и ако компромис који је међународна заједница направила иза тих правила и даље функционише. Нажалост, видели смо неколико супротних примера. ЕУ показује релативно јаку сарадњу и активност у области кривичног правосуђа, дипломатије и санкција. Какву улогу ЕУ може да има у решавању сукоба и очувању постојећег међународног правног поретка, и даље је питање.

Кључне речи: КОНФЛИКТ, РАТ, МЕЂУНАРОДНО КРИВИЧНО ПРАВО, CFSP, ДИПЛОМАТИЈА, САНКЦИЈЕ, ЕУ.